

# Centre for Child Law

## Alternative Report to the UN Committee on the Rights of Persons with Disabilities in Response to the Republic of South Africa's State Party Report

On the implementation of the UN Convention on the Rights of Persons with  
Disabilities

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CENTRE FOR  
**CHILD LAW**

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UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
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## **1. ABOUT THE CENTRE FOR CHILD LAW**

The Centre for Child Law (“Centre/CCL”) is a public interest litigation organization that is registered with the Legal Practice Council as a child law and child rights law clinic, established in terms of the Legal Practice Act. CCL is housed in the University of Pretoria’s Law Faculty and contributes to the establishment and protection of children’s rights through litigation, legislative and policy advocacy, research, as well as education.

CCL’s mission is to set legal precedents to improve and strengthen laws pertaining to children and to ensure that their constitutionally and statutorily codified rights are realized.

## **2. SUMMARY OF SUBMISSIONS**

The core of our substantive submissions can be summarized as follows:

- Full-service schools must be supported at the district level to enable schools to provide education to children with disabilities in their respective communities as envisioned in White Paper 6;
- The obligations set out in the *Minimum Norms and Standards for Public School Infrastructure* must be met;
- Adoption of data collection methods that provide disaggregated data on disability in South Africa;
- There must be a concerted effort to ensure disability-inclusive planning, monitoring and evaluation of infrastructure projects related to basic education for children in ordinary, special and full-service/ resource schools.

## **3. SUBSTANTIVE SUBMISSIONS**

### **3.1. ARTICLE 24: EDUCATION**

Despite the codification of every child's immediately realizable right to access basic education in the Constitution of the Republic of South Africa, 1996,<sup>1</sup> and as well as its equality clause which expressly prohibits unfair discrimination on the basis of disability,<sup>2</sup> there are some 500 000 -600 000 learners with disability who are out of school.<sup>3</sup>

The current legislative and policy framework regulating the planning, implementation, monitoring, and reporting of access to services for children with disabilities (CwDs) remains fragmented, outdated, and lacking in its inclusion of CwDs.

Access to education for children with disabilities takes three forms in South Africa: ordinary public schools, full-service schools and special schools under the oversight of the Department of Basic Education. While an unofficial fourth type exists, called

South Africa's Auditor General, in a presentation to Parliament's Basic Education Committee, highlighted that R818 million (\$962,937.60) was spent 'irregularly' or in a fraudulent manner by the Department of Basic Education in the 2019 financial year alone, that R818 million constituted more than double the amount from the previous year, 2018.<sup>4</sup>

The impact of this is that learners continue to be denied the right to enjoy basic education on equal footing with other children. Equally, many other children are taught in schools that are not adequately resourced. This is more pronounced when taking cognizance of the fact that there are very few special schools and adequately resourced full-service schools in South Africa.

Nearly 121 500 children with disabilities are enrolled in ordinary schools; 119 500 are enrolled in special schools and an additional 11 500 have been placed on long waiting

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<sup>1</sup> Constitution of the Republic of South Africa, 1996, section 29(1)(a).

<sup>2</sup> Constitution of the Republic of South Africa, 1996, section 9(3).

<sup>3</sup> Human Rights Watch available at < <https://www.hrw.org/news/2019/05/24/south-africa-children-disabilities-shortchanged>> (accessed on 14 June 2023)

<sup>4</sup> Budgetary Review and Recommendations Report, by the Auditor General, briefing to the Parliamentary Committee on Basic Education, available at <https://static.pmg.org.za/201103AGSA.pdf>, accessed on 05 December 2022.

lists because of a lack of spaces in public schools. The waiting lists are long and many children and parents have reported being on the waiting lists for years, some up until their child ages out of the basic education system and is removed from the waiting list, never having been able to enjoy the right to basic education.<sup>5</sup>

There is pervasive underspending, irregular, and fruitless expenditure in the area of education, which disproportionately and systematically affects children with disabilities and children residing in rural areas.

On the issue of overcrowded schools, the Department of Basic Education announced a Special Intervention on Overcrowding in Schools, according to the DBE's director-general Mathanzima Mveli, following a meeting in August 2022. Up to now, government has tried to reduce school overcrowding mainly by providing mobile classrooms. As our research report on school overcrowding shows school infrastructure is only one of many variables to consider in reducing overcrowding.<sup>6</sup> CCL does however, recognize that the provision of hard infrastructure like classrooms is only effective in preventing overcrowding if a school has enough other related resources, such as teachers, non-teaching staff, and furniture and learning materials.

### **3.3.1. Full service schools**

Full-Service Schools are intended to serve as examples of good practice and to chart the way for all schools to ultimately become inclusive institutions. The target set by White Paper 6 of establishing 500 Full-Service Schools (which represents the conversion of 3,6% of all ordinary public schools into full-service schools) was far too low to realize this aim.<sup>7</sup>

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<sup>5</sup> Human Rights Watch, 'South Africa: Children with Disabilities Shortchanged , Adopt free inclusive education for all', accessed at < <https://www.hrw.org/news/2019/05/24/south-africa-children-disabilities-shortchanged> > (accessed on 05 December 2022)

<sup>6</sup> Kialene Pillay, 'Overcrowded classrooms and lack of resources still plague Gauteng schools', 11 October 2022, accessed at < <https://www.iol.co.za/education/overcrowded-classrooms-and-lack-of-resources-still-plague-gauteng-schools-739aa5ad-03ec-4ebf-8437-7263b9a11649> > (accessed on 03 December 2022)

<sup>7</sup> Guidelines for Full-Service/ Inclusive Schools 2010, Education White Paper 6, Special Needs Education, Building and Inclusive Education and Training System, see p 1.

Despite reports of the government having exceeded this number, the effectiveness of these schools in achieving their intended outcomes has, as has been shown, comes into question.

In 2019, the Auditor-General of South Africa issued a damning report detailing the findings of an audit conducted at Full-Service Schools across the country. The audit looked at a number of indicators aligned with the *Full-Service Schools Guidelines* to assess their functioning and found that the majority of *Full-Service Schools* across all provinces were not functioning as they ought to be.

The report stated that 77% of education districts were either, not sufficiently resourced, or that districts did not have plans in place to support Full-Service Schools at all. Consequently, 79 % of schools lacked adequate resourcing in terms of infrastructure, assistive equipment, and funding to constitute functioning Full-Service Schools that are fit for purpose.<sup>8</sup>

The Department of Basic Education would later issue a Moratorium announcing the Temporary Suspension of the Designation of Full-service Schools for three years to “ensure that those schools that have been designated as Full-service schools, were adequately capacitated to fulfill their function”.<sup>9</sup>

We note, regrettably, that the 20-year implementation plan including aspects on infrastructure development, envisaged in *White Paper 6* came to an end in 2021. Many of the targets remain unmet and will remain unmet if there is no overt initiative to include learners with disabilities in the planning, budget, implementation and evaluation efforts of the Department of Basic Education.

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<sup>8</sup> Parliamentary Monitoring Group (PMG), ‘Auditor-General’s briefing to the Portfolio Committee on Basic Education on the Budgetary review and Recommendations Report: PFMA 2018–19’, available at [https://static.pmg.org.za/191008AGSA\\_Presentation.pdf](https://static.pmg.org.za/191008AGSA_Presentation.pdf).

<sup>9</sup> *Ibid.*

### 3.3.2. Disability-inclusive budgeting and reporting

Education receives the greatest share of government spending, constituting 5% of the overall GDP, yet, the struggle for access to safe, quality schools and education continues for many learners in South Africa. Particularly, those who are economically and socially disadvantaged- being children from rural areas and children with disabilities.

In 2010, the President of the Republic and the Minister of the Department of Basic Education were taken to court as a result of a failure to provide infrastructure and resources to ensure the enjoyment of basic education for children with severe to profound intellectual disabilities, in the matter of *Western Cape Forum for Persons with Severe to Profound v Government of the Republic of South Africa*.<sup>10</sup>

There is pervasive underspending in the area of education for CWDs, this is exhibited through marked issues regarding Full-Service Schools and the lack of special schools for those children with disabilities who cannot be taught in ordinary public school.

The Promotion of Equality and Prevention of Unfair Discrimination Act empowers the state to undertake special measures to promote equality with regard to race, gender and disability by enacting appropriate laws, developing progressive policies and initiating codes of practice in order to eliminate discrimination on the grounds of race, gender and disability.<sup>11</sup>

Additionally, South Africa is a State party to the UN Convention on the Rights of Persons with Disabilities, African Charter on the Rights and Welfare of the Child, the UN Convention on the Rights of Children, which require that access to education be made available to children with disabilities. These treaties require the state to make resources available for the education of children with disabilities. Furthermore, the Constitution of the Republic of South Africa, 1996, sets out the right to access basic education and further excludes disability as a ground for unfair discrimination.

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<sup>10</sup> *Western Cape forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (a5) SA 87 (WCC).

<sup>11</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 28(3)(b).

Children and their families have reported travelling far distances and residing in hostels because schools do not exist in their own communities that can reasonably accommodate them.

In this respect, CCL recommends the adoption of a disability-inclusive approach to the planning, budgeting, implementation, evaluation, and reporting of basic education infrastructure and facilities for learners with disabilities in line with existing legislation and policy under the management of the state.

### **3.3.3. Monitoring, Reporting and Evaluation**

The *National Infrastructure Plan* uses infrastructure reporting as a compliance tool and not as a purposive evaluative resource that aids in planning, early warning and efficient resource allocation.<sup>12</sup> In this premise, reporting is important but is insufficient for purposes of compliance and accountability in the actualization of the rights of CwDs.

We draw the Committee's attention to the *National Policy Framework* wherein it is stated that evaluations tended to be equity blind and fail to articulate and mainstream critical issues affecting major sectors of society including people with disabilities.<sup>13</sup> This is clear in the context of basic education, in that no data is readily available on the planning, budgeting and implementation of the building and development of public schools, appropriately equipping full-service schools and ensuring that ordinary public schools are able to provide basic education to CwDs.

The CCL recommends that the South African government implement its *National Strategic Framework on Universal Design and Access*, with respect to public infrastructure, as well as the disability-inclusive approach codified in the *National*

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<sup>12</sup> Draft NIP 2050 Phase 2, on Monitoring and Evaluation at p84, see 'Status of monitoring, reporting and evaluation', at p84.

<sup>13</sup> National Evaluation Policy Framework, November 2019, at p13-15.

*Evaluation Policy Framework*, while also using that data to inform further planning to ameliorate the shortage of real school infrastructure.<sup>14</sup>

### 3.2. ARTICLE 18: LIBERTY OF MOVEMENT AND NATIONALITY

Section 21 of the Constitution of the Republic of South Africa guarantees freedom of movement and residence. South Africa has promulgated the South African Citizenship Act, 1995, and the Births and Deaths Registration Act, 1992, which respectively facilitate legislative measures to ensure the rights of persons with disabilities to equal access to a nationality, and provide for the registration of all new-born children within 30 days after birth.

However, there are difficulties in the provision of services for late birth registration cases, concerning orphaned and abandoned children with disabilities who are unable to find their parents to assist them in registering their births. Firstly, applicants are expected to present themselves physically to the Department of Home Affairs offices to register their births, this is a challenge when dealing with older children with severe mobility disabilities. The ‘2014 Regulations on the Registration of Births and Deaths Registration Act’, which regulate the administrative processes for the registration of births and deaths, do not make provision for reasonable accommodations for persons with severe physical disabilities for whom it is extremely difficult to move around. Equally, the late birth registration process, requires interviews by a panel constituted by DHA staff members, this is an additional hurdle especially in rural parts of South Africa where accessible public transport is difficult to come by.

CCL recently dealt with a matter concerning a 10-year-old child with cerebral palsy and epilepsy, the child’s parents applied for a late birth registration and were unable to do so for some years. Eventually the parents contacted CCL to assist, following a lot of hassle the Department of Home Affairs (DHA) eventually assisted the child by sending a mobile DHA office and officials to assist the child and his family after the intervention of the Office of the Director-General of DHA in the matter.

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<sup>14</sup> National Evaluation Policy Framework, November 2019.



Our biggest challenge in that respect was the negative attitude of DHA staff who accused CCL of seeking special treatment for its client, which was inaccurate considering that the DHA is a state department that provides a public service and must adopt equitable measures to reasonably accommodate persons with disabilities in the provision of its services as per the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities.

CCL recommends that various state departments and agencies, such as the Department of Home Affairs (DHA), Department of Social Development(DSD), South African Police Services (SAPS), South African Social Security Agency(SASSA) that provide services directly to the public, adopt and incorporate the *National Strategic Framework on Reasonable Accommodation for Persons with Disabilities* in their operating procedures and regulations to ensure effective administration and birth registration for CwDs.

Additionally, unfortunately it is not uncommon for CwDs to be abandoned by their parents, this results in a plethora of problems for children and renders it difficult for such children to have their births registered. The Births and Deaths Registration Act, makes provision for the birth registration of abandoned and orphaned children, with the assistance of and following investigations by social workers, however, even this process is hindered by DHA officials who refuse to acknowledge or accept social worker reports and Children’s Court judgements ordering the provision of services for children in need of said services.

### **3.3. ARTICLE 31: STATISTICS AND DATA COLLECTION**

The *2011 Census: Profile of persons with disabilities in South Africa*,<sup>15</sup> is the most recent statistical data on disability in South Africa, issued by Statistics South Africa.<sup>16</sup> *The 2011 Census: Profile of persons with disabilities in South Africa* is outdated and

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<sup>15</sup> Statistics South Africa, ‘StatsSA: 2011 Census: Profile of persons with disabilities in South Africa’ available at <https://www.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed 25 June 2023)

<sup>16</sup> The Statistician-General of South Africa is mandated to collect, produce and disseminate official and other statistics, including the conducting of a census of the population.

inadequate and notes this in its text.<sup>17</sup> The findings show a national disability prevalence rate of 7, 5%.<sup>18</sup>

In this premise, it is clear that because the state does not take account of the number of children with disabilities or collect disaggregated data regarding the types of disabilities that the South African child demographic has. This lack of data renders any sort of effective planning and implementation of education and health services for children with disabilities impossible for the state, as the state is unable to allocate resources.

Disability statistics play a pivotal role in all areas of policy-making, and in every stage from development and implementation, to monitoring and assessment of effectiveness, to the analysis of cost-effectiveness. A policy without valid and reliable data is potentially costly and wasteful guesswork; it is a policy without a basis of evidence.<sup>19</sup> In this premise, we recommend that the South African government through StatsSA collect the required information through the South African Social Security Agency (SASSA), which dispenses disability grants and care dependency grants. Through the Department of Health, through schools and the waiting lists of children with disabilities, and other effective methods to get a better understanding of the landscape to enable better planning to provide services to children with disabilities.

## CONCLUSION

The reverberating message in our submissions is that the South African government has adopted a lot of legislation intended to ensure inclusivity, however, the promises made in the letter of the law and policy and the implementation of such laws and policies show a pervasive exclusion of CwDs. CwDs and their rights seem to be an afterthought although legislation and policy shows otherwise.

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<sup>17</sup> Ibid, executive summary, v. “The report also does not include statistics on children under the age of five or persons with psychosocial and certain neurological disabilities due to data limitations, and should therefore not be used for purposes of describing the overall disability prevalence or profile of persons with disabilities in South Africa”

<sup>18</sup> Ibid

<sup>19</sup> World Health Organization/ESCAP Training Manual on Disability Statistics, ‘Disability Statistics: Why are they important and what does the ICF Add?’ at 3, accessed on <https://www.unescap.org/sites/default/files/Chapter1-Disability-Statistics-E.pdf> (accessed on 28 June 2023).

Any disability-inclusive policies and laws are either not implemented or not known by state agents outside of the Department of Women, Youth & Persons with Disabilities (DWYPwDs) which is wrong and irreconcilable when considering that various other departments are mandated with providing public services to everyone in South Africa. CCL merely requests the actualization of the South African government's undertakings in terms of domestic law and policy.

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