**SUBMISSION: RIGHT TO EDUCATION**

**TO**

**THE HUMAN RIGHTS COUNCIL**

**UNITED NATIONS**

**hrc-sr-education@un.org**

**BY**

**WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY**

**SOUTH AFRICA**

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**BACKGROUND**

1. The Western Cape Forum for Intellectual Disability (‘WCFID’) welcomes this opportunity to make a submission to the UN Human Rights Council on the right to education, specifically for children with severe to profound intellectual disability (SPID).
2. WCFID is a not-for-profit, non-governmental organisation (1971 -) that provides a support network for persons in the intellectual disability community, including training, research, resource development and advocacy.
3. WCFID is a membership-based organisation with +/- 200 members, including +/- 69 special care centres in the Western Cape and the Limpopo Disability Centres Managers Forum (98 centres). Special care centres (‘Centres’) were established, sometimes by mothers, in response to the exclusion of their children from public schools based on disability.
4. The Western Cape Forum for Intellectual Disability (WCFID) represents special care centres that accommodate some of these marginalised learners who have severe to profound intellectual disability (SPID). Learners with SPID generally have an IQ below 34 and associated impairments of adaptive functioning. Many learners with SPID have additional disabilities and are considered to have multiple and complex disabilities.

**I. Assessing the achievements made by the mandate of the Special Rapporteur**

**on the right to education over the last 25 years**

**1. In your country, are education issues approached through the lens of the human right**

**to education, and if so, with what challenges and results? In your view, what is the**

**added value of such an approach in your work?**

1. Education for children with disabilities, and especially for those with severe to profound intellectual disability (SPID), falls short of human rights principles (universality, indivisibility, equality and non-discrimination, participation, accountability) in practice. Although South Africa includes these principles in its Constitution[[1]](#footnote-1) and the Promotion of Equality and Prevention of Unfair Discrimination Act[[2]](#footnote-2) (PEPUDA), the Department of Basic Education (DBE) excludes an estimated 200 000 - 597 953[[3]](#footnote-3) learners with disabilities from the state school system (DBE 2016).
2. Special care centres (‘Centres’) were established, sometimes by mothers, in response to the exclusion of their children from public schools based on disability. These centres accommodate some of the marginalised learners who have severe to profound intellectual disability (SPID).
3. These centres are partially funded by the government departments of social development and health, evidence of a ‘charity’ and medical model of disability respectively and undermining a human rights-based approach to the right to education.

**2. How do you assess the 4 A’s framework of availability, accessibility, acceptability and adaptability as conditions for realizing the right to education? Is such a framework integrated in legal and policy documents relating to education in your country, as well as used in practice? If not, what are the key obstacles? Should the framework be reviewed to include other dimensions? If so, which?**

1. The 4As are broadly included in general education policy documents in South Africa but are not translated into legislation, funding regulations and practice for children with disabilities or who have other diverse support needs.

*Availability*

1. Children with SPID are refused admission at schools because they do not have the ability to accommodate them. The education department reports that:
* they do not have the funds they would need to build more public schools and/or classrooms for children with SPID currently at special care centres
* they do not have entry qualifications for the staff who ‘teach’ children recently enrolled in special classes at public schools because there is currently no training and accreditation available for them
1. Centres report that they and parents carry the financial and resourcing burden of transporting children to and from centres, with a wholly inadequate contribution from the social development department.

*Accessibility*

1. Non-discrimination: Children with SPID are refused access to education via the school application process based on disability. They may be placed on ‘waiting lists’ and remain at home or attend NGO-based centres. Some remain in these centres until age 18 with no experience of attending public schools.
2. Physical accessibility: Children with SPID rely on learner transport to access schools or centres. The child’s distance from the pre-determined bus route sometimes precludes children from accessing education. The prohibitive cost of transport for already financially constrained parents and centres sometimes precludes children from accessing education.
3. Economic accessibility: South Africa does not have fee-free special (needs) schools. Education for children with disabilities is not free at special (needs) schools, or at special care centres. The cost sometimes precludes children from accessing education.

*Acceptability*

1. The acceptability of the quality of education for children with SPID is questionable since the education department reports that it does not have prerequisite qualifications or training and accreditation processes for their ‘teachers’ at schools or centres. The policy and learning programme for the education of children with SPID has been in draft form since 2017.

*Adaptability*

1. The education system in South Africa falls short of adaptability since it systemically excludes children with severe to profound intellectual disability (SPID) from schools because these schools report they do not have the ability or resources to accommodate them. The education department in the Western Cape initiated a very slow process of transferring children with SPID from centres to schools. The model was upscaled to include all provinces by the national department recently. In one case, children were transferred back to a special care because the school and staff were not adequately prepared and trained to accommodate and support the children placed at the school.

**3. The human right to education entails States’ obligations to respect, protect and fulfil the right to education in international human rights law. To what extent are these obligations clearly identified in your country’s legislation and in practice?**

12. South Africa has failed to promulgate laws (especially as they pertain to financing and resourcing) for the education of children with disabilities or for inclusive education which would support and promote the availability, accessibility, acceptability and adaptability for all children. Litigation is often required to compel the education department to respect, protect and fulfil the right to education and its components. Our organisation’s case (Case no: 18678/2007)[[4]](#footnote-4) illustrates this well. As it does the laborious and expensive process of ensuring that the court order is implemented expeditiously and effectively, often requiring subsequent litigation.

**4. Has the right to free education been progressively implemented at all levels of education in your country, based in particular on article 26 of the Universal Declaration of Human Rights, articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights, and article 28 of the Convention on the Rights of the Child? If yes, please provide examples. If not, please explain why not.**

13. South Africa has not moved as expeditiously and effectively as possible" towards the full realization of article 13 (ICESCR). South Africa does not have free special (needs) schools for children with disabilities. Parents must pay for ‘facilitators’ to support their children in ordinary public schools. Children with severe to profound intellectual disability are generally refused admission at public schools. Many of them attend under-resourced special care centres. The Government of South Africa does not fund these centres adequately or equitably. The education department does not fund these centres at all.

**5. Is the right to education considered a justiciable right in your country and if so which aspects of that right? If so, please provide a short summary of emblematic cases.**

14. Yes, it is.

15. WCFID litigated successfully and obtained a court order (Case no: 18678/2007)[[5]](#footnote-5) (November 2010), instructing the Government of South Africa and the Government of the Western Cape Province to provide education of an adequate quality to all children with severe to profound intellectual disability at special care centres in the Western Cape:

[52] In the circumstances I conclude that the applicant is entitled to the relief sought and accordingly make the following orders:

1) It is declared that the respondents have failed to take reasonable measures to make provision for the educational needs of severely and profoundly intellectually disabled children in the Western Cape, in breach of the rights of those children to:

1.1 a basic education

1.2 protection from neglect or degradation

1.3 equality

1.4 human dignity

2) The respondents are directed forthwith to take reasonable measures (including interim steps) in order to give effect to the said rights of severely and profoundly intellectually disable children in the Western Cape, including (but not limited to):

2.1 ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic education of an adequate quality;

2.2 providing adequate funds to organizations which provide education for severely and profoundly intellectually disabled children in the Western Cape at special care centres, such as to enable them to:

2.2.1 have the use of adequate facilities for this purpose;

2.2.2 hire adequate staff for this purpose;

2.3 providing appropriate transport for the children to and from such special care centres;

2.4 enabling the staff of such special care centres to receive proper accreditation, training and remuneration; and

2.5 making provision for the training of persons to provide education for children who are severely and profoundly intellectually disabled.

16. The Minister of Basic Education reported[[6]](#footnote-6) to Parliament (31 August 2017 - NW2247) that National Treasury had provided a conditional grant of R477m (2017) in response to the court order (Case No 18678/2007). The Minister provided the following framework for the distribution of the grant:

(1) (b) Provinces will distribute the grant in accordance with the following guidelines as stipulated in the Grant Framework:

* 13% for training of teachers and the 31 Outreach Teams;
* 11% for Learning and Teaching Support Materials, toolkits and equipment for centres and designated schools;
* 56% for compensation of itinerant teams and provincial co-ordinators; as well as
* 20% for administration including travel, vehicles, accommodation and subsistence.

 (2) (a) The Grant will be used to benefit learners in the following ways:

* To provide therapeutic and psycho-social intervention to learners and their families in targeted 186 schools and 280 care centres by appointing and training 155 specialised staff, who will provide the therapeutic intervention and procuring equipment as well as learning teaching support materials (LTSM) to be used by the staff;
* To track, provide learner-specific support and follow up on their progress by creating a comprehensive and reliable database of learners in the targeted schools and care centres;
* To provide quality education and support to learners by further developing the professional capacity, knowledge and skills of caregivers and teachers in the 280 care centres, 186 schools;
* To facilitate leaners’ access to various government services and other intervention programmes through working collaboratively with other government departments and non-governmental organisations (NGO); and
* To advocate for learners’ rights to access public-funded quality education through documenting and reporting on the Grant’s achievements.

17. Clearly, this education conditional grant does not respond to the court order adequately and is a disproportionate response to the actual need. Parents and NGOs (centres) carry the financial burden for the right to education. The education department’s contribution amounts to learning and teaching support material and 6 – 10 hours of on-site support at centres for the training of carers and therapeutic support of learners.

18. The education department is yet to introduce the training and accreditation for centre staff. Children at these centres therefore generally do not have access to appropriately trained and remunerated teachers. The education department reports that it is unable to fund these centres because their laws prohibit the funding of NGOs. Yet, despite the department’s initial commitments[[7]](#footnote-7) the department has taken no publicly available steps to amend these regulations to enable access to quality education for these children.

**6. To what extent are the non-discrimination and equality principles respected in implementing the right to education in your country? Have past recommendations made by the Special Rapporteur on the right to education of vulnerable and marginalized populations been taken into account? If so, can you list which ones?**

19. South Africa has not moved as expeditiously and effectively as possible" towards the full realization of the right to education. Children with severe to profound intellectual disability (SPID) attend NGO-run under-funded and under-resourced special care centres because schools exclude them based on their disability. The education department is yet to amend its funding regulations to enable equitable funding of these centres. The cost of education for these children falls mainly on parents and centres and inadequate funding from the social development and health departments. Even the education department’s draft Guidelines for the Resourcing of Inclusive Education relegate the education of children with SPID to the periphery without a commitment to funding the education of these children at special care centres.

1. <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf> [↑](#footnote-ref-1)
2. <https://www.justice.gov.za/legislation/acts/2000-004.pdf> [↑](#footnote-ref-2)
3. <https://static.pmg.org.za/160308overview.pdf> [↑](#footnote-ref-3)
4. <http://www.saflii.info/za/cases/ZAWCHC/2010/544.html> [↑](#footnote-ref-4)
5. <http://www.saflii.info/za/cases/ZAWCHC/2010/544.html> [↑](#footnote-ref-5)
6. <https://pmg.org.za/committee-question/6474/> [↑](#footnote-ref-6)
7. <https://www.education.gov.za/SPIDRoundtable.aspx> [↑](#footnote-ref-7)