

COVID-19 and the Violation of the Right to Basic Education of Learners with Disabilities in South Africa: An Examination of *Centre for Child Law v Minister of Basic Education*

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Abstract

This article explores the extent to which the right to basic education of learners with disabilities in South Africa was guaranteed during the COVID-19 pandemic. It uses the *Centre for Child Law v Minister of Basic Education* (*Centre for Child Law*) as the main canvas for discussion. It argues that, notwithstanding its normative compliance with the international regime of the right to an inclusive basic education, the government has failed learners with disabilities during COVID-19. An examination of *Centre for Child Law* reveals that, not only did the government's directions for the phased return to school exclude learners with disabilities, they also required the closure of special schools where compliance with social distancing rules was impossible. This violated the right to inclusive education and substantive equality of learners with disabilities and highlighted the need to advance these rights through reasonable accommodation initiatives.

Keywords

COVID-19, inclusive education, learners with disabilities, disablism, substantive equality

INTRODUCTION

The COVID-19 pandemic is the most important challenge to face the world in recent times. In South Africa, as in many parts of the world, the government imposed general lockdowns to flatten the infection curve in its attempt to control the pandemic. To this end, the South African government relied on the Disaster Management Act No 57 of 2002, which was the bridge used by the president of the republic to declare a state of disaster on 15 March 2020. This paved the way for the national lockdown declared on 23 March 2020. This exceptional measure curtailed many freedoms, including freedoms of

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assembly, movement, occupation and profession, and the right to education through a complete closure of schools.

However, given the significance of education for human development,¹ schools could not be closed indefinitely or until the defeat of the pandemic. Therefore, the government adopted measures and guidelines to ensure that schools could reopen while it continued to address the pandemic. The aim of this article is to explore the extent to which the Department of Basic Education (DBE) directives to reopen schools during the pandemic support the right to education of learners with disabilities. At the heart of this question is the issue of the inclusive education of learners with disabilities at the basic or primary level. The focus is on basic education because it is compulsory and to be realised immediately under international law. The article argues that measures adopted to reopen schools did not cater for the return of learners with disabilities who were already excluded when education was moved to online platforms and media in the early stages of lockdown.²

In making its case, the article uses the decision in *Centre for Child Law v Minister of Basic Education (Centre for Child Law)*³ as the central canvas for discussion. The gist of the argument in this article is that the facts that led to the litigation in this case show that South Africa has been indecisive in complying with its international obligations related to inclusive education. While the article demonstrates that South Africa has made considerable progress in adopting credible legal and policy frameworks to advance inclusive education, mainly in the context of the post-apartheid transformation landscape, it also shows flaws in updating and implementing these policies to meet the inclusive demands of the pandemic on the state. The facts behind *Centre for Child Law* unequivocally demonstrate the state's failure to update its inclusive education policies to open the doors of basic education to learners with disabilities during COVID-19. This article is important, as it can help to ensure that laws are enacted, and policies or programmes are formulated and

1 Committee on Economic, Social and Cultural Rights, General Comment No 13: The Right to Education (Art 13 of the International Covenant on Economic, Social and Cultural Rights), 21st session, 1999, UN doc E/C 12/1999/10, reprinted in "Compilation of General Comments and General Recommendations adopted by human rights treaty bodies", UN doc HRI/GEN/1/ Rev6 at 70 (2003), para 1; BR Akinbola "The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities" (2010) 10 *African Human Rights Law Journal* 457.

2 C McClain-Nhlapo "An inclusive response to COVID-19: Education for children with disabilities" (11 May 2020, Global Partnership for Education), available at: <<https://www.globalpartnership.org/blog/inclusive-response-covid-19-education-children-disabilities>> (last accessed 6 July 2021); J McKenzie, R Vergunst, C Samuels and T Henkeman "The education of children with disabilities risks falling by the wayside during the pandemic" (27 May 2020) *Daily Maverick*, available at: <<https://www.dailymaverick.co.za/article/2020-05-27-the-education-of-children-with-disabilities-risks-falling-by-the-wayside-during-the-pandemic/>> (last accessed 6 July 2021).

3 High Court of Pretoria, case no 3123/2020.

implemented in ways that further the right to inclusive education and substantive equality in general.

The article is divided into five parts. After this introduction, the article analyses the international regime of inclusive education to explain what is expected from South Africa, being a party to global instruments related to inclusive education. It then presents the facts of and decision in *Centre for Child Law* to explain the violation of the right to inclusive education of learners with disabilities during COVID-19. The next part is an appraisal of the decision in order to unveil its significance; the conclusion follows.

THE INTERNATIONAL REGIME OF INCLUSIVE EDUCATION

This part of the article seeks to demonstrate that, under international law, inclusive education takes place in both mainstream and special schools.

Inclusive education in mainstream schools

Education is the foundational right on which other rights can be realised because it enables the beneficiaries to grow as human beings and live a meaningful life.⁴ Given its importance, at the primary or basic level, education should be compulsory, *universally* accessible, and realised immediately, free of charge and not progressively, with consideration of available resources as for other socio-economic rights.⁵ *Universally* accessible means accessible to *everyone* and to all learners with no discrimination whatsoever. Basic education should comply with the “4 As” framework, to be: available, accessible, acceptable and adaptable (accompanied by a plan of action to ensure its implementation).⁶ Under the right to primary education framework, state parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) are obliged to “adopt a plan of action”⁷ with detailed deadlines⁸ to implement the right. In this vein, the plan of action to give effect to compulsory education free of charge for all is a “continuous obligation”, under which states should oversee and upgrade a plan to have permanent universal free education for all.⁹

4 General Comment No 13, above at note 1, para 1.

5 For more on the regime of primary education, see *id* at 6(b)(iii), paras 1 and 2(a), para 9; also see A Skelton and SD Kamga “Broken promises: Constitutional litigation for free primary education in Swaziland” (2017) 61/3 *Journal of African Law* 433.

6 See “Preliminary report of the special rapporteur on the right to education, K Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33”, UN doc E/CN.4/1999/49, paras 51–56; also see K Tomasevski *Human Rights Obligations in Education: The 4-A Scheme* (2006, Wolf Legal Publishers). Also, see General Comment No 11 of the Committee of Economic, Social and Cultural Rights, UN doc E/C.12/1999/4 (10 May 1999).

7 General Comment No 11, *id*, para 9.

8 *Id*, para 10.

9 *The Right to Education Free of Charge for All: Ensuring Compliance with International Obligations* (2008, UNESCO) at 3.

This approach underscores the compulsory inclusiveness of basic education, which should include learners with disabilities. This requirement is at the centre of key human rights instruments, such as the Universal Declaration of Human Rights, the ICESCR and the UN Convention on the Rights of Persons with Disabilities (CRPD) at the global level, and the African Charter on Human and Peoples' Rights and African Charter on the Rights and Welfare of the Child at the regional level. South Africa is party to all these instruments.

The CRPD urges all member states to implement the right to education of learners with disabilities "on the basis of equal opportunity, [and] ensure an inclusive education system at all levels and lifelong learning".¹⁰ This means that the admission of learners with disabilities to mainstream schools is not negotiable. Government should put in place all necessary measures to provide education to all learners, including those with disabilities, in the same setting.¹¹ This goes beyond the mere integration of learners with disabilities, which seeks to insert them in mainstream schools, rather than making sure that these pupils are actually learning.¹² It concerns the child's right to participate and benefit on an equitable basis to their non-disabled peers. Inclusive methods underline the duty of education systems to admit all children and ensure their equal participation in fostering diversity in the classroom. This would entail the adoption and implementation of a universal learning design that embodies the development of a curriculum and the training of teachers to meet different needs in a classroom.¹³ The universal learning design encompasses various means of representation, of action and expression, problem solving and thinking, as well as multiple means of engagement to provide for the needs of all learners in a classroom, including those with disabilities.¹⁴

The effective inclusion of learners with disabilities in the "general system education" or mainstream education therefore requires the provision of reasonable accommodation,¹⁵ such as assistive devices, sign language and other means to make sure that these pupils have equal access to education. This also means ensuring that reasonable accommodation is proportionate to a learner's disability to ensure effective access to education.¹⁶ This underlines the need to include learners with disabilities in mainstream schools, taking their different needs into consideration.¹⁷ In *Sofia v Bulgaria*, the European Court of Human Rights held that the equal right to education of learners

10 CRPD, art 24(1).

11 ST Tesemma *Educating Children with Disabilities in Africa: Towards a Policy of Inclusion* (2011, African Child Policy Forum).

12 Ibid.

13 EM Dalton, J McKenzie and C Kahonde "The implementation of inclusive education in South Africa: Reflections arising from a workshop for teachers and therapists to introduce universal design for learning" (2012) 1 *African Journal of Disability* 1 at 3.

14 Ibid.

15 CRPD, art 24(2)(c), (d) and (e).

16 Ibid.

17 B Keith "Concluding thoughts" in B Keith (ed) *Inclusive Education: International Voices on*

with disabilities was violated if the school did not have an enabling environment for their success and failed to create such an environment so as to ensure equal treatment with other learners.¹⁸ Similarly, in the Bulgarian case of *Mental Disability Advocacy Center v Bulgaria*,¹⁹ the European Committee of Social Rights held that Bulgaria encroached upon the right to education of learners with disabilities under the European Social Charter by removing them from mainstream education. This trend was followed in South Africa in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*.²⁰ In this case, the court was of the view that abandoning children with intellectual disabilities to the care of non-governmental organizations that catered for their education violated the right to education of these children who should be in school. This jurisprudence clearly suggests that inclusion in mainstream school is the rule under international law. However, such inclusion is not so easy at first sight. Often the type or intensity of some disabilities is problematic and hinders the ability of the learner to succeed in a mainstream school and therefore special education becomes the solution.²¹

Inclusion in special schools

Inclusive education entails sending learners with special needs to special schools to secure their success in life. This decision is often informed by the need to protect the child's best interests. It is believed that deaf and deaf / blind learners have "special education needs"²² and should be educated in a specialized environment for their appropriate development, while protecting them from being frustrated by non-disabled pupils.²³ Subscribing to this approach, in the case of *Eaton v Brant County Board of Education*,²⁴ the Supreme Court of Canada held that, in considering the best interests of the child, it is appropriate to place a child with multiple disabilities including visual and mobility impairment, and cerebral palsy with the inability to communicate through speech, sign language, or any other alternative communication system, in a special needs education centre. Failure to do so

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Disability and Justice (1999, Falmer Press) 169; see also Tesemma *Educating Children with Disabilities*, above at note 11.

18 *Sofia v Bulgaria* case no 13789/06, decision of 18 May 2007. For more on this case, see *The Mental Disability Advocacy Centre (MDAC) v The Republic of Bulgaria* complaint no 41/2007, 2 at 16.

19 Complaint no 41/2007, decision delivered 3 June 2008.

20 2011 5 SA 87 (WCC).

21 Tesemma *Educating Children with Disabilities*, above at note 11 at 54.

22 S Stubbs *Inclusive Education: Where There Are Few Resources* (2002, Atlas Alliance) at 21.

23 F Aefsky "Inclusion confusion: A guide to educating students with exceptional needs" (1995) at 6 (on file with the author). See also GF López "Social skills training for autistic children: A comparison study between inclusion and mainstreaming education" (2016) 1/3 *Academic Journal of Pediatrics & Neonatology* 65.

24 [1997] 1 SCR 241.

violated the child's right to equality as stipulated in section 15 of the Canadian Charter of Rights and Freedoms. For Sopinka J, the best interests of the child require that he or she is sent to a special school to succeed. Failure to do so and sending the learner to a mainstream school would be discriminatory and detrimental, as he or she would be forced to "sink or ... swim within the mainstream environment".²⁵ This view was further reiterated by the Irish High Court in *O'Donoghue v Minister for Health*²⁶ and confirmed by the Irish Supreme Court in *Sinnott v Minister for Education*²⁷ eight years later.

Although inclusion through special school is part of the inclusive education jurisprudence, to avoid abandoning learners with disabilities in sub-standard special schools, American jurisprudence developed criteria for the admission of learners with disabilities into special schools. In the case of *Daniel RR v State Board of Education and Others*,²⁸ the US Court of Appeals, 5th Circuit was of the view that, although special schools can be necessary for some learners with disabilities, it is preferable to educate them in mainstream schools and rely on special schools only under strict conditions:

"(1) Can education in the regular classroom, with the use of supplementary aids and services, be achieved satisfactorily for a particular student? (a) Has the school taken sufficient steps to accommodate the student in the regular classroom with the use of supplementary aids and services modifications? (b) Will the student receive educational benefit from the regular education? (c) What will be the effect of the student's presence in the regular education classroom on the education of the other students? (2) If the student is to be removed from a regular education classroom and placed in a more restrictive setting, has the student been mainstreamed to the maximum extent appropriate?"²⁹

These criteria for the inclusion of learners with disabilities in special schools were further reiterated by the court in *Oberti v Board of Education*.³⁰ In this case, the judge clearly held that placing a learner with a severe disability in a special school is not permissible without taking into account the possibility of his or her education in mainstream school where reasonable accommodation measures are considered.³¹

25 Id, paras 66–67.

26 [1993] IEHC 2 (27 May 1993).

27 [2001] IESC 63; [2001] 2 IR 505 (12 July 2001).

28 874 F 2d 1 036; 53 Ed Law Rep 824 (5th Cir 1989). For more discussion of this case, see SD Kamga "Inclusion of learners with severe intellectual disabilities in basic education under a transformative constitution: A critical analysis" (2016) 49/1 *The Comparative and International Law Journal of Southern Africa* 24 at 43.

29 Ibid.

30 995 F 2d 1204 (3rd Cir).

31 Id, para 1204.

In summary, the international regime of inclusive education prescribes the inclusion of learners with disabilities in mainstream schools as well as in special schools, although caution should be considered on the appropriateness of special schools.

FACTS AND DECISION IN *CENTRE FOR CHILD LAW*

This section of the article presents the facts and the decision, to reveal the events that triggered the case and how it was handled by the court.

The facts

While examining the facts of *Centre for Child Law*, it is necessary to recognize that, normatively, South Africa complies with international standards of inclusive education. First, the South African Constitution of 1996 (the Constitution) provides for the right to basic education to be enjoyed by “everyone” without exception.³² Secondly the country has adopted several policies to foster inclusive education.³³ Chief among these policies is *White Paper 6*,³⁴ which expressly provides for the right of persons with disabilities to be educated in mainstream schools as well as in special schools or special centres. This policy also underlines the need to provide reasonable accommodation for learners in those schools to ensure that they enjoy the right to education as their counterparts without disabilities do.³⁵

Yet, during lockdown when education was moved to online platforms and media, no support and services were provided for pupils with disabilities and their parents or caregivers.³⁶ These learners had become “uneducable”. Similarly, during the phased return to school, the DBE was reluctant to adopt measures for the return of learners with disabilities to school. It is against this backdrop that the Centre for Child Law, represented by the Equal Education Law Centre, took Minister of Basic Education Angie Motshekga to court seeking the invalidation of the DBE’s directions, which failed, inter alia, not only to provide guidelines for all categories of learners with disabilities, but did not cater for the preparedness of hostels in which the “excluded categories” are educated.³⁷

On 8 April 2020, the Centre for Child Law engaged the DBE and its Inclusive Education Directorate to determine what measures had been put in place to

32 The Constitution, sec 29.

33 The South African Schools Act, No 84 of 1996.

34 *White Paper 6: Special Needs Education, Building an Inclusive Education and Training System* (2001, Department of Education). See also: *White Paper on Education and Training* (1995, Department of Education); *White Paper on an Integrated National Disability Strategy* (1997, Office of the Deputy President); and *White Paper on the Rights of Persons with Disabilities* (2015, Department of Social Development).

35 *White Paper 6*, ibid.

36 *Centre for Child Law*, above at note 3, para 46.

37 Id, notice of motion, paras 2.1 and 2.2.1.

support learners with disabilities and their parents or caregivers during lockdown.³⁸ However, for weeks, they received no meaningful response.³⁹ Subsequently, on 30 April 2020, when the minister of basic education announced the plan for the reopening of schools following the COVID-19 pandemic, the mentioning of learners with disabilities was symbolic, because the DBE indicated that it was mindful of the needs of learners with disabilities and was working with provinces to ensure that special schools were adequately provided for, but without further details.⁴⁰ On 29 May 2020, the DBE published directions on the reopening of schools and related measures to combat the spread of COVID-19 (the Directions).⁴¹ The Directions provided information, including on aspects such as the phased return of learners and educators, the health and safety standards to which schools must adhere in order to reopen, screening processes, the wearing of masks, the provision of sanitizers and disinfectants, social distancing and timetable models, and curriculum trimming and re-organization.⁴²

However, although the Directions included a tabulated schedule for returning learners, which differentiated between schools of skills, schools for learners with severe intellectual disabilities and special care centres for learners with severe and profound intellectual disabilities, they did not outline measures to protect learners with disabilities who were returning to school or to support those who remained at home.⁴³ For example, the Directions requested educators and officials to wear masks without considering the special needs of, for instance, deaf learners who lip read and for whom cloth face masks would make it impossible for them to communicate.⁴⁴ Based on this disquieting omission, the Equal Education Law Centre further engaged the DBE. The latter responded with the publication of amended directions on 1 June 2020 (Amended Directions). Unfortunately, the Amended Directions brought nothing new because, without guidance, they shifted the burden onto provincial education departments to “arrange with schools to ensure that teaching and learning continues if learners remain at home [and that] learners with disabilities would require very specific support in certain cases in order to ensure this”.⁴⁵

The blatant reluctance to plan adequately for the return of learners with disabilities to school during lockdown did not discourage the Centre for Child Law and its representative (the Equal Education Law Centre), which further engaged the DBE on its omissions. Subsequently, on 9 June 2020, the minister

38 *Centre for Child Law*, above at note 3, paras 46, 47, 48 and 49.

39 *Id.*, para 46.

40 *Id.*, para 51.

41 Available at: <https://www.gov.za/sites/default/files/gcis_document/202105/44633gon451.pdf> (last accessed 20 July 2021).

42 *Centre for Child Law*, above at note 3, para 57.

43 *Id.*, paras 57 and 58.

44 *Id.*, para 59.

45 *Id.*, para 63.

circulated further revised Directions, which still failed adequately to capture the needs of learners with disabilities.⁴⁶ Upon further enquiries by the applicant, on 23 June 2020, the DBE published further unsatisfactory Directions.⁴⁷ They were unsatisfactory because they only captured the needs of learners with autism, and deaf, hard of hearing, blind and partially sighted learners.⁴⁸ In other words, the Directions did not cover many other categories of disabilities. For example, they did not include the needs of learners with physical disabilities, intellectual disabilities, epilepsy and severe to profound intellectual disabilities.⁴⁹ Further pressure from the applicant did not persuade the minister to adopt the measures needed to ensure the readiness of schools to welcome learners with disabilities and to cater for those remaining at home during the COVID-19 pandemic.

Based on the DBE's failure adequately to ensure the safe return to schools of all learners with disabilities in the wake of the COVID-19 pandemic, the applicant approached the court with an urgent application to seek the following reliefs: a declaration that the Directions published on 23 June were invalid and an order to remedy their shortcomings within three weeks;⁵⁰ remedying the flaws in the Directions and related guidelines, to be done urgently to protect the health and safety of learners with disabilities, hence the request to finalize the process within three weeks;⁵¹ compelling the minister to publish draft amended Directions and DBE guidelines for comment and then to consider the comments received before releasing final amended Directions and revised guidelines.⁵²

Ultimately, the applicant demonstrated, with evidence, its efforts to engage meaningfully with and even assist the respondent in crafting appropriate measures and guidelines to ensure that the return of learners with disabilities to school would take place without compromising their health and safety. The respondent had no counter argument; hence the court made an order by agreement between the parties, which could be interpreted to mean a recognition by the DBE that its Directions were flawed.

The court's decision

The court found for the applicant and made the following order by agreement between the parties. It held that within three weeks of issuing the order: the respondent was to amend the 23 June Directions to include guidelines for learners with physical disabilities, intellectual disabilities, epilepsy and severe to

46 Id, para 69.

47 Id, para 73.

48 Id, para 75.

49 Id, paras 75 and 78.1, 78.2, 78.3 and 78.4.

50 Id, para 127.1.

51 Id, para 127.3.

52 Id, para 127.5.

profound intellectual disabilities (the excluded categories);⁵³ the Directions were to cater for the preparedness of hostels in which learners from the excluded categories receive their education;⁵⁴ the respondent was to remove the requirement to close overpopulated special school hostels in which social distancing rules could not be respected;⁵⁵ the respondent was to provide “for additional infrastructure capacity for special school hostels where alternatives do not provide for the reasonable accommodation needs of learners with disabilities residing in school hostels”;⁵⁶ the respondent was to ensure that the draft amendment of the DBE Guidelines for Schools on Maintaining Hygiene During COVID-19 contain measures to ensure the health and safety of learners with disabilities at schools, hostels and offices;⁵⁷ the respondent was to ensure that the draft amended Directions contained guidelines to heads of department to ensure that pupils who cannot return to school are “provided with appropriate learning and teaching support material, assistive (ie education-specific) devices and therapeutic services to access basic education while they remain at home”;⁵⁸ and the respondent was to ensure that draft amended Directions and guidelines were made available for public comment for ten days and take those comments into account before issuing the final amended Directions and guidelines all within six weeks of the order.⁵⁹

THE SIGNIFICANCE OF THE DECISION

Considering South African jurisprudence on the right to equality, the decision demonstrates how the Directions violate the right to substantive equality of learners with disabilities. It also calls for the substantive equality of learners with disabilities to be advanced through reasonable accommodation measures in schools.

The DBE Directions and the violation of the right to substantive equality of learners with disabilities

The right to equality is central in the South African transformative agenda. Located in section 9 of the Constitution, it seeks to repair the wrongs of the apartheid regime and build an equalitarian society in which everyone's dignity is respected. However, to enhance its significance, South African jurisprudence has highlighted the need to move beyond formal equality to achieve substantive equality.⁶⁰ Although the concept lacks a universal definition, to

53 *Id.*, para 1.1; notice of motion, above at note 37, para 2.1.

54 *Centre for Child Law*, above at note 3, para 1.2.1; notice of motion, para 2.2.1.

55 *Centre for Child Law*, *id.*, para 1.2.2; notice of motion, para 2.2.2.

56 *Centre for Child Law*, *id.*, para 1.2.3.

57 *Id.*, para 1.3.

58 *Id.*, para 1.4.

59 *Id.*, para 2.

60 *Prinsloo v Van der Linde* (CCT4/96) [1997] ZACC 5; *Harksen v Lane NO and Others* 1998 (1) SA 300.

be meaningful, substantive equality seeks to “redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change”.⁶¹ Based on an evaluation of South African jurisprudence on the right to equality, this section assesses the extent to which the Directions advance substantive equality, as required by the Constitution. It is against this backdrop that the case of *Harksen v Lane (Harksen)*,⁶² is used as a bridge to examine the non-discriminatory nature of the Directions and the extent to which they address disadvantages and foster substantive equality.

In *Harksen*, the court explained the test of unfair discrimination. This test is informed by three important questions. First, whether there is a rational and legitimate reason for the policy, law or practice that distinguishes between people or groups of people, such as the distinction in the form of omission found in the Directions; and whether such distinction / omission or differentiation is unfair and, in the event it is unfair, whether it is defensible under section 36 of the Constitution.⁶³

The second question seeks to protect human dignity for all. The court interrogates the impact of the discrimination on the plaintiff and the social group to which he or she belongs. In this interrogation, the following elements are essential: understanding “the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not”. The third question is related to the nature of the provision or power and its purpose, taking into account whether the provision or power is intended to achieve a commendable social goal; and “the extent to which the provision or power has affected the rights or interests of the complainant and whether it has caused an impairment of the fundamental human dignity of the complainant in a comparably serious nature”.⁶⁴

In the case at the centre of this article, the second question shows that the Directions discriminate unfairly against learners with disabilities because: these learners are in a fragile or vulnerable position; they are from a group that is often disadvantaged and marginalized; and the provision or power (the Directions) had affected their rights or interests and violated their fundamental human dignity by violating their right to education. The Directions did not attempt to include the disadvantaged and marginalized as these groups were excluded from the plan to return to school. When pressed for their inclusion, only a few selected groups of learners with disabilities were

61 S Fredman “Substantive equality revisited” (2016) 14/3 *International Journal of Constitutional Law* 712 at 713.

62 Above at note 60.

63 For more on the *Harksen* test, see: C Ngwenya “Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education” (2013) 1 *African Disability Rights Yearbook* 139 at 139; and Fredman “Substantive equality revisited”, above at note 61.

64 *Harksen*, above at note 60, paras 51–53.

included in the Directions, with the effect of underlining the “uneducability” of the excluded ones. Therefore, the court’s decision was adequate in its attempts to remedy the unfair discrimination against learners with disabilities. It buttresses the judgment in *South Africa v Hugo*, in which the court held that, “[t]he prohibition of unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups, [but] seeks advance equal dignity [for all]”.⁶⁵

Ultimately, the *Centre for Child Law* decision urges the DBE to protect the right to substantive equality of learners with disabilities by giving effect to their right to inclusive education. Failure to do so would amount to treating them differently in a manner that violates their dignity,⁶⁶ which can be avoided by advancing their participation and providing reasonable accommodation.⁶⁷

A call to foster substantive equality of learners with disabilities through reasonable accommodation measures

The CRPD defines reasonable accommodation as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.⁶⁸ Put differently, the inclusion of persons with disabilities in society entails the adoption of reasonable adjustment initiatives. Nonetheless, these initiatives should not impose a disproportionate or undue burden. The notion of “disproportionate or undue burden” is unclear and can be an impediment to the promotion of reasonable accommodation. However, before the adoption of the CRPD, this notion was addressed both by the USA and Canada. On the one hand, in the context of practising one’s religion at the workplace, the US Supreme Court held that employers need only sustain “a de minimis cost” to accommodate an individual’s religion.⁶⁹ This means that the cost to pay for the accommodation should be minimal. On the other hand, the Canadian Supreme Court was of the view that “more than mere negligible effort is required to satisfy the duty to accommodate”.⁷⁰ Avoiding standardizing the measures or cost to be used, the Canadian approach enables the duty-bearer to consider the context in dealing with the reasonable accommodation that should also be dispensed on a case-by-case basis. It is in this context that the South African Constitutional Court subscribed to the Canadian model,

65 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), para 41.

66 *Prinsloo v Van der Linde*, above at note 60.

67 Freedman “Substantive equality revisited”, above at note 61.

68 CRPD, art 2.

69 *Trans World Airlines Inc v Hardison* 1977 (63) 432 (US), para 84.

70 *Central Okanagan School District No 23 v Renaud* 1992 (2) 970 (SCR), paras 983G–85A.

which advances respect for diversity, which is central to the South African transformative project echoed by the Constitution.⁷¹

In the context of education, the state is not only obliged to ensure that persons with disabilities are not excluded from the “general education system”,⁷² but is also compelled to take positive steps to provide these persons with individualized materials and other support to enable effective education and maximize academic and social development in a way that is consistent with the goal of “full inclusion”.⁷³ This is a clear benchmark that the Directions could have followed.

Further, more guidance is provided by section 9(3) of the Constitution, which prohibits discrimination on the ground of disability. This enjoins the government not only to avoid any act that can lead to discrimination against persons with disabilities, but also requests that positive action be taken to remove barriers to their inclusion.⁷⁴ In other words, advancing substantive equality for persons with disabilities is not simply a negative obligation or a prohibition against violating the right, but is also a positive obligation to take action to ensure reasonable accommodation of the beneficiaries. This was emphasized by the Constitutional Court in *MEC for Education v Pillay*,⁷⁵ which relied on *Eaton v Brant*⁷⁶ to stress the significance of reasonable accommodation for the inclusion and participation of persons with disabilities. In a similar vein, the court in *Christian Education South Africa v Minister of Education* was of the view that making an exception from a general law to accommodate disadvantaged persons does not amount to unfair discrimination.⁷⁷ This was further reiterated in *Prince v President of the Law Society of the Cape of Good Hope*, where the Constitutional Court was unequivocal in encouraging reasonable accommodation if it does not obstruct the government’s objectives.⁷⁸

However, in the case under discussion, the Directions did not even treat learners with disabilities within the paradigm of formal equality. In this regard, not only did the Directions not include these learners in their planning for return to school, but those staying at home were also forgotten. When forced to include these learners, the Directions selected a few disabilities to be included, but without explicit reasonable accommodation measures to ensure their effective inclusion. Instead of providing for additional infrastructure capacity, the Directions called for “the closure of unequipped special school hostels which cannot allow the observation of social distancing rules”.⁷⁹ This was

71 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC), para 76.

72 CRPD, art 24(2)(a).

73 Id, art 24(2)(d) and (e); see also Ngwenya “Western Cape Forum”, above at note 63 at 142–43.

74 Currie and De Waal *The Bill of Rights Handbook* (1999, Juta) at 234–35.

75 Above at note 71, paras 72 and 74.

76 Above at note 24, para 67.

77 2000 (4), para 42.

78 2002 (2) SA 794 (CC), para 79.

79 *Centre for Child Law* notice of motion, above at note 37, paras 1.22. and 2.2.2; see also *Centre for Child Law* decision of 4 August 2020, above at note 3, para 1.2.3.

a failure by the DBE to comply with its positive obligation to include learners with disabilities in its return to school plan, so as to ensure their equal participation in education with their non-disabled counterparts. Yet the South African legal landscape provides abundant guidance on the provision of reasonable accommodation for persons with disabilities. This guidance includes sec 9(a) and (c) of the Promotion of Equality and Prevention of Unfair Discrimination Act,⁸⁰ which not only prohibits unfair discrimination against persons with disabilities, the removal of any facility essential for their functioning in society and the restriction of equal opportunity to these persons, but also condemns the failure reasonably to accommodate their needs. Unfortunately, the Directions violated these measures.

CONCLUSION

The article has examined the extent to which the right of learners with disabilities to basic education was protected during the COVID-19 pandemic in South Africa. Relying on *Centre for Child Law*, it assessed whether the DBE ministerial Directions for a phased return to school during the pandemic were inclusive of learners with disabilities.

After presenting the international regime of inclusive education and related jurisprudence, the article recognized that South Africa complies normatively with this regime because it has adopted law and policies to ensure that learners with disabilities are not left behind. However, of significance, *Centre for Child Law* showed that the DBE violated the right to inclusive education of learners with disabilities during COVID-19. In doing so, the DBE did not include learners with disabilities in planning the phased return to school and did not include measures for those remaining at home. When pressed to do so, it selected only a number of disabilities from the Directions and requested the closure of special schools in which compliance with social distancing was not possible.

Furthermore, disregarding South African jurisprudence on equality, the DBE violated the right to substantive equality of these learners who found themselves marginalized. Lastly, the court's decision also highlighted the need to use reasonable accommodation measures to ensure the realization of the rights of learners with disabilities to equality and education. To its credit, *Centre for Child Law* guides the South African government as well as other African governments on what should be done to advance the right of learners with disabilities to inclusive education, not only in time of crisis or pandemic, but always.

CONFLICTS OF INTEREST

None

80 Act of 2000.