



LEARNERS AT SPECIAL-NEEDS SCHOOLS RESEARCH BRIEF

The Management of and Rights of Learners
at Special-Needs Schools



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THE MANAGEMENT AND RIGHTS OF LEARNERS AT SPECIAL-NEEDS SCHOOLS RESEARCH BRIEF

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ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare on the Child
CCL	Centre for Child Law
Commission	South African Human Rights Commission
Committee	Committee on the Rights of People with Disabilities
Constitution	Constitution of the Republic of South Africa, 1996
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of People with Disabilities
DBE	Department of Basic Education
DBST	District-Based Support Teams
FEDSAS	Federation of Governing Bodies of South African Schools
HRW	Human Rights Watch
ICESCR	International Covenant on Economic, Social and Cultural Rights
MEC	Member of the Executive Committee
NDP	National Development Plan
SAHRC Act	South African Human Rights Commission Act, 40 of 2013
SAPS	South African Police Service
Schools Act	Schools Act, 84 of 1996
SDG	Sustainable Development Goal
SGB	School Governing Body
WP6	White Paper 6: Special Needs Education



CHAPTER 01

INTRODUCTION

The right to education is a fundamental human right, which according to the Equal Education Law Centre, “contributes to the full personal development of each learner, and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes”.¹ All children have a right to access education, including children with special needs. An inclusive education system should be one that ensures that all learners are fully accommodated by schools, and that all learners should have equal access to quality education.

Despite the fact that universal access to education is enshrined in myriad international treaty bodies and in national legislation and policies, the realisation of the right to access education for learners with disabilities remains a challenge for the Department of Basic Education (DBE) and State in its entirety. Estimates on the number of learners with disabilities that are not attending school remain in dispute. However, taking all estimates into consideration, Human Rights Watch (HRW) placed the figure at around 600 000 learners in 2016.²

In addition to the barriers that impede access to schools, learners that do attend special-needs schools face additional challenges, such as a lack of access to appropriate transport, a lack of adequate infrastructure or services within schools and bullying or abuse at the hands of other learners or educators.

In September 2017, the Centre for Child Law (CCL) approached the South African Human Rights Commission (Commission) for assistance with complaints it had received in relation to *inter alia* the abuse of learners at special-needs schools by educators, particularly learners boarding at school hostels. Following discussions with the CCL and a preliminary review of literature on schools for learners with special needs, the Commission decided to visit such schools and conduct interviews on the management of the school and the rights of learners.

This research brief provides a brief overview of the policies governing the management and operations of schools for learners with special needs followed by an analysis of the findings of the interviews conducted. It finally provides recommendations for the DBE to consider in order to improve the running of these schools and the experiences of the learners that are attending these schools.

¹ Equal Education Law Centre (EELC) *Inclusive Education: Learners with Learning Barriers the Right to an Equal and Quality Education* (2016) <<http://eelawcentre.org.za/wp-content/uploads/2016/08/Inclusive-Education-Final.pdf>>.

² Human Rights Watch *Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities* (2016) <https://www.hrw.org/sites/default/files/report_pdf/southafrica0815_4up.pdf>.



CHAPTER 02

BACKGROUND

The Commission's Mandate

The Commission is an independent institution that was established in terms of section 181 of the Constitution of the Republic of South Africa (Constitution) to support constitutional democracy. Section 184(1) and (2) of the Constitution clearly outline the mandate, functions and powers of the Commission, namely to:

- a. Promote respect for human rights and a culture of human rights;
- b. Promote the protection, development and attainment of human rights; and
- c. Monitor and assess the observance of human rights in the Republic.

In terms of section 184(2) of the Constitution, the Commission is empowered to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to research; and to educate. Additional powers and functions are prescribed by the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act).

Further, section 184(3) is specific in respect of the Commission's obligation to monitor and assess the realisation of economic and social rights. It states that:

Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.

Each year, the Commission collects information as stipulated above, but further chooses whether to report its findings on the realisation of all the rights listed above, or to prioritise its focus on certain rights, based on varying selection criteria such as systemic violations of a right.



Context

During the 2017/2018 financial year, the Commission took a strategic decision to focus on inclusive education and ways to eliminate the barriers to accessing education for learners with special needs. This decision was based on research that indicated that over half a million learners with disabilities had no or limited access to education in South Africa.³ In response, the Commission decided to use its unique position to engage with the State around policy and implementation solutions for removing the barriers to education for such learners.

However, in late 2017, the CCL approached the Commission with numerous complaints of abuse and the ill-treatment of learners attending special-needs schools, particularly those living in school hostels.

Following various engagements with the CCL, the Commission decided that it would conduct interviews in at least one school in each of the country's nine provinces. The interviews were designed to examine the matter from a more holistic perspective, aiming to assess whether the schools have the required policies and procedures in place, if these are followed, how they were developed and if those enrolled at the school were informed of their rights as learners.

The section below will unpack the methodology and content of the questionnaire guide used for interviews in more detail.

Methodology

Following an intensive literature review of legislation and challenges faced by both special needs schools and learners attending these schools, the Commission developed a lengthy questionnaire, which would serve as an interview guide for the meetings with schools.

Initially, it was anticipated that an interview would be conducted with at least one school per province in the country. However, numerous challenges were encountered when the Commission attempted to secure interviews. The main challenge was broken telephone lines in most schools, particularly in the North West, Limpopo and Mpumalanga provinces. If the Commission did manage to contact a school and it did have a hostel on its premises, it proved near impossible to make contact with a relevant school representative to secure an interview. Furthermore, schools were extremely busy between December and February and refused to be interviewed during this time. Eventually, the Commission managed to secure interviews in seven of the nine provinces (excluding the Eastern Cape and Mpumalanga).

The responses were analysed under specific themes as set out in the questionnaire. Given that not all planned interviews were conducted, it is possible that the CLC or the Commission may decide to further pursue this study in the future.

³ See for example, Human Rights Watch Complicit in Exclusion: *South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities* (2016)
<https://www.hrw.org/sites/default/files/report_pdf/southafrica0815_4up.pdf>.



CHAPTER 03

LEGISLATIVE FRAMEWORK ON EDUCATION FOR CHILDREN WITH DISABILITIES

The rights of persons with disabilities are enshrined under myriad international instruments and national legislation and policies. This section provides an overview of the legal and policy framework governing the right to education for learners with disabilities.

International Law

Article 26 of Universal Declaration of Human Right provides that “[e]veryone has the right to education. Education shall be free, at least at the elementary and fundamental stages and elementary education shall be compulsory.” “Everyone” includes persons and children with disabilities.

In 2015, the government of South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides, in Article 13, that States Parties must provide free and compulsory primary education to all.⁴ States Parties to the ICESCR are also required to ensure that secondary education is generally available and accessible to all and that higher education be equally accessible on the basis of capacity by the progressive introduction of free education.⁵ When South Africa ratified the ICESCR, it included a declaration that it would “give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources”.⁶ The declaration made by South Africa upon ratification of the ICESCR evidently contradicts a judgment of the Constitutional Court, which held that:

Unlike some of the other socio-economic rights, [the right to a basic education] is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application...⁷

⁴ International Covenant on Economic, Social and Cultural Rights (1966) 6 IML 360.

⁵ Ibid.

⁶ <<https://treaties.un.org/doc/Publication/UNTS/No%20Volume/14531/A-14531-South%20Africa-08000002803ff711.pdf>>.

⁷ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) para 37.



The Convention on the Rights of the Child (CRC) also guarantees the right to free primary education.⁸ South Africa ratified the CRC in 1995. Furthermore, one of the targets of Sustainable Development Goal (SDG) four on quality education stipulates that “[b]y 2030, [the State must] eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations”.⁹

South Africa ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2007 and is therefore bound by Article 24 of the convention, which provides that States Parties must ensure that “persons with disabilities are not excluded from the general education system on the basis of disability” and “can access an inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live”.¹⁰ The CRPD also includes positive and specific obligations for States Parties, which include the requirements that States Parties must facilitate the learning of braille, the learning of sign languages, alternative modes of writing and speaking, and must employ and train teachers, who are able to educate children with disabilities.¹¹

In 2016, the Committee on the Rights of Persons with Disabilities (Committee) adopted General Comment 4¹² in order to interpret the inclusive education provision of the CRPD. The Committee indicated that when interpreting the normative content of Article 24, States Parties to the CRPD must ensure that inclusive education is available to persons with disabilities at all levels of the education system, including vocational training and lifelong learning.¹³ It focuses specifically “on the full and effective participation, accessibility, attendance and achievement of all students without discrimination.”¹⁴ Inclusive education thus requires a systemic transformation of the education system embodying changes and modifications in educational content, teaching methods, approaches, structures and strategies.¹⁵ States Parties to the CRPD are thus required to “respect, protect and fulfil each of the essential features of the right to inclusive education: availability, accessibility, acceptability, adaptability”.¹⁶

The guidelines provided in the General Comment would be effective in an education system that faces cultural and social challenges rather than infrastructural and resource challenges. South Africa’s education system is one which faces a number of systemic challenges, most of which stem from historical neglect and the poor implementation of legislation and policies since 1994. To the extent that significant resources and infrastructure are required to address structural issues in the South African education system, full implementation of the guidelines provided in the General Comment is not possible in the short term.

⁸ Article 28, G.A. Res. 44/25.

⁹ <<http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-4-quality-education/targets/>>.

¹⁰ Article 24(2)(a)-(b).

¹¹ Article 24(3)-(4).

¹² Committee on the Rights of Persons with Disabilities *General comment No. 4: Article 24: Right to Inclusive Education* (2016) CRPD/C/GC/4.

¹³ *Ibid* 3.

¹⁴ *Ibid*.

¹⁵ *Ibid* 4.

¹⁶ *Ibid* 13.



Regional Law

Article 17 of the African Charter on Human and Peoples' Rights deals with the right to education, cultural life, morals and traditional values,¹⁷ while article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa makes broad provisions for the education and training of women and girls.¹⁸ Article 11 of the African Charter on the Rights and Welfare on the Child (ACRWC) provides that "[e]very child shall have the right to education".¹⁹ States Parties to the ACRWC are required to provide free and compulsory basic education, encourage secondary education and make higher education accessible to all on the basis of capacity and ability. Article 13(2) further provides that States Parties must ensure that children with disabilities have access to training, preparation for employment and recreational opportunities.²⁰

Domestic Law and Policy

Section 29(1) of the Constitution of the Republic of South Africa provides that "[e]veryone has the right to a basic education... and further education, which the state, through reasonable measures, must make progressively accessible". Parliament enacted the South African Schools Act, 84 of 1996 (Schools Act) in 1996, which provides an interpretation of "basic education" as education which must be provided to all children between the age of 7 and 15.²¹

In 2001, the DBE released the White Paper 6: Special Needs Education (WP6), wherein it committed itself to realising inclusive education within 20 years. In the WP6, the DBE envisions the transformation of the education system from one which is divided into "special education" and "mainstream education" to an integrated system, which embraces learners with differing mental and physical abilities. While the WP6 acknowledges the deep discrepancies in access to education for learners with disabilities, particularly for black learners, it also evident that the WP6 does not respond in all respects to current systemic challenges faced in the education sector.

For example, a study on teacher perceptions of education support structures in the implementation of inclusive education in South Africa found that formal support structures are not as effective as proposed by policy and educational authorities and that the WP6 must be reconsidered.²² Significant time and resources are required for South Africa to meet global standards for inclusive education. As such, in the short to medium term, at the very least, schools for learners for special needs will remain and must be monitored and resourced adequately to ensure the realisation of the rights of persons with disabilities, to basic education.

¹⁷ African Charter on Human and Peoples' Rights ("Banjul Charter") (1981).

¹⁸ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003).

¹⁹ African Charter on the Rights and Welfare of the Child (1990).

²⁰ Ibid.

²¹ Ibid section 3(1).

²² NM Nel, LDN Tlale, P Engelbrecht & M Nel 'Teachers' perceptions of education support structures in the implementation of inclusive education in South Africa' (2016) *Koers (Online)* 81 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2304-85572016000300003>.



In 2014, the DBE published *Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres to Support Inclusive Education*,²³ which provides guidelines on levels of norms and standards that these schools should attain and to assist special-needs schools to meet these standards prior to and during operation.

In 2016, the DBE released a draft learning programme and minimum norms and standards for children with severe to profound intellectual disabilities.²⁴ This draft learning programme is in line with some of the key principles emanating from South Africa's international obligations towards persons with disabilities. It "emphasise[s] the rights of children to be educated in an inclusive education system, close to their home with access to appropriate health service, assistive devices..."²⁵ The National Development Plan (NDP) in Chapter 9 recognises the need for inclusive education in order to ensure that all persons can participate effectively in society.

²³ Department of Basic Education *Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres to Support Inclusive Education* (2014) 25.

²⁴ Department of Basic Education *Draft National Norms and Standards for Resource Distribution for an Inclusive Education System* (2015) 33 <<http://www.saou.co.za/wp-content/uploads/2011/04/Draft-norms-2015.pdf>>.

²⁵ Ibid 10-11.



CHAPTER 04

FINDINGS

The findings of the literature review and interviews with representatives from special schools are analysed and presented under specific themes below.

Policy Awareness

Amongst the school representatives interviewed, the awareness of policies and guidelines governing the management, operations, quality and support of schools for learners with special needs was poor. Table 1 provides an indication of whether the school interviewed in a particular province was aware of policies or guidelines in relation to various aspects of the management of a special-needs school, either from the provincial or national DBE.

The table clearly illustrates that the awareness of policies and guidelines is poor, particularly in relation to the management of hostels; hiring, vetting and training of staff; and norms and standards on infrastructure to which special-needs schools are entitled. All schools indicated that they were responsible for drafting their own policies, sometimes using guidelines from their respective provincial departments, and sometimes without any assistance.



Table 1: Awareness of National or Provincial Guidelines or Policies in Relation to the Management of Special-Needs Schools

POLICIES / GUIDELINES	FS	GP	KZN	LP	NC	NW	WC
Management of hostels	No	Yes	No	No	Yes	No	No
School code of conduct	Yes	Yes	Yes	Yes	Yes	No	Yes
Learners code of conduct	Yes	No	Yes	Yes	Yes	No	Yes
Discipline in the province	Yes	Yes	Yes	Yes	No	No	Yes
Hiring of staff	Yes	No	No	No	No	Yes	Yes
Vetting and training of staff	No	Yes	No	No	No	No	No
Norms and standards for infrastructure	No	No	No	No	No	Yes	No
School safety	Yes	Yes	Yes	Yes	No	No	No
Health policy	Yes	Yes	Yes	No	Yes	No	No
Norms and standards on infrastructure	No	No	No	No	No	No	No

Some of the responses provided by all schools during this policy discussion were quite concerning. First, all respondents indicated that national legislation and policies, while applicable to all public schools, were more suited to mainstream schools and less to special-needs schools. Secondly, although guidelines on the drafting of policies are provided to the schools, principals and educators are not trained on how to draft policies and all schools found this task difficult and onerous. Furthermore, they were unsure if the policies that they had developed covered all provisions required by such policies.

Occasionally, a school will send the members of a policy committee or the educators that tend to draft policies, for relevant training. Where such training is provided by the provincial DBE, this occurs mainly in the larger metropolitans or urban-based schools. The schools that were rural-based indicated that they also attempted to send their educators for such training, but that unless a partnership was formed with a training school or university, the cost could be quite exorbitant and would have to be paid for by the school governing body (SGB), which is unaffordable for most schools.

In some cases, the principals were trained and would thereafter train the educators and members of the SGB, while one school indicated that it had partnered with the Federation of Governing Bodies of South African Schools (FEDSAS) to learn to draft policies and develop guidelines for the district to assist other special-needs schools to do the same.

All schools were quite critical of their respective provincial governments for failing to provide support in relation to the drafting of policies. One school elaborated greatly on the challenges faced by special-needs schools when formulating policy. In addition to the lack of support from provincial departments, the school expressed the view that the process of drafting policies should include parents and



learners and that this is impossible with limited training and funds. In addition, special-needs schools have to spend their own resources in order to translate such policies into other languages, including sign language to ensure true accessibility to such resources. None of the schools were aware of legal entitlements to infrastructure and moveable items.

It is important to note that despite these challenges, most schools were proactive with policy drafting and often drafted additional policies that were not required by the provincial DBE. In such instances, the school would identify a gap in its own suite of policies and would attempt to draft the applicable policy, for example an *HIV and AIDS* policy or *Inclusion and Diversity* policy.

While it is the role of the SGB to create policies such as a Code of Conduct, Language Policy and Pregnancy Policy, this must be done using guidelines from the provincial DBE and with assistance from the District Office.²⁶ In addition, in line with section 8 of the South African Schools Act, all policies must be formulated in consultation with learners, parents and educators, which in turn must conform to the principles of the Constitution and other relevant national and provincial legislation. This means that no policy governing special-needs schools may discriminate against any learner on *inter alia* the basis of race, gender, pregnancy, marital status, sexual orientation and disability.

The lack of guidance provided to schools from District Offices and provincial Departments of Education means that not only are the needs of the educators ignored, but it is possible that the policies of these schools are in violation of legal and constitutional requirements. There have been cases where the policies of mainstream schools have violated the constitutional rights of learners²⁷ and it is not inconceivable that the same applies to schools for learners with special-needs. However, in these schools, the agency and ability of learners to articulate rights violations are greatly reduced.

It is essential to reiterate that all schools indicated that greater support by the DBE in terms of policy development and an audit of the policies that schools had developed is urgently needed. While broad guidelines are provided, schools find these inadequate and clearly require greater support.

Rights of Learners in Special-Needs Schools

All interviewed schools indicated that there was a code of conduct in place, which was formulated by an educator or team of educators at the school. One school indicated that the code of conduct was formulated based on guidelines provided by the provincial DBE. None of the schools had separate codes of conduct for the school and the learners, and just one school had distinct codes of conduct for the school and the hostel.

When asked if the code of conduct of the school included a section on the rights of the learners, only two schools indicated that it did, and one of those stated that it was very basic, including information on the learners' rights to not be subjected to corporal punishment. Upon review of the available codes of conduct, it is evident that the focus for most schools is on the responsibilities of the parents and learners

²⁶ S Mansfield-Barry & L Stwayi 'School Governance' in F Veriava, A Thom & TF Hodgson (Section 27) *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 75-89.

²⁷ See for example: *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School and Another*; *Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2014 (2) SA 228 (CC).



as opposed to the rights of learners. This is a glaring omission, particularly in schools where learners are often more vulnerable than those in mainstream schools and the discrepancy in power and agency between staff and learners, even broader.

Although not included in the codes of conduct for five of the seven schools, most respondents indicated that learners were informed of their rights upon enrolment at the school, or explained to the parents representing young learners or learners with severe mental disabilities. Alternatively, the rights of the learners were presented by the educators during the teaching of subjects such as life orientation, or at school assembly. Codes of conduct applicable to hostels were explained to all hostel dwellers. Hostels generally had their own rules and regulations in addition to the existing code of conduct.

Explanations of the rights of learners were fairly perfunctory, including an explanation of the schools' rules and regulations, disciplinary procedures and the learners' right to not be subjected to corporal punishment, abuse or bullying. None of schools took any guidance from the Constitution or international instruments in explaining the rights of a child or learner. As such, none of the explanations on the rights of a learner transcended a discussion about discipline or abuse. Worryingly, one school reported that it was reluctant to inform learners of their rights as this could be used against the educators and other staff in future.

All but one of the schools were clearly aware that corporal punishment was not allowed as a form of punishment and that there were severe repercussions for any staff member found guilty of abusing a learner in any way. One school was candid in admitting that corporal punishment did occur, but indicated that these incidents were not extreme and the staff were given written warnings in response. The other schools admitted that there are occasional complaints of abuse, both in the schools and hostels, and some reported isolated cases of abuse, ranging from minor to severe.

Table 2 provides an overview of the instances of abuse that the schools admitted to having occurred, either once-off or on an ongoing basis. All schools admitted that verbal abuse by educators and other learners, as well as bullying by other learners, were common problems. While there were strict rules against any form of abuse and associated repercussions in each of the schools, verbal abuse and bullying seem difficult to control.

Table 2: Incidents of Abuse by an Educator or Learner, by Province

INCIDENTS OF ABUSE	FS	GP	KZN	LP	NC	NW	WC
Verbal abuse	✓	✓	✓	✓	✓	✓	✓
Physical abuse				✓	✓		✓
Sexual abuse			✓ (2)			✓	✓
Bullying by another learner	✓	✓	✓	✓	✓	✓	✓
Incident due to negligence or mistake				✓		✓	



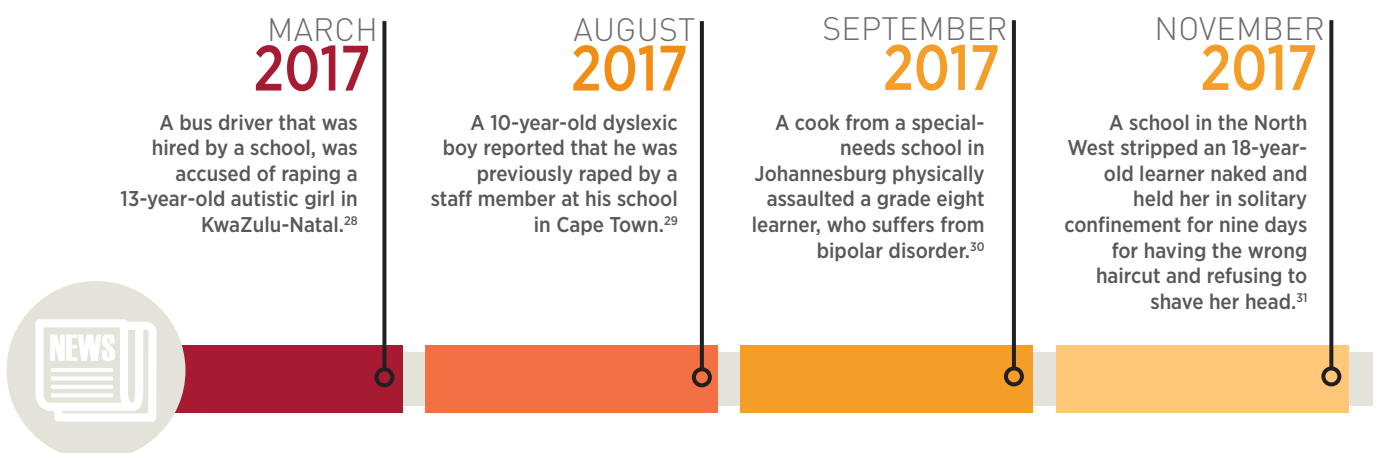
Learners are wary of complaining about bullying for fear of victimisation or reprisal. Schools attempted to address this by installing boxes for complaints, referred to as “bully boxes”, and educators are asked to monitor behavioural changes in learners. The wealthier schools employ full-time or part-time psychologists to assist with the identification of learners who are victims of abuse and report such incidents to the school.

There were incidents reported of an educator slapping a child or a learner hitting a fellow learner. Respondents insisted that these were isolated incidents and that the matters were promptly dealt with. There were also two cases where learners were injured when they wandered off from the larger group of pupils, while being supervised by an educator.

There were four reported cases of sexual abuse. Two cases involved a learner abusing another learner and the remaining two involved the abuse of a learner by a staff member. In all of these cases, the provincial DBEs, Department of Social Development and South African Police Service (SAPS) were approached and criminal cases were opened against the transgressors. The learners were found guilty and expelled, while in one case a staff member was found guilty and eventually dismissed. In the other case of a staff member sexually abusing a learner, the abuser was found guilty but was not dismissed by the provincial DBE, which is the employer. The staff member remains in the school’s employ and had to be moved to kitchen duty, in order to minimise regular contact with the learners.

Most of the schools that were interviewed indicated that it was very difficult, if not impossible, to dismiss staff even when they were guilty of some form of misconduct. The procedures for dismissal are convoluted and cases involving SAPS are even more onerous. The school in KwaZulu-Natal indicated that it had taken the better part of four years to convict the abuser and longer to have the guilty party dismissed.

While the respondents interviewed in this study insist that the cases of reported abuse were isolated incidents, even one case of sexual or physical abuse is too many. In the past year, the following incidents have been reported in the media:



²⁸ N Mohedeen 'Rape claim at special needs school' *Athlone News* (23 August 2017).

²⁹ K Singh & M Zondi 'Autistic teen rape puts KZN special needs school back in spotlight' *News24* (24 March 2017).

³⁰ A Khoza 'School suspends cook seen beating pupil in video clip' *News24* (18 September 2017).

³¹ S Ebrahim 'Discipline in schools: What the law says you can and can't do' *Mail and Guardian* (09 November 2017).



In 1996, the Schools Act, under Section 10, banned the use of corporal punishment in schools, a decision affirmed by the Constitutional Court on two separate occasions. In the case of *S v Williams and Others*³² the Court found that a culture which legitimises the use of violence is inconsistent with the values of the Constitution.

In the *Christian Education Case*,³³ the Constitutional Court dismissed the argument by the appellant that the Schools Act violates the rights of parents of children in independent schools who have consented to the use of corporal punishment, as dictated by their religious beliefs. The Court further stated that:

The state is... under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse.³⁴

In 2012, UNICEF, the Department of Social Development and the Department of Women, Children and People with Disabilities published a report entitled 'Violence Against Children in South Africa'.³⁵ The report indicated that "children with disabilities had a 10% prevalence rate for physical abuse compared to 6% of other children"³⁶ and that children with disabilities were more likely to be sexually abused.³⁷

While all of the schools that were interviewed did have a disciplinary committee and a complaints procedure (formulated by the respective schools) in place, these systems are clearly only effective in cases of mild transgressions or abuse. Furthermore, codes of conduct and disciplinary procedures apply mainly to learners, not staff. The provincial DBEs should maintain oversight of staff and assist with complaints and cases of abuse. However, principals state that, in practice, this does not happen, which often exacerbates an already complex situation. It is clear that there exists a systemic violation of the rights of learners in special-needs schools that extends beyond the violation of the right to a basic education to include the infringement of rights to freedom and security of the person, dignity, and equality. These schools and the provincial and national DBE are either not aware of such violations, or are not fulfilling their duty to ensure the protection and dignity of the learners in their care.

³² *S v Williams and Others* 1995 (3) SA 632 (CC).

³³ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

³⁴ *Ibid* para 40.

³⁵ DSD, DWCPD & UNICEF *Violence Against Children in South Africa* (2012) 75.

³⁶ *Ibid* 26.

³⁷ *Ibid* 26.



Protections and Complaints Procedure

All but one school that was visited indicated that the school did have one or more grievance procedures in place to assist learners to report abuse or bullying. As described above, most schools have boxes strategically placed in one or more locations in the school for learners to report such incidents. Educators are also asked to continuously raise issues of abuse and bullying in the class and encourage learners to report such incidents to adults that they trust at the school. There is generally one complaints procedure for both the school and hostel.

All schools were candid in their admission that there are probably incidents that are not reported for fear of victimisation and that their complaints procedure, developed with minimal assistance from the DBE, was not completely adequate. As such, it is clear that additional assistance on matters of both monitoring and reporting is needed, and requires greater intervention by provincial and the national DBE. Further, the training of educators and learner representatives on Learner Representative Committees to recognise potential signs of abuse or abusive behaviour is required.

Staff Employed in the Schools and Hostels

Based on research conducted, it appears that the process of recruiting staff differs greatly between provinces and districts. Most schools indicated that vacant educator posts were advertised by the provincial DBE, while other professional and non-professional positions were advertised by the school and at the school's cost. In other provinces, all posts were advertised by the provincial DBE.

Every school indicated numerous problems with staff recruitment and numbers. The following complaints were noted:

COMPLAINTS

- Advertisements for non-teaching staff made by the provincial DBE are not always in line with the requirements of the school. As such, the school receives over-qualified or under-qualified applicants or applicants that are missing a vital quality that is of importance to the school.
- Advertisements for non-teaching staff made by the provincial DBE are not placed in local newspapers. As such, applications from distant areas are received and these employees then have trouble relocating or travelling. Local applicants do not always see the advertisements.
- Applicants are almost never trained to work with learners with special needs. The onus is then on the school to send the employee for training, at the school's cost. If training is not conducted, additional problems arise for the learners and staff.
- Schools for learners with special needs are severely understaffed, especially in hostels. Sometimes there is just one houseparent or educator to supervise approximately 80 learners.
- Not all special-needs schools have a trained medical assistant on the premises, which poses a significant risk to the learners, particularly given that these children have special needs.
- When a non-teaching staff member resigns or retires, they are seldom replaced by the provincial DBE. Therefore schools have to operate without key staff on site. The excuse for not replacing staff is consistently cited as a lack of funding.³⁸

³⁸ See also I Dhanook 'Special needs schools lack support staff' *The Post* (08 December 2018).



Overall, the number available staff decreases each year, while the number of learners increases. This is particularly problematic at night, when there is a limited number of staff members to assist with management of the hostel. As such, one staff member may be responsible for between 40 to 80 learners at a time.

The lack of proper training of staff at these schools has led to accidents by the staff who are unaware of certain requirements for working with special-needs learners. For example, one employee would continuously move furniture around at the hostel and learners with visual disabilities would trip over the furniture, expecting it to be elsewhere. As a result, injuries were sustained.

The lack of a full staff complement is a serious risk for schools, particularly in a medical emergency. The lack of vetting of staff and absence of a consolidated Child Protection or Sex Offenders register has meant that offenders are often reemployed at other schools, putting the learners at risk.³⁹ For example, the Gauteng-based school that was interviewed indicated that a background check or vetting process for a person that they had employed, would have revealed that they had had an affair with a learner in another school. This was only exposed sometime after the person was employed at the Gauteng school and had already made advances on learners.

The low number of support staff, particularly at hostels, and the failure to ensure that key professionals are on site at these schools, constitute major concerns. One principal indicated that in an emergency, the school was required to call an ambulance, which was over 40 kilometres away. In the case of a serious health emergency, a child's life could be at stake.

All schools lamented the lack of or limited psychology and occupational therapy services. All respondents believed that the regular services of a trained psychologist would assist the learners and staff by decreasing abuse, identifying cases of abuse and assisting learners with developmental and other problems.

The above findings indicate that there is a violation of the rights of learners and non-adherence by provincial DBEs to policies and jurisprudence. In relation to the unacceptably high vacancy rates in special-needs schools, the *Linkside Case*⁴⁰ dealt with ongoing failure of the Eastern Cape DBE to fill vacant posts in public schools in the province, and the consequent impact on the right to basic education for the affected learners. Following from a previous judgment on the failure of the Eastern Cape DBE to pay educators, reimburse schools that had appointed their own educators and to fill vacant posts, the Court found that the DBE had failed to follow the relevant court order, which constituted an ongoing violation of the right to basic education. Findings from the interviews with special-needs schools illustrate that there are ongoing issues with the appointment of educators to vacant posts, which constitute a more significant challenge in these schools due to the special needs of learners. The absence of specialist staff such as health care workers is extremely concerning, particularly in an environment where specialised health care services are required.

On the issue of training, the Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres to Support Inclusive Education state that:

³⁹ See also P Govender 'Sexpest teacher gets another job' *Times Live* (09 February 2018).

⁴⁰ *Linkside and Others v Minister of Basic Education and Others* (3844/2013) [2015] ZAECGHC 36 (26 January 2015).



It is imperative that all special schools' personnel, especially teaching and professional expert support personnel, must engage in relevant ongoing professional development that will assist them to deliver the curriculum and support learners. Ongoing professional development will assist in keeping them abreast of latest developments in the education and support of learners who require high level of specialised support.⁴¹

Evidence from those interviewed indicate that neither basic nor follow-up training is taking place at special-needs schools, which could pose a serious threat to the wellbeing of the learners. The policy further states that "all personnel employed in special schools must be thoroughly screened to ensure suitability to work with children who require high levels of support".⁴² It is clear that this is not being done either.

Quality Assurance

Three of the seven schools interviewed indicated that the district or provincial DBE regularly visited the schools to conduct assessments and checks. One of the three schools indicated that the Department of Social Development also visited regularly and two of the three schools indicated that reports were provided following the assessment of their respective schools. The remaining school indicated that it would benefit from feedback reports.

The remaining four schools were never visited by a district or provincial official and all agreed that it would be useful if such visits were conducted, in order to assist in correcting policy deficiencies and other challenges prevalent at these schools. One respondent was scathing of the district managers, indicating that they had never visited the school, and were unaware of circumstances at the school, yet are responsible for much of the school's decision making.

The Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres to Support Inclusive Education state that:

The [DBE] at national, provincial and district levels has an obligation to monitor all special schools on a regular basis and provide the necessary support. All aspects of education provision must be monitored. These include, but are not limited to, school governance and management, curriculum planning and delivery, infrastructure provisioning, human resource management and transport. Special schools must not be seen as the sole responsibility of officials from the Inclusive/Special Needs Education sections of the [DBE].⁴³

Again, a clear violation of policy intended to ensure support for special-needs schools and the quality of services being provided to learners.

⁴¹ DBE (note 19 above) 15.

⁴² Ibid 10.

⁴³ DBE (note 19 above) 5.



Services and Care for Learners



Recreational Activities

All schools that were interviewed, indicated that recreational services were offered to hostel dwellers both during the week and weekends. These were mainly football, netball, board games, reading and television watching. Those schools with pools also allowed swimming on the weekends.

All schools agreed that funding was a barrier to the stimulation of the learners. The urban-based schools that had better facilities indicated that they would appreciate funding for even greater facilities. The less-advantaged schools indicated that funding for recreational activities would be used for the construction of a swimming pool and to purchase more board games or table soccer for indoor play. The recreational programmes described were structured and engaging. It is evident that the schools are being very proactive, despite significant resource constraints.



Health Care and Safety

The findings made in respect of the health care and safety of learners are of some concern in selected schools that did not have a registered health professional on the schools premises, despite the fact that one is required to treat the special-needs learners and dispense their medication. Both the Free State and Limpopo schools indicated that once their previous health care worker had resigned, the position had never been refilled. This puts the school at great risk, as learners have to then dispense and take their own medication. It also means that in the event of a medical emergency, there is no on-site assistance available to the school.

Table 3: Health and Safety Procedures, by Province

HEALTH & SAFETY MEASURES / PROCEDURES	FS	GP	KZN	LP	NC	NW	WC
Health care professional on site	x	✓	✓	x	✓	✓	✓
Available after hours	x	x	✓	x	x	✓	✓
Clinic on site	✓	✓	✓	x	✓	✓	✓
Health policy	✓	✓	x	x	x	✓	✓
Medication dispensed by health worker	x	✓	✓	x	✓	x	✓
Sufficient safety equipment on site	✓	x	✓	x	✓	✓	✓
On-site	✓	✓	✓	✓	✓	✓	✓



Two schools indicated that there were insufficient fire extinguishers on site and they did not have proper emergency evacuation plans in place. From observation of the schools, all seemed secure, with visible policing by guards or security personnel.

Despite the evident readiness of the rest of the schools to deal with emergencies, there have been incidents of injury and death in schools for learners with special needs in the past. In 2010, four learners died in a fire at a special-needs school for the blind in the North West. In 2013, a child drowned in a pool at the same school. The Commission was unsuccessful in attempting to secure an interview with this school. In August 2014, three learners were killed in a fire, also in the North West. An investigation conducted by the Commission found *inter alia* that the respondents in the matter, including the HoD of the North West School for the Deaf, the North West Department of Education, the Member of Executive Council for Education (MEC) and the Minister of Basic Education, failed to comply with the Constitution, legislation and policy, including the National Building Standards, Regulations and National Norms and Standards, Regulations for Safety Measures at Public Schools and Uniform Norms and Standard the Department of Public Works Disability Policy Guidelines.⁴⁴

The investigation further found that on the night of the incident, there were no educators on duty and that the hostel rooms were locked from the outside. There were only two fire extinguishers on the premises, no evacuation and exits signs in the corridors or hostel rooms and no fire detectors or flashing alarms. The investigation subsequently found that there had been a violation of the learners' rights to life, dignity, a safe and healthy environment, freedom and security of person, reasonable accommodation and a duty to protect. The learners were also subject to discrimination.

The Commission subsequently instructed the North West DBE to conduct an audit of special-needs schools in the provinces to identify gaps in existing policies and resources for implementation and the competency and qualifications of school employees. Further, the provincial DBE must establish a centralised system through which compliance with safety standards is monitored and which will enable the timely correction of instances of non-compliance.

⁴⁴ South African Human Rights Commission *Investigative Report: North West School for the Deaf* (2018) 59: <<https://www.sahrc.org.za/home/21/files/Investigative%20Report%20-%20North%20West%20School%20For%20The%20Deaf%20Final.pdf>>.



CHAPTER 05

CONCLUSION

Following the receipt of myriad complaints regarding the abuse of learners in special-needs schools, the Centre for Child Law approached the South African Human Rights Commission for assistance with the matter. The Commission proceeded to visit seven schools in different provinces to question relevant school representatives on various aspects of school management and policies.

The Commission found that despite the fact that all schools had various policies in place, many of these were drafted with little or no assistance from their respective provincial DBE. This exposes the school and its learners to unnecessary risk. The Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres to Support Inclusive Education state unequivocally that:

As indicated by the inclusive education policy, [Special School Resource Centres] must be part of district-based support teams (DBSTs). They must provide specialised professional support in curriculum, assessment and instruction to designated full-service and other neighbourhood schools as part of these teams. They should provide this support whilst also providing improved educational services to those learners who require high levels of support that are enrolled at their schools.⁴⁵

Further, while learners were made aware of their rights as learners, the extent to which this was covered was limited and would do very little to curb abuse or ill treatment at the hands of staff at their school. All schools had grievance mechanisms in place and learners were regularly encouraged to report complaints via this mechanism or to a staff member that they trusted.

Despite various mechanisms in place, occurrences of abuse were not uncommon as evidenced by testimony from the schools and media reports. Some of these cases could be attributed to the lack of adequate numbers of staff to assist with monitoring and the lack of vetting of staff members prior to employment.

⁴⁵ DBE (Note 19 above) 19.



Recreational activities were provided to all hostel dwellers but were limited by funding constraints. There remains concern around the lack of qualified medical professionals at some schools and / or the lack of health and safety policies. It is clear that greater monitoring and assistance from provincial DBEs are required, with broad oversight from the national DBE. It was also clear that the schools based in metropolitan or urban areas were better resourced and offered greater support and access to services than rural and outlying schools.

As one respondent indicated, special-needs schools are not only neglected compared to mainstream schools, but current systems exacerbate existing inequalities. Schools that have always been well resourced continue to offer the best services, while benefitting from support and infrastructure. Poorer schools must therefore be prioritised.

Accordingly, it is clear that there is a systemic violation of the rights of learners that attend and, in some cases, live at special-needs schools in South Africa. Their rights to *inter alia* dignity, basic education, health, equality, and freedom and security of person are threatened or infringed, and urgent attention by the respective provincial DBEs and national DBE is required.



CHAPTER 06

RECOMMENDATIONS

Given the large number of challenges facing special-needs schools and the fact that each province works differently in managing these schools, the Commission makes one broad recommendation and one specific recommendation at this time. Broadly, the South African Human Rights Commission should convene a meeting with the National Department of Basic Education within the 2018/2019 financial year, to highlight all of the listed complaints and challenges. Subsequently, the Commission can monitor the implementation of plans to improve the conditions in schools for learners with special-needs. The following points of discussion must be included in the agenda:



- a. **Policy drafting:** and ways in which the DBE can ensure that adequate and ongoing support is provided to the schools for learners with special needs.
- b. **National policies:** to ensure the standardisation of specific policies, such as *inter alia* codes of conduct, sexual harassment and assault, health and safety and post provisioning.
- c. **Vacancy rates:** and the lack of essential staff in schools for learners with special needs.
- d. **A national audit:** of the state of all schools for learners with special needs.
- e. **Quality assurance:** specifically monitoring and evaluations by district or provincial offices.
- f. **Funding allocations:** for poorer and outlying schools.
- g. **A specific examination:** into cases of abuse at these schools and hostels, and the development of a streamlined process to deal with perpetrators.

Further, the Commission recommends that the DBE conduct a thorough health and safety audit of all special-needs schools across the country to ensure that all health and safety policies are in order and being implemented. This is urgently required to avoid injuries and the loss of life in the event of an emergency at one or more of the schools.



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