



South African Human Rights Commission

Waiting Lists for Children with Special Needs

1. The South African Human Rights Commission

- 1.1. The South African Human Rights Commission is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as “state institutions supporting constitutional democracy”.
- 1.3. In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - 1.3.1. Promote respect for human rights and a culture of human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Furthermore, section 184(2) affords the Commission authority to undertake research and education activities together with the duty to investigate and report on the observance of human rights. These duties contribute and enhance the exercise of its authority in terms of section 184(2)(b) to take appropriate steps to secure redress where human rights have been violated.
- 1.5. The Human Rights Commission Act, 54 of 1994 (hereinafter referred to as “the HRC Act”), further supplements the powers of the Commission to fulfil its constitutional mandate.

2. Facts:

1

2.1. More than 3,000 South African children with special needs are on waiting lists for schools that cater for them. According to the Department of Basic Education:

- Northern Cape had 1 643 pupils on waiting lists for special schools;
- Mpumalanga had 725 pupils on waiting lists for special schools;
- Free State had 561 pupils on waiting lists for special schools;
- Eastern Cape had 183 pupils on waiting lists for special schools; and
- Gauteng had 155 pupils on waiting lists for special schools.

2.2. There are no statistics available for special needs pupils in Limpopo and KwaZulu-Natal. The 147 special needs children in the Western Cape have been placed in ordinary and full service schools where they receive additional support until they are placed accordingly.

2.3. According to the Department, each province has plans to accommodate pupils with special education needs. This includes improving resources of existing special schools; providing additional accommodation for pupils with special needs in ordinary and full service schools; and re-orientating and re-training officials and teachers in the guidelines for special schools.

3. Legal Questions:

3.1. Is placing special needs children in ordinary schools pending their placement in special needs school in the best interest of the children?

3.2. Are provincial governments obligated to keep record/statistics on the number of children with special needs placed on waiting lists?

4. Authority:

4.1.1. The Constitution and National Legislation

4.1.1.1. Section 29(1)(a) of the Constitution of the Republic of South Africa makes provision for the right to basic education.² The right to basic

¹ 'Shortage of special needs schooling highlighted' SowetanLive 09 April 2014 <http://www.sowetanlive.co.za/youthtube/2015/04/09/shortage-of-special-needs-schooling-highlighted?mode=true> (accessed 09 April 2015).

² Section 29(1)(a):

"Everyone has the right to a basic education, including adult basic education."

education is one guaranteed by the constitution, and one that places a positive obligation on the state to realise, without qualification.³

4.1.1.2. Section 3(1) of the South African Schools Act (Act) 84 of 1996 requires that primary and secondary schooling be compulsory for all children between the ages 7 and 15 years. This read together with section 5(1) of the Act, which states that, a “public school must admit learners and serve their educational requirements without unfairly discriminating in any way”. According to Section 3(3) of the Act, Members of the Executive Council *must* ensure that there are enough school places for every child to attend, and section 3(4) states that if the section 3(3) cannot be complied with because of a lack of capacity, Members of the Executive must take steps to remedy such lack of capacity as soon as possible and make an annual report to the Minister on the progress achieved in doing so.

4.1.1.3. Section 4 of the Act makes provision of learners that may be exempted from (compulsory) attending school. Section 4(1) of the Act states that, a “Head of Department may exempt a learner entirely, partially or conditionally from compulsory school attendance *if it is in the best interests of the learner.*”

4.1.1.4. Section 9 of the Children’s Act 38 of 2005 states that:

‘In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.

4.1.1.5. The Children’s Act also states in Section 11 that in matters concerning children with disabilities due consideration must be given to making it possible for them to participate in educational activities.

4.1.1.6. **Case Law**

4.1.1.6.1. In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*,⁴ it was held that (quoting *O’Donoghue v The Minister for Health, The Minister of Education, Ireland and the Attorney General*)⁵:

³ *In re Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) [9], *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. & Others* 2011 (8) BCLR 761 (CC) [36]-[38], S Woolman and M Bishop ‘Education’ in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* (2002) 57/5, and F Veriava ‘The amended legal framework for school fees and school funding: a boon or a barrier?’ 23 *South African Journal on Human Rights* (2007) 193.

⁴ 2011 (5) SA 87 [25].

⁵ [1997] 2 IR 20.

4.1.1.6.1.1. ... *there is a constitutional obligation imposed on the State by the provisions of ... the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be. Or, to borrow the language of the United Nations Convention and Resolution of the General Assembly - "such education as will be conducive to the child's achieving the fullest possible social integration and individual development; such education as will enable the child to develop his or her capabilities and skills to the maximum and will hasten the process of social integration and reintegration". This process will work differently for each child, according to the child's own natural gifts, or lack thereof. In the case of the child who is deaf, dumb, blind, or otherwise physically or mentally handicapped, a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted, than would be regarded as appropriate for a child suffering from no such handicap."*

4.1.2. International and Regional Framework

4.1.2.1. The right to education is recognized and guaranteed under several international and regional human rights instruments. These include the United Nations' Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities; African Charter on Human and Peoples' Rights (Article 17); and the African Charter on the Rights and Welfare of the Child.

4.1.2.2. The Convention on the Rights of the Child

4.1.2.2.1. The Convention on the Rights of the Child, which has been ratified by South Africa, states in Article 23 that:

4.1.2.2.1.1. *States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*

4.1.2.2.1.2. This means States must ensure that children with disability enjoy decent lives like their counterparts. This including access to education.

4.1.2.3. **The Convention of Rights of Persons with Disabilities**

4.1.2.3.1. The Convention of Rights of Persons with Disability, which South Africa has ratified, states in Article 24(2)(a) that State Parties must ensure that:

4.1.2.3.1.1. *Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability.*

4.1.2.3.1.2. This simply means that under no circumstance should children with disabilities be excluded from receiving quality education.

4.1.2.3.1.3. And Article 24(2)(d) states that:

4.1.2.3.1.3.1. *Persons with disabilities receive the support required, within the general education system, to facilitate their effective education.*

4.1.2.3.1.4. The Convention accepts that children with special needs can be placed in ordinary schools however the schools must be capable of providing the children all the needs required for them to learn. That the necessary measures needed to provide full inclusion is in place.

4.1.2.4. **The International Covenant on Economic, Social and Cultural Rights**

4.1.2.4.1. Another important convention and point of reference on the right basic education is the Committee on Social, Economic, and Cultural Rights' ((I)CSECR) General Comment on the Right to Education.⁶

4.1.2.4.2. Articles 13 and 14 of the CESCR set out detailed formulations of the right to education. Article 13 contains a general statement that everyone has the right to education and that education should contribute to the full development of the human personality:

⁶ General Comment 13 (21st Session, 1999) 'The Rights to Education, Article 13' UN Doc E/C.12/1999/10 [1].

4.1.2.4.2.1. “[e]ducation is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain means to participate fully in their communities”.

4.1.2.4.3. Further, the ICSECR listed the following as measures for compliance to providing basic education by governments: availability/adequacy; accessibility; adaptability and acceptability.

4.1.2.4.3.1. Availability

4.1.2.4.3.1.1. Education should be available to all children to eliminate exclusion and discrimination of vulnerable, marginalized and/or disadvantaged children. These must take account of the need of the poor and the most disadvantaged, including working children, remote rural dwellers and nomads, and ethnic and linguistic minorities, children, young people and adults affected by conflict, HIV/AIDS, hunger and poor health; and those with special learning needs.

4.1.2.4.3.2. Accessibility

4.1.2.4.3.2.1. Many children in rural, remote areas are not enrolled, dropped out or repeat (especially girl children) for many reasons, among them the shortage of schools and classrooms or distance from their villages to schools.

4.1.2.4.3.2.2. The key principle of the Convention on the Rights of the Child, which asserts that education must be designed and implemented with the best interests of each child in mind, necessitates identifying and eliminating factors that impede the child’s learning.

4.1.2.4.3.3. Acceptability

4.1.2.4.3.3.1. Well-rounded education systems may be faulted for their failure to eradicate the inter-generational transmission of racism or xenophobia, and segregated education may be faulted for fostering disintegration of society or even inter-community conflicts.

4.1.2.4.3.4. Adaptability

4.1.2.4.3.4.1. The education system should remain adaptable, taking into account *the best interests of the child*.

5. Application of the Law to the Facts

5.1. The placement of children with special needs

- 5.1.1.** The rights of the 3000 children not enrolled in special needs school are violated as this is in contravention of the right to education clearly stated in the Constitution.
- 5.1.2.** Children, including those with special needs, should be enrolled at school as required by law.
- 5.1.3.** Children with special needs should not be unfairly discriminated against, as the Department as an obligation to meet their educational needs, accordingly.
- 5.1.4.** The exclusion and perpetual waiting imposed on children with special needs is not in their best interests.
- 5.1.5.** Further, by placing children with special needs on a waiting list, the Department failed to give due consideration to their best interests.
- 5.1.6.** By placing children with special needs on a waiting list, the Department infringed and continues to infringe on their dignity, self-reliance and inhibits their participation in their respective communities, and access to education.
- 5.1.7.** By placing children with special needs on waiting lists, the Department continues to exclude such children from receiving quality education.
- 5.1.8.** Further, the Department, by placing children with special needs on a waiting list, is not providing the support, as required by law.
- 5.1.9.** The Department by placing children with special needs on waiting lists is not cognisant of the fact that the right to education is an indispensable right, used to realise other human rights: socio-economic rights.
- 5.1.10.** The Department has failed to make education available, accessible, adaptable and acceptable to children with special needs.

5.2. Statistics on the placement of children with special needs

5.2.1. In cases where children with special needs are not admitted, the MEC concerned should make provision to remedy the situation and report on the provisions made.

5.2.2. Lack of inadequate statistics in this case depicts lack of planning to reasonably accommodate all children with special needs.

6. Conclusion

6.1. It is recommended that the Members of the Executive Council in Northern Cape, Mpumalanga, Free State, Eastern Cape and Gauteng take immediate steps to remedy this violation and to provide SAHRC with a plan on remedying the situation.

6.2. It is also recommended that the Members of the Executive Council in Western Cape submit a report to SAHRC on how the ordinary schools have been fitted for the purpose of meeting the needs of special children.