THE FUNDAMENTAL RIGHTS OF LEARNERS WITHIN INCLUSIVE EDUCATION: AN EDUCATIONAL-JURIDICAL PERSPECTIVE

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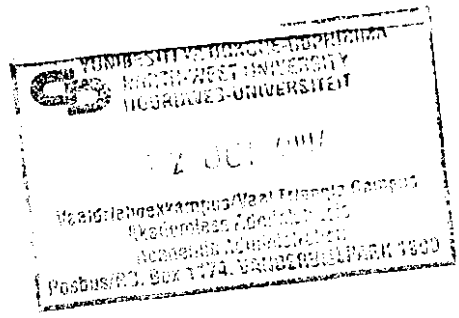

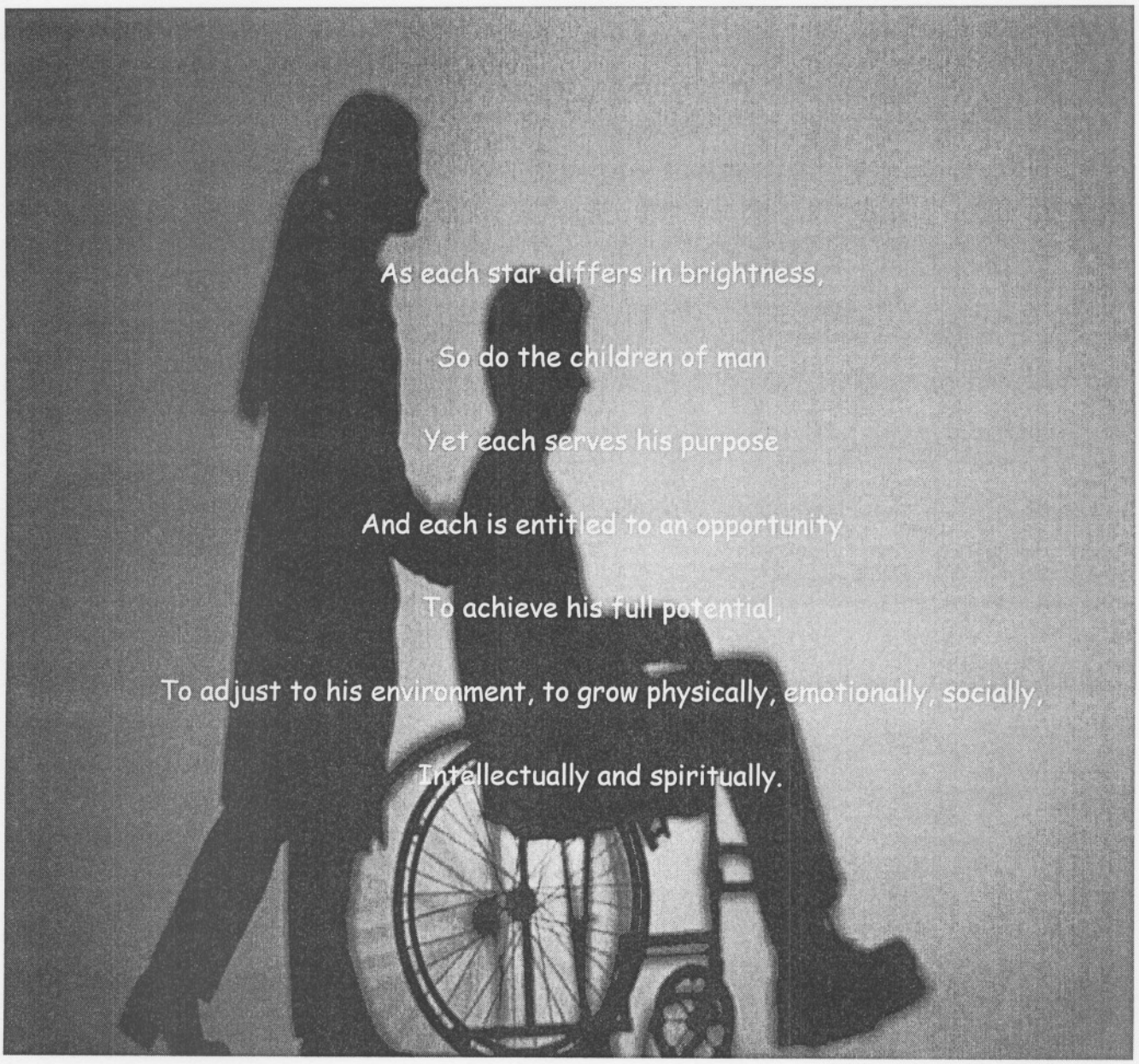

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PREFACE

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Without work, all life goes rotten
but when work is soulless,
life stifles and dies.
And without people to love,
nothing much matters anyway.
Albert Camus

ABSTRACT

THE FUNDAMENTAL RIGHTS OF LEARNERS WITHIN INCLUSIVE EDUCATION: AN EDUCATIONAL-JURIDICAL PERSPECTIVE

The increasing international acknowledgement of fundamental human rights has resulted in a dynamic movement in South Africa aimed at recognizing the fundamental rights of, *inter alia,* learners. The Constitution of the Republic of South Africa, Act 108 of 1996 founded South Africa as a democratic country based on the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms. As such, a duty is placed on the State to provide for the realization of individual fundamental rights while prohibiting the State to violate such rights.

Guaranteed fundamental rights are of immense importance since they enable human beings and thus learners, to stand tall with dignity and be respected for who they are. The values contained in the Constitution expect all South Africans to take up the responsibility and challenge of building a humane and caring society, not for the few, but for all South Africans.

In order to give effect to the fundamental rights of learners and to lead each one to realize his/her full potential, an inclusive educational system is proposed as the one best system. In light hereof, the main objective of this study is to establish whether the fundamental rights of all learners can be addressed within an inclusive education system.

Since the realization of fundamental rights in practice presents an alarming challenge, this thesis aims at providing an educational-judicial perspective on inclusive education by means of a literature and comparative school law study between South Africa, the United States of America and the United Kingdom in order to establish whether these challenges can be met in South Africa.

All chapters are organized into sections to enable thematic clustering of information on various legislative provisions, court interpretations, learner diversity, expectations, as well as on practical implications. Each chapter is preceded by a brief introduction, followed by a coherence of different views on inclusion, threaded with rich comments

on inclusive education and pursued by a brief summary. Throughout the text, various sections are cross-referenced to alert the reader that a particular concept is discussed elsewhere.

The importance and relevance of the study are highlighted in Chapter 1. In order to comprehend the nature and extent of learners' fundamental rights fully, Chapter 2 focuses on international documents and, to a greater degree, on the SA Constitution as the supreme law in South Africa.

Existing educational policies, subsequent legislation, and accompanying White Papers, propounding the profound impact which the fundamental rights of all learners in South Africa should have, are discussed in Chapter 3. These documents are important to take cognizance of as they represent the basis for the establishment and coordination of an inclusive education system.

Chapter 4 aligns a discussion on the ideals behind inclusion with a picture of the expectations that it creates in practice. The aim in this chapter is to straddle the theory-practice divide, seeking at all times to look both to theory and practice – to keep in mind the strong principles behind the move to inclusion while observing the practical challenges to be met. It is intended to inform the theoretical discussion, contained in Chapters 2 and 3, with the expectations of all role players, and to examine practical implications in the context of the theoretical discussion.

The difficulties and challenges, successes and failures of inclusive education in light of the experiences of the United States of America and the United Kingdom are examined in Chapter 5 to make recommendations, as set out in Chapter 6, for the successive movement to inclusive schools in South Africa.

UITTREKSEL

DIE FUNDAMENTELE REGTE VAN LEERDERS BINNE INKLUSIEWE ONDERWYS: 'N OPVOEDKUNDIG-JURIDIESE PERSPEKTIEF

Die toenemende internasionale erkenning van fundamentele menseregte het 'n dinamiese beweging in Suid-Afrika, gerig op die realisering van die fundamentele regte van, onder andere, leerders tot gevolg gehad. Die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996 het Suid-Afrika gevestig as 'n demokratiese land gebaseer op die waardes van menswaardigheid, die bereiking van gelykheid, en die bevordering van menseregte en vryhede. As sodanig, rus daar 'n plig op die Staat om voorsiening te maak vir die realisering van individuele regte, terwyl die Staat ook verbied word om op sulke regte inbreuk te maak.

Gewaarborgde fundamentele regte is uiters belangrik aangesien dit die mens, en dus leerders, in staat stel om met menswaardigheid sterk te staan en gerespekteer te word vir wie hulle is. Die waardes vervat in die Grondwet verwag van alle Suid-Afrikaners om die verantwoordelikhede en uitdagings vir die bou van 'n gemeenskap wat vir alle Suid-Afrikaners omgee en nie net vir sommiges nie, te aanvaar.

Ten einde effek te gee aan die fundamentele regte van leerders en elkeen te lei tot die ontwikkeling van sy volle potentiaal, word 'n inklusiewe onderwysstelsel voorgestel as die een beste stelsel. In die lig hiervan, is die vernaamste doel van hierdie studie om te bepaal of die fundamentele regte van all leerders aangespreek kan word binne 'n inklusiewe onderwysstelsel.

Aangesien die realisering van fundamentele regte in die praktyk buitengewone uitdagings bied, stel die proefskrif homself ten doel om 'n opvoedkundig-juridiese oorsig van inklusiewe onderwys te verskaf deur middel van 'n literatuur- en vergelykende onderwysreg-studie tussen Suid-Afrika, die Verenigde State van Amerika en die Verenigde Koningryk ten einde vas te stel of Suid-Afrika die uitdagings kan bevredig.

Al die hoofstukke is georganiseer in afdelings ten einde tematiese samevoeging van inligting oor verskeie wetlike voorskrifte, hof-interpretasies, leerder-diversiteit, verwagtinge, asook praktiese implikasies te bewerkstellig. Elke hoofstuk word

voorafgegaan deur 'n kort inleiding, gevolg deur 'n eenheid van verskillende beskouinge oor inklusie, verweef met ryk kommentaar oor inklusiewe onderwys, gevolg deur 'n kort samevatting. Deur die teks word verskeie eenhede kruis-verwys ten einde die leser bewus te maak van 'n besondere konsep wat elders bespreek word.

Die belangrikheid en relevansie van die studie is uitgelig in Hoofstuk 1. Ten einde die aard en omvang van leerders se fundamentele regte te begryp, fokus Hoofstuk 2 op internasionale dokumente en, in 'n meerdere mate, die Suid-Afrikaanse Grondwet, as die oppergesag in Suid-Afrika.

Bestaande onderwysbeleide, ondergeskikte wetgewing en samehangende Witskrifte, wat die verlangde impak van die fundamentele regte van alle leerders in Suid-Afrika onder die aandag hou, word in Hoofstuk 3 bespreek. Dit is belangrik om van hierdie dokumente notisie te neem aangesien hulle die basis vorm vir die skepping en koördinering van 'n inklusiewe onderwysstelsel.

Hoofstuk 4 stel 'n bespreking rakende die ideale agter inklusie in lyn met 'n beeld van die verwagtinge wat in die praktyk geskep word. Die doel in die hoofstuk is om die teorie praktyk-verdeeldheid in ag te neem deur deurgaans na beide die teorie en die praktyk te kyk – om die sterk beginsels agter die beweging na inklusie in ag te neem terwyl die praktiese uitdagings wat ontmoet moet word, waargeneem word. Dit is die bedoeling om die teoretiese bespreking in Hoofstuk 2 en 3, toe te lig aan die hand van die verwagtinge van alle rolspelers, en om die praktiese implikasies in die konteks van die teoretiese bespreking te ondersoek.

Die probleme en uitdagings, suksesse en mislukkings van die Verenigde State van Amerika en die Verenigde Koningkryk word ondersoek in Hoofstuk 5 ten einde voorstelle, soos vervat in Hoofstuk 6, te maak vir die suksesvolle beweging na inklusiewe skole in Suid-Afrika.

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CRC	United Nations' Convention on the Rights of the Child
CSIE	Centre for Applied Studies on Inclusive Education
ICESCR	International Convenant on Economic, Social, and Cultural Rights
IEP	Individualized Educational Programme
Language Policy	Language in Education Policy, 1997
LEAs	Local Education Authorities
NCESS	National Commission on Special Needs in Education and Training
NCSNET	National Committee for Educational Support Services
OBE	Outcomes-Based Education
SA	South Africa
SAHRC	South African Human Rights Commission
SA Constitution	The Constitution of South Africa, Act 108 of 1996
SA Policy Act	National Education Policy Act, No. 27 of 1996
SA Schools Act	The South African Schools Act, No. 84 of 1996
UDHR	United Nation's Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

UK	United Kingdom
USA	United States of America
WCED	Western Cape Education Department
White Paper 6	Education white paper: special needs in education – building an inclusive education and training system

CHAPTER ONE

ORIENTATION TO THE STUDY

1.1 INTRODUCTION

The Constitution of South Africa, Act 108 of 1996 (1996a: section 1; hereafter referred to as SA Constitution) founded South Africa as a democratic state with common citizenship, based on the values of human dignity (section 10), the achievement of equality (section 9) and the advancement of human rights and freedoms, especially from unfair discrimination (subsections (2),(3),(4) & (5)).

The immense importance of fundamental human rights is enlightened by Human (2000b:152) who explains that human rights enable human beings, and therefore learners[1], to stand with dignity, if necessary to demand what is their due without having to grovel, plead, beg, or express gratitude when they are provided this and to express indignation when what should be theirs is not forthcoming.

The values contained in the SA Constitution (1996a; *cf.* 2.4) summon all South Africans to take up the responsibility and challenge of building a humane and caring society, not for the few, but for all South Africans. Since the well-being of a society depends on the ability to prepare well-adjusted, responsible and well-educated young people to step forward as the older generation passes (as illuminated by McWhirter, Mc Whirter, McWhirter & McWhirter, 2004:4), education plays an immense role in ensuring that the fundamental rights of learners are put into effect. All stakeholders in education (*i.e.* the State, educators, parents and community) therefore carry a special responsibility to implement these values in establishing a unified inclusive education system based on equity to ensure that all learners realize their full learning potential (*cf.* 3.5, 3.6.1, 3.7.2.2 & 4.2.2).

1.2 STATEMENT OF THE PROBLEM

The special challenges imbedded in section 29(1) and (2) of the SA Constitution (1996a; *cf.* 2.4.1.6.10) require the fundamental right to a basic education for all

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[1] Although the term *learners* refers to *any person receiving education or obliged to receive education* (SA Schools Act, 84/1996c) and therefore includes learners of school-going age as well as adult learners, this dissertation will mainly concentrate on the first group of learners.

learners in the language of their choice, where reasonably feasible. It is, conversely, essential to take cognizance of the fact that these rights should never be regarded as absolute, unlimited or inalienable (Beknink, 2003:251; *cf.* 2.4.1.6.13).

This, together with the equality clause (1996a: section 9; *cf.* 2.4.1.6.3), implies that all learners should have equal access to the widest possible educational opportunities, irrespective of their diverse backgrounds, interests, abilities or learning needs (SA, 2001:24; *cf.* 3.6 & 4.2.2). In line herewith, the Department of Education (Department of Education, 2005a:8) upholds the promotion of equal, non-discriminatory access to learning intervention and assistance to all learners who require support.

Since all learners may be regarded as requiring learning support, the Ministry (SA, 2001:17&24) accepts that a broad range of learning needs will exist among the learner population of South Africa at any point in time. Where these learning needs are not met, learners may fail to learn effectively or be excluded from the learning system, ending in failure to give effect to their fundamental human rights.

An education system must, therefore, be created in line with the transition to a new age backed by all role players. An integrated, individualized, comprehensive and flexible system suited to contemporary society is needed to accommodate weak, average and gifted learners, as well as a curriculum which reflects the needs of the community (Carl, 2000:87).

For this purpose, Meier (2003:230) indicates that traditional methods of schooling are inappropriate. Consequently, the Consultative Paper on Special Education: building an inclusive education and training system (Department of Education, 1999b:12), as well as White Paper 6: Special Needs Education: building an inclusive education and training system (SA, 2001:3; hereafter referred to as White Paper 6) advocates inclusion, based on the principle that barriers to learning arise from the education system, rather than from the learner (*cf.* 3.6.2). The latter is consistent with the socio-ecological model which explains that the general challenges of development cannot be separated from the specific challenges of addressing social and structural issues, because of their interconnection (Donald, Lazarus & Lolwana, 2005:57).

Engelbrecht, Green, Naicker and Engelbrecht (2004:viii; *cf.* 3.3.3 & 4.2), in addition, argue that the inclusion of all learners (needing equal opportunities to achieve their individual potential) is only possible if one education system is responsible for

education provision and not two systems (mainstream and special education systems). This implies a radical restructuring of schools so that they are inherently capable of educating all learners in their communities (Dyson & Millward, 2000:8).

The importance of the above is underscored by White Paper 6 (SA, 2001:3) which recognizes the vital contribution that, among others, people with disabilities are making and must continue to make, but as part of and not isolated from the flowering nation. Asmal (SA, 2001:4) asserts that it is only when all learners are accommodated as a natural and ordinary part of the inclusive classroom and therefore of the broader community that a society can truly lay claim to the status of cherishing all its learners equally.

Although the approach to an inclusive education system in South Africa has its roots in the theory of including people with disabilities in society, Hay (2003:136) avows that it has potential benefits for all learners. Green (2001:5) states that inclusive education is the strategy most likely to achieve a democratic and just society - in which all citizens are equal, treated with fairness and have an opportunity to be fully educated (Nelson, Palonsky & Carlson, 2000:418), since it involves the rights of all previously marginalized learners to be recognized as full members of the community (*cf.* 4.3.5).

Illuminating the above, Swart and Pettipher (2005:4) explain that inclusion in South Africa entails more that just *special needs* or *disabilities.* It is concerned with comprehensive education responding to all learners' individual needs and thus *an expression of the struggle to achieve universal human rights* (*cf.* 3.7.1).

The SA Constitution (1996a) recognizes that children are especially vulnerable to violations of their rights and that they have specific and unique interests (*cf.* 4.2.3), different from other groups in society (Bekink & Brand, 2000:177). As such, their rights deserve special protection in addition to the protection to which they are entitled to as ordinary inhabitants of South Africa. In line herewith, section 28 of the SA Constitution (1996a; *cf.* 2.4.1.6.9) gives effect to the rights of children in particular, tailored to their special needs and interests, providing them with enhanced protection. Clark (2001:617) expounds that the extensive long-standing debate regarding children's rights continues to raise controversy and dissent worldwide.

Recognizing the educational needs of learners as fundamental human rights, however, implies the availability of additional support mechanisms (*cf.* 3.8.5 & 4.4.5) such as appropriate technology, interpreter services and sign language instruction for the deaf (*cf.* 3.8.3 & 4.4.3), flexible curricula (*cf.* 3.8.5.5 & 4.4.5.2), respect and understanding for diversity and human rights (*cf.* 3.6.2 & 4.2.2.1), equipped educators (*cf.* 3.8.5.7 & 4.4.7) and a barrier-free environment (*cf.* 3.8.4 & 4.4.4) within an inclusive learning system (SA, 1997a:39).

Flowing from the above, McWhirter *et al.* (2004:4) explain that schools must provide learning environments for all learners including those who struggle with, *inter alia,* poverty, learning problems, environmental deprivation and marginalization. In addition, Feldhusen (1985:3) explains that the needs of gifted learners should also be adhered to as talent in learners is simply potential and will not develop into a defined, productive talent without sufficient support. Similarly, Lomosfsky and Skuy (2001:197) reveal that it is imperative to take cognizance of the fact that the gifted have diverse needs that require an accelerated and enriched general education system which provides them ample opportunities to work with peers and adult mentors who are themselves gifted, in order to provide high level modelling and stimulation (*cf.* 4.3.3).

Accordingly, Meier (2003:230) explicates that every learner needs an environment that allows him to proceed at his[2] own pace in developing skills without being compared with someone else. An atmosphere of cooperation rather than competition is thus essential (Thomas, Walker & Webb, 2000:3).

To address the diverse needs of all learners within an inclusive educational system, Carl (2000:2) stresses that the development of a flexible curriculum (*cf.* 3.8.5.5 & 4.4.5.2) should not be something done to educators, but rather by educators. Since educators are the dominant classroom authority figures who control how and what is taught and learned, they should be empowered to make contributions to, *inter alia,* curriculum development (Donald *et al.*, 2005:7; Du Toit, 2006:4; *cf.* 4.4.7).

Education institutions, conversely, often interpret their endeavours as producing qualified educators to fit into an existing school system where they merely follow

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[2] To simplify matters, the male reference is used in this research. The female reference is *mutaties mutandis* included.

externally designed curricula uncritical of their own approaches or initiatives. With the advent of democracy and the potential of educational policy to unleash the creative possibilities of alternative curricula for the new South Africa, Lewin, Samuel, and Sayed (2003:xv) indicate that teacher education is challenged to reflect and develop educators who could innovate and give birth to a reconstructed education system.

Underscoring the above, White Paper 6 (SA, 2001:24; *cf.* 3.7) acknowledges that too many learners experience barriers to learning or drop out, primarily because of the inability of the system or individuals within the system to recognize and accommodate the diverse range of learning needs.

White Paper 6 (SA, 2001:32) forthwith recognizes that the prevailing situation at special schools and in remedial classes is currently inappropriate and, in general, fails to provide a cost-effective and comprehensive learning experience for participating learners. Similarly, the South African Human Rights Commission (2006:23; hereafter referred to as SAHRC) reports that the limited capacity of special schools in South Africa has hitherto resulted in the majority of learners being excluded from educational opportunities altogether, especially in rural areas, as the environment at regular schools does not facilitate integration (*cf.* 3.3.1.1).

From the above, it is evident that the establishment of an inclusive education system will require changes to mainstream education in order for learners who experience barriers to learning to be identified early and be provided with appropriate support (*cf.* 3.7.2 & 4.2.2.2). It will also require changes to special schools (*cf.* 3.8.5.1 & 4.4.5.1) so that learners who experience mild to moderate disabilities can be adequately accommodated within mainstream education (SA, 2001:24).

In the Introduction to the White Paper 6 (SA, 2001:3), Asmal, previous Minister of Education, acknowledges the concerns shared by parents, educators, lecturers, specialists and learners regarding the future of special schools and specialized settings in an inclusive education and training system (*cf.* 3.8.5.1). Asmal further stresses the fact that he has derived more insight into these concerns since he observed what differences special schools can make *when they provide a quality and relevant learning experience to learners.*

Within the framework of the SA Constitution (1996a: section 9), which aims at the achievement of equality for all, an inclusive education system requires a strong moral

and political commitment by the State to take action for the equalization of educational opportunities for all learners (*cf.* 2.4.1.6.3, 3.6, & 4.2.2).

In addition, White Paper 6 (SA, 2001:4) acknowledges that the transformation of the educational system will require persistence, commitment, support, monitoring, evaluation, follow-up and leadership from all parties involved.

Since inclusive education in South Africa has its origin in an international rights perspective informed by liberal, critical, and progressive democratic thought (Engelbrecht, *et al.,* 2004:16; *cf.* 2.3), policy documents and legislation have emerged that reflect these values.

Unfortunately, legislation in South Africa has, in certain areas, contributed to the exclusion of some learners from education, since it fails to protect the rights of learners with disabilities and created barriers to prevent all learners from accessing equal opportunities (SA, 1997b:3).

Section 5(1) of the South African Schools Act (84/1996c; hereafter referred to as the SA Schools Act; *cf.* 3.6.1 & 3.8.5.4), for example, states that *a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.* Swart and Pettipher (2005:17), however, elucidate that the SA Schools Act contains gaps and weaknesses which restrict the rights of learners experiencing barriers to learning and undermines the development of an integrated inclusive education system. Defining and translating human rights into specific measures and programmes thus still remain a major challenge (Department of Education, 1997a:19).

Although an attempt to identify and eliminate discriminatory legislation has been initiated since 1994, the SAHRC (2006:18) reports that large sections of the legislative framework still fail to meet all international human rights standards and principles.

In order to achieve equal opportunities for all learners and to address their special needs in achieving their highest potential in an inclusive education system in South Africa, Feldhusen (1985:182) maintains that changes are inevitable. In this regard, Lewin *et al.* (2003:xxiv; *cf.* 3.2 & 4.1) show that much has, regrettably, remained at the level of theory, rather than being implemented, because of a resistance to

change. Consequently, ideas and theories which can provide models and concepts for new practice, have frequently not found their way into practice.

To the same extent, Meier (2003:22) concludes that an inclusive education system is still more rhetoric than reality in South Africa because of certain constraints faced by education, such as class size and inadequate training, which label education as *learner-conscious* rather than *learner-centred,* where learners feature prominently in classroom activities and make decisions regarding their learning (*cf.* 3.4.1).

There is, subsequently, a pressing need to convert ideas and theory into practical structures and learning opportunities. This process is still far from complete and there are many issues which are contested. Whatever the potential benefits of a national curriculum are, its practical realization in the context of practice must be examined carefully and critically as accentuated by Bowe, Ball and Gold (1992:125; *cf.* 4.1).

Since international movements have directly influenced and will continue to influence educational policies and practices in South Africa (*cf.* 2.3), Swart and Pettipher (2005:15) draw attention to the necessity to focus on both international and national trends in inclusion, as well as on all relevant theories and legislation. In light hereof, a comparative study on South Africa, the United States of America and the United Kingdom was conducted (*cf.* 5.1).

1.3 RESEARCH QUESTIONS

In order to establish whether the fundamental rights of all learners can be addressed within an inclusive education system in South Africa, the following questions need to be addressed:

- What are the fundamental rights of learners in South Africa against the background of an international perspective?
- Are existing policies and legislation in South Africa consistent with the theory of an inclusive education system?
- What are the expectations of inclusive education in South Africa?
- How are the fundamental rights of learners provided for in inclusive educational systems in the United States of America and the United Kingdom?

- Is an inclusive education system that addresses the fundamental rights of all learners feasible in South Africa against the background of the successes and failures of inclusion experienced by the USA and the UK?

- Which recommendations could be offered as guidelines in addressing the fundamental rights of all learners within inclusive education in South Africa?

1.4 OBJECTIVES OF THE RESEARCH

The overall objective of this study is to establish whether the fundamental rights of all learners are addressed within an inclusive education system in South Africa.

This overall objective will be effectuated by:

- studying literature in order to identify the fundamental rights of learners in South Africa against the background of an international perspective;

- reviewing existing policies and legislation with reference to an inclusive education system in South Africa to determine consistency with the theory of such a system;

- establishing what the expectations of inclusive education in South Africa are;

- determining how the fundamental rights of learners are provided for in inclusive educational systems in the United States of America and the United Kingdom;

- ascertaining the feasibility of an inclusive education system that addresses the fundamental rights of all learners in South Africa against the background of the successes and failures of inclusion experienced by the USA and the UK; and

- providing recommendations as guidelines in addressing the fundamental rights of all learners within inclusive education in South Africa.

1.5 THE CONTRIBUTION OF THIS RESEARCH PROJECT

This research aims at addressing the major concerns of almost every educator in South Africa regarding inclusion (Venter, 2007:6). Since educationalists, as pointed out by Alston (2006), hold different perspectives regarding what inclusion entails, it is apparent that a clear meaning of inclusion must be provided.

Since inclusion is internationally (*cf.* 2.3) and nationally assumed to be the best educational system (White Paper 6, SA, 2001; *cf.* 3.1), it is officially on its way to South African schools. In this regard, Venter (2007:6) asks whether schools are ready for it. This study aims at providing an answer to the question.

As ignorance of the law is not accepted as an excuse in court, it is the aim of this study to empower educators to deal effectively with the concept by knowing what inclusion entails, what it expects from them and how they can become inclusive in their own ways of equally holding fast to the rights of all learners in their classes.

The results of this study are related to developing judicial-educational knowledge, theory and practice, since they:

- provide knowledge about an enduring theory and practice;
- provide, extend and clarify the understanding of inclusion;
- are related to current social issues of immediate concern such as the practical implementation of inclusive education at schools;
- evaluate a specific theory and practice, namely the inclusion of all learners in regular classes,
- are exploratory, explaining the feasibility of inclusion in South Africa; and
- are designed to draw a comparison between the RSA, USA, and the UK in order to distinguish the successes and failures of inclusion in theory and practice, which can be used to implement inclusive education in South Africa successfully.

In order to enhance the worth of this research, Charles Russo (Panzer Chair in Education and Adjunct Professor of Law at the University of Dayton, Ohio, USA) acted as a critical reader, casting an international perspective on inclusion in general, and on the USA in particular. From a South African stance, Mirna Nel (Doctorate in Educational Psychology and Lecturer at the North-West University) was included to evaluate this research on inclusion against South African requirements.

A few limitations of the study are addressed in Chapter 6 (*cf.* 6.5).

1.6 RESEARCH METHODOLOGY

The comparative law method was followed in this research (*cf.* 1.6.2) since part of the focus would be on similarities and differences between South Africa, the United States of America and the United Kingdom (*cf.* Chapter 5).

1.6.1 Literature study

Primary and secondary legal and educational sources were studied to gather information on an inclusive education system with regard to the fundamental rights of all learners within such a system. A review of literature was essential (Mouton, 2004:179) to come to a full understanding of the concept *inclusion* and its practical implications and to be able to obtain critical insight into the practical challenges that inclusion may present in the South African context.

GOOGLE, EBSCO-host and SA e-publication searches were conducted to locate related literature sources. Key concepts used in this study were, among others, inclusion, exclusion, human rights, equal opportunities, special education needs or barriers to learning, giftedness, fundamental rights, child rights and inclusive education.

A literature study was used as research method to describe theoretical perspectives and previous research findings related to the research questions on hand (Leedy & Ormord, 2001:70). The purpose of the literature review was to define and limit problems surrounding inclusive education in giving effect to learners' rights, to provide a background perspective, to place the study into perspective and to gain insight into the researched topic. The main objective was to offer an overview of effective learning within an inclusive educational framework while critically analysing the trends, debates, and practicality which influence the effectiveness of adhering to learners' fundamental rights. The literature review provided insight into the changes that need to occur in the South Africa context (Venter, 2007:6) to make inclusion a reality, rather than an idealistic dream.

1.6.2 Comparative school law perspective

In line with current international instruments (*cf.* 2.3), South Africa is moving towards a policy of inclusion (Engelbrecht, *et al.*, 2004: viii).

Venter, Van der Walt, Van der Walt, Pienaar, Olivier and Du Plessis (1990:213) define a comparative school law perspective as a *unique systematic and jurisprudential strategy* which is used regarding a specific topic with a variety of legal systems by virtue of resemblances and distinctions, to come to a new understanding about the area of research. Similarly, Mouton (2004:154) maintains that comparative studies focus on the similarities and, especially, on the differences between groups, which could include countries and societies.

Moreover, a comparative study provides the opportunity to investigate and compare successes and failures and to study the relationships between different phenomena (McMillan & Schumacher, 2001:34).

A study on inclusive education systems in South Africa, the United States of America (USA) and the United Kingdom (UK) was conducted in order to draw a comparison between the different rights of learners and the different theories and practices to adhere to these rights in each country. These countries were selected since the USA continues to be a leading force, influencing the rhetoric that surrounds education internationally, and the UK has become a haven for thousands of South African educators who move to England in order to educate under better conditions (Rossouw, 2006:13).

Studying inclusion in the USA was regarded as essential since inclusion is a term which had its origins in the USA in the late 1980s, then grew in strength and, subsequently, had an influence worldwide (Dyson & Millward, 2000:3). The USA was also included due to its historical background of racism correlating with that of South Africa. For the same reason, the UK was studied as it drastically differs in this area from the latter two countries in historically having a more liberal approach to education, thus providing a different perspective (Partington, 1990:87).

1.7 CHAPTER DIVISION

The research was divided into six chapters as are indicated below.

CHAPTER 1: ORIENTATION TO THE STUDY

This chapter describes the necessity of examining the fundamental rights of learners and the adherence to these rights within an inclusive education system. It represents

an orientation to the research, defines the research problem, determines the objectives and demarcates the research method to reach the objectives.

CHAPTER 2: FUNDAMENTAL HUMAN RIGHTS OF LEARNERS

Chapter two contextualizes the study in terms of international and constitutional acknowledgement of learners' fundamental rights in South Africa.

CHAPTER 3: INCLUSIVE EDUCATION WITHIN A SOUTH AFRICAN LEGAL FRAMEWORK

In this chapter, existing legislation is reviewed with reference to an inclusive education system in South Africa to determine consistency with the provision of fundamental rights by the SA Constitution (1996a).

CHAPTER 4: AN OVERVIEW OF THE EXPECTATIONS CREATED BY INCLUSIVE EDUCATION

As a result of the introduction of basic democratic values and fundamental rights of learners into the new education system by the SA Constitution (1996a), various expectations were shaped among learners, educators and the society at large regarding education. This chapter therefore aims at ascertaining what these prospects are and if they can virtually be provided for throughout an inclusive educational framework in South Africa.

CHAPTER 5: FUNDAMENTAL RIGHTS OF AMERICAN AND BRITISH LEARNERS WITHIN AN INCLUSIVE EDUCATIONAL SYSTEM

Since countries can learn from one another's successes and, indeed, from their mistakes, this chapter aspires to cast light on the rights of learners in the United States of America, and the United Kingdom within an inclusive educational framework in order to render, by way of comparisons, some proficiency which could present guiding principles for the successful achievement of inclusion in South Africa.

CHAPTER 6: SUMMATION, FINDINGS AND RECOMMENDATIONS

This chapter aspires to provide recommendations as guidelines against the background of the findings made in previous chapters, to address the fundamental rights of learners within an inclusive education in South Africa.

1.8 SUMMARY

In line with international pressure (*cf.* 2.3) to adhere to the fundamental rights of learners, South Africa has adopted a constitution containing a Bill of Rights (*cf.* 2.4) which places prominent value on learners' fundamental rights. Since inclusion in South Africa is, at policy level, regarded as the best educational system to align education with the fundamental rights of learners, this research aims at establishing whether these rights of learners can indeed be addressed within an inclusive education system in South Africa. In order to arrive at efficient results, a comparison on inclusion between South Africa, the USA and the UK is intended.

This chapter has provided an orientation to the research, defined the problem, determined the objectives and demarcated the research method to reach the mentioned objectives. Against the background of current different perspectives held by educationalists (*cf.* 1.5) and the heated debate surrounding inclusion in South Africa (Alston, 2006), the value of this study was enhanced. The chapter division has also been determined.

The next chapter will focus on the identification of the fundamental rights of learners in South Africa against the background of an international perspective, which poses a special challenge to education systems worldwide.

CHAPTER TWO

FUNDAMENTAL HUMAN RIGHTS OF LEARNERS

2.1 INTRODUCTION

The concept of fundamental human rights originated with the philosophers of ancient civilizations who described a system of values for human beings based on the principles of natural law. Since then, the concept of fundamental human rights has come to the fore whenever a struggle rages around freedom and equality (Joubert & Prinsloo, 2001:20).

Human (2000b:150), conversely, cautions that the theory of children's fundamental rights is complex as great importance is attached to the idea that children have rights and the actual contents of these rights. Moreover, Viljoen (2000:221) explains that children are viewed as vulnerable and in need of protection due to their position in society, arising from their inherent vulnerability or from specific groups having more pronounced needs.

Despite children's need for protection, Haupt and Robinson (2001:24) accentuate the fact that the *kiddie libber*-approach places emphasis on children as independent bearers of fundamental rights and not just as legal subjects (*cf.* 2.4.1.6.9 & 4.1). As such, the involvement and active participation of children in all matters concerning themselves is crucial, rather than adults having to decide or act on their behalf (Dyson & Millward, 2000:178).

From a Romantics-view, humans intuitively know their rights, as human needs define human rights (University of Minnesota, 2006:7). Nevertheless, Rossouw and Oosthuizen (2004:40) confirm that the majority of educators only have a vague idea of fundamental human rights and obligations. The Human Rights Resource Centre (University of Minnesota, 2006:2) advocates that a *deep knowledge* of fundamental human rights, as reflected through a country's constitution, is necessary, otherwise people, such as educators, may be conveying information, but inspiring neither commitment nor action.

It is, consequently, essential that all role players - the State, educators, parents, and learners - expand their knowledge on fundamental human rights. They must know

which local and national laws reinforce their fundamental rights and how to use these documents to call violators of their rights to account for their transgressions. In adition, role players also necessitate information regarding persons and agencies responsible for promoting and protecting human rights (University of Minnesota, 2006:3).

Rosa and Duthschke (2006:226), furthermore, believe that it is crucial for all stakeholders to be aware of the process by which fundamental rights legislation comes into being and the obligations a government assumes when it ratifies a human rights convention (*cf.* 2.3.9). In addition, everyone needs not only to accept responsibility for promoting and protecting fundamental rights, but also to be acquainted with how to do so at the level of individual interactions. Equally essential is honest self-examination, and coming to understand the personal bias that everyone so often entertains, in order to concede that their attitudes determine the quality of the education they offer (Department of Education, 2000b; Code of Conduct : Preamble 2.2).

Bray (1992:24), for instance, conveys the importance that educators must be aware that learners' rights are not co-extensive with those of adults. Accordingly, Human (2000a:400; *cf.* 2.3.3) heightens the reality that children's rights do not provide absolute freedom. As a result, learners' rights do not undermine the authority of adults, nor do they equate a child with an adult. The latter fact was made clear by the US Supreme Court in *Tinker v Des Moines Independent School District*[3] in affirming the comprehensive authority of school officials to maintain discipline at schools to the extent that such efforts are *consistent with fundamental constitutional safeguards.*

To take note of the above is important, as also averred by Prinsloo (2005:30), since the misinterpretation of the privileges of fundamental rights has resulted and will continue to result in disharmonious relationships between, among others, parents, educators, and learners. In addition, Jordaan (2001:114) urges that respect for fundamental human rights is not an end in itself, but a means to individual and social development.

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[3] *Tinker v Des Moines Independent School District 393 U.S. 503 (1969)*

In line herewith, Rossouw (2004:49; *cf.* 3.2) submits to a shift in the focus of education from the interest of organizations and schools, to the rights of learners, parents and educators along the lines of holding fast to the fundamental rights that learners and parents, as the most important clients, possess.

In order to comprehend fully the nature and extent of learners' fundamental human rights, which incorporate only those rights that are explicitly or implicitly guaranteed by the constitution of a country (Levin, 1990:61), this chapter focuses on various international documents (*cf.* 2.3) and, to a greater degree, on the SA Constitution (1996a; *cf.* 2.4) as the supreme law giving effect to such rights. Therefore, the phrase *fundamental rights* will forthwith be used to refer to fundamental human rights.

2.2 FUNDAMENTAL RIGHTS: BACKGROUND AND PERSPECTIVE

The value and importance of fundamental rights are highlighted by Human (2000b:152) who emphasizes that a society, in which rights are not recognized, will be morally impoverished as relationships will solely be based on power. In agreement, the University of Minnesota (2006:2) draws attention to the fact that fundamental rights include everyone personally, both as individuals with inherent rights and as members of the community.

2.2.1 Historic movement

Originally, fundamental rights were perceived as those rights that all human beings possess in order to protect them from the excessive powers of the State. In modern times fundamental rights have, conversely, developed into rights that are not only applicable to protect individuals against the State, but also to shield them from the incursion or limitation of their basic rights by other people or private institutions (Bekink, 2003:247). Consequently, the overall protection and fulfillment of human rights is broadened (Bekink & Brand, 2000:174).

South Africa has entrenched specific fundamental rights within its overall legal system. Such rights have been afforded supreme status through Chapter 2 of the SA Constitution (1996a; *cf.* 2.4.1.3), as being part of the highest law of the State. Learners' rights are incorporated in the overall scope of fundamental rights. Concerning this, Human (2000a:400) elucidates the fact that learners are empowered with rights during the time of their childhood, while taking into account

that different rights come into existence during different phases of a learner's life (*cf.* 2.4.1.6.9). These rights possess a unique nature, the contents of which go beyond the traditional terminology of rights and obligations (Human, 2000a:395).

The granting of learners' rights in the Bill of Rights, as part of the SA Constitution (1996a; *cf.* 2.4.1.6) and of fundamental rights in general, therefore, cuts to the core of the traditional South African legal position on learners. The fundamental rights of children, as highlighted by Human (2000a:402), confer a status on learners which is evidently in conflict with the private-law status of children as immature and dependent persons and, as such, have practical implications for learners' relationships. Bray (2000a:283) explains that it must be acknowledged that the personal aspects of the parent-child relationship are concerned as much (if not more) with parental obligations as with parental powers and rights, and that children's rights are based on the status of the child as an independent bearer of individual rights and obligations (*cf.* 2.4.1.6.9).

By themselves, learners' fundamental rights can be regarded as controversial since they touch existing juristic and social considerations deeply, while leading to tension between empowerment and protection, thus implying changes to an established law system and intervening with the lives of learners and adults (Human 2000a:402). As a result, Labuschagne (2000:521) asserts that governments are now called to respect and promote learners' fundamental rights to an extent which would have been inconceivable until even a few years ago.

Fundamental rights can furthermore be regarded as the point of intersection of many recent trends in education such as conflict resolution, law-related education, developmental education, issues-related education, peace education and global education (University of Minnesota, 2006:1).

In addition, De Waal (2000:55) elucidates the fact that the basic idea of fundamental rights is embedded in the doctrine of natural rights, which are typified as those rights that apply independent of human sanction. The same author emphasizes the fact that fundamental rights apply in principle to all people and are limited only because of functional reasons such as age and level of maturity.

According to Human (2000a:393), an ideological and emotional acceptance of the idea of learners' rights (*cf.* 3.8.2 & 4.4.2) underlies requirements for an appreciation of the nature and extent of the implications of fundamental rights.

Within this context, Timms (cited by Human, 2000a:402) affirms that the difficulty lies in incorporating the wishes and feelings of learners into decision-making, without sacrificing any aspect of learners' welfare or imposing inappropriate burdens of responsibilities on learners. The extent to which adults are willing or able to do this, depends not just on an intellectual acceptance of the ideological concept of learners' rights, but on an emotional acceptance of the benefits of listening to learners and allowing them to participate in plans for their future. As pointed out by Kapp (2006:459), this requires changes in culture, as well as changes in ideology. A functional shift in attitude is required, as well as an ideological acceptance of the concept of learners' rights, which together provide the necessary climate of change (*cf.* 3.8.2, 4.4.2 & 5.4.2). In this regard, Rossouw (2004:64) maintains that too many educators suffer as a result of an overemphasis by learners of their rights, while they do not admit that the enjoyment of these rights implies corresponding obligations as well.

While learners may therefore be aware that they have certain fundamental rights, Van der Bank (2000:308) accentuates that they must also realize that others have similar rights and, subsequently, respect these rights. Learners must, in particular, recognize the dignity and equality of all persons and undertake to exercise their rights in such a manner that the rights of others are not violated by their actions.

Although education is principally a national concern, its national and regional boundaries have been transcended to provide universal rules and standards that are essential for the advancement of education and training worldwide (Bray, 2002:515). Rosa and Dutschke (2006:224) also put forward that South African Courts have an important role to play in the realization of international human rights law.

In light hereof, an international perspective on the fundamental rights of learners merits special attention.

2.3 AN INTERNATIONAL PERSPECTIVE ON THE FUNDAMENTAL HUMAN RIGHTS OF LEARNERS

In order to anticipate possible judicial interpretations and evaluations of the various legal issues concerning the fundamental rights of learners, an overview of the relevant rules and principles of South African law with special reference to international law, is required (Bekink, 2003:248). International law on human rights is defined by Rautenbach and Malherbe (2004:9) as the law concerning the protection and promotion of fundamental rights through cooperation between countries.

Although South Africa has become an important partner in global governance, Bray (2005:357) states that it also faces many challenges in this regard (*cf.* 2.4.1.6.15). Since its rise to democratic rule in 1994, South Africa's international standing as a modern developing nation has soared and it is increasingly playing a role internationally.

As a party to a number of international agreements on fundamental rights, South Africa has incurred specific obligations. Section 39 of the SA Constitution (1996a; *cf.* 2.4.1.6.15) stipulates that a court, tribunal or forum *must* consider international law, and *may* consider foreign law (*i.e.* court cases in other countries that are applicable to the South African situation) against the background of democratic values. In this regard, Van der Vyver (1997:319) draws attention to the fact that courts must *consider* international law, which does not imply that they must necessarily *follow* international law.

Attention was drawn to the importance of international law in the matter of *Christian Education*[4] as the court declared that section 39 of the Constitution (1996a) affirms that international law is to be regarded as an important interpretative tool when interpreting the Bill of Rights and realizing fundamental rights in education.

Since the SA Constitution (1996a: sections 39 & 231-233) requires South Africa to comply with its international obligations, it is necessary to start with a survey of the main international instruments (conventions and declarations) to which South Africa is a signatory.

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[4] *Christian Education of South Africa v Minister of Education 1999 (3) (SE)*

Relevant to the fundamental rights of learners, the following international documents will be discussed:

- United Nations Universal Declaration of Human Rights, 1948-1998;
- United Nations Convention on the Rights of the Child, 1989;
- International Covenant on Economic, Social and Cultural Rights, 1966;
- Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- United Nations Convention on the Elimination of All Forms of Racial Discrimination, 1965;
- UNESCO Convention against Discrimination in Education, 1960; and
- World Declaration on Education for All, 2000.

2.3.1 United Nations Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UN, 1948-1998; hereafter referred to as the UDHR) was first written in 1948. It has shaped history as it lies at the heart of all fundamental human rights education (University of Minesota, 2006:2). As such, the UDHR has symbolic, moral and practical significance, legal authority and poetic power.

The UDHR (UN, 1948-1998) recognizes the right of everyone to education aimed at promoting an understanding, tolerance and friendship among, *inter alia*, racial or religious groups (section 26), as well as recognizing that the exercising of these rights is subject to the limitations determined by law (section 29). Section 29 determines that, in the exercise of rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society.

Section 26 (UN, 1948-1998) stipulates that education shall be free, at least in the elementary and fundamental stages, and that elementary education shall be

compulsory (*cf.* 3.5, 4.2 & 5.4.1). It also provides that technical and professional education shall be made generally available and that higher education shall be equally accessible to all on the basis of merit. Section 26(2) prescribes that education shall be directed at the *full* development of the human personality and at the strengthening of respect for human rights and fundamental freedoms (*cf.* 1.1; 3.6.1, 3.7.2.2 & 4.2.2).

Section 26(3) provides parents with a prior right to choose the kind of education that shall be given to their children (*cf.* 4.2.4 & 5.8.7). The founding principles of human rights, as set out in the UDHR (UN, 1948-1998), are as follows:

- *Equality.* Section 1: The basis of human rights is that *all human beings are born free and equal in dignity and rights*. Education must accord dignity to every child. Thus, respect as a value is critical. In terms of this equality provision, Pigozzi (1999:6) emphasizes the fact that learners' education facilities, including those for learners with disabilities, must be equally accessible to all (*cf.* 3.6, 4.2.2 & 5.5.1).

- *Universality.* Preamble: Certain moral and ethical values are shared in all regions of the world, therefore governments and communities should recognize and uphold them.

- *Nondiscrimination.* Sections 2 and 7: The UDHR and subsequent international human rights law affords the same rights and responsibilities equally to all women and men, by virtue of their humanity and regardless of any role or relationship they may have. This implies that education must be available without discrimination (*cf.* 2.4.1.6.3). The principle of nondiscrimination underscores the UNICEF commitment to reach out to those who have been traditionally inaccessible, including the poor, girls, working children, children in emergencies, children with disabilities and those with nomadic lifestyles. But it is not merely a concern with quantity, since learners have the right to quality education that will serve as the basis for lifelong learning (Pigozzi, 1999:1; *cf.* 3.5.1, 4.2.1 & 5.5.2.1).

The UDHR (UN: 1948-1998) also provides everyone with the following important rights: the right not to be subjected to torture or cruel, inhuman or degrading treatment and punishment (section 5), the right to freedom of thought, conscience and religion (section 18), freedom of expression and opinion (section 19) and freedom of association (section 20), the right to equal access to public services

(section 21), the right to social security (section 22) and the right to freely participate in the cultural life of the community (section 27).

The UDHR (UN, 1948-1998) forthwith maintains that all are equal before the law (section 7) and determines that everyone is entitled to all the rights and freedoms (section 2) as set forth.

2.3.2 United Nations Convention on the Rights of the Child

Ratification of the Convention on the Rights of the Child (UN, 1989; hereafter referred to as the CRC) placed South Africa and the United Kingdom within the international debate regarding the nature, contents, implementation and protection of learners' rights (Human, 2000a:394). Rosa and Dutschke (2006:226) illuminate the fact that when a State ratifies a treaty, it formally becomes a State Party to the treaty and is, as such, bound under international law to respect the rights and carry out the duties in that treaty.

Therefore Pigozzi (1999:2) emphasizes that whenever education decisions are made or educational activities assessed, the CRC (UN, 1989) and what it stands for, must take a central position. In this regard, Human (2000a:398) mentions the consideration that the CRC (UN, 1989) must be seen as the most comprehensive document which provides content to learners' (under the age of twenty-one years; UN, 1989: section 1) fundamental rights. It may be regarded as the symbol of the status of learners (*cf.* 2.2) which must be provided to all learners within the framework of each country's national law, regardless of whether public or private law is concerned. In addition, Eiselen (1997:228) points out that the CRC provides rights to children and families which will be directly enforceable against the State.

The fundamental principles on which this treaty is based can be found in the Preamble and one of the leading principles is that the inherent dignity (*cf.* 2.4.1.6.4), equality (*cf.* 2.4.1.6.3) and inalienable fundamental rights of every person should be protected (Eiselen, 1997:229; *cf.* 2.2). The CRC explicitly refers to children who live under exceptionally difficult conditions (the vulnerable and disadvantaged) and need special consideration. Ross and Dutschke (2006:230) expound that the essential theme underlying the CRC is that children need special protection and priority care as a vulnerable group as they are in the developmental phase of their lives while it

explicitly refers to children who live under exceptionally difficult conditions and need special consideration.

The *right to freedom of discrimination* as set out in section 2 (UN, 1989) requires State Parties to take all appropriate measures to ensure that children are respected and protected against all forms of discrimination and therefore to ensure equal enjoyment of all rights. This section, as enlightened by Rosa and Dutschke (2006:235), makes specific reference to learners who experience barriers to learning and development, as it obliges State Parties to identify individual learners and groups of learners who may need special measures and subsequently, as Eiselen (1997:230) explicates, to provide assistance and facilities to enable the realization of their rights.

The duty to respect all the fundamental rights of learners (UN, 1989: section 2) implies, as elucidated by Rosa and Dutschke (2006:234), that State Parties must not infringe the rights of learners, while the duty to ensure learners' rights indicates that State Parties have to take positive action to realize these rights. The CRC (UN, 1989) therefore commented that respect for fundamental rights alone is not sufficient and it has accordingly called for specific activities and positive steps to be taken to enable learners to enjoy all their rights fully.

Useful content to the requirement of the *best interests of the child as a primary consideration* is provided by the relatively detailed provisions of section 3 (UN, 1989). Section 3(1) makes it clear that the protection of learners' needs must be balanced against a concern for their growth and independence and respect for their rights as individuals. In this regard, section 12(1) provides for the principle of participation as it obliges State Parties to assure that, where the child is sufficiently mature to form his own views, he has a right to express those views freely in matters affecting him. Such views will be taken into account and accorded weight in accordance with the age and maturity of the child.

Clark (2001:617-618) proposes that, although the CRC is child-centred, it should not be perceived as focusing only on the rights of children or establishing a framework that would allow children to do simply what they want to do. It does not merely provide a list of rights for children and impose a correlative set of duties on others, such as parents and the State. It presents a framework whereby the very social and

political status of children, their relationship to their parents and to adults in general, may be viewed from a different perspective. It also alters the balance of power between children and adults in such a way that children can generally play a more active part in decision-making.

Sections 28 and 29 of the CRC (UN, 1989) provide for State Parties to recognize the right of everyone to education, and to make primary education free, compulsory and available to all (*cf.* 3.5.2, 4.2.1.1 & 5.5.2.1). These sections stipulate that secondary education should be available and accessible to every learner, that educational and vocational information and guidance be made available and accessible to all learners and that measures should be taken to encourage regular attendance at schools and to reduce drop-out rates. Forthwith State Parties agree that the education of learners shall be directed to the development of learners' personalities, talents, mental and physical abilities to their fullest potential, the development of respect for human rights, the development of respect for parents and own culture, identity, language and values.

Pigozzi (1999:3) indicates that, while the CRC calls for free compulsory education, it is also recognized that this might not internationally be possible immediately, but plans must be put in place and immediate action initiated towards this end. It is, conversely, essential that any costs of education should in the short-run at least be equitable (*cf.* 3.5.2, 3.8.1.1, 4.2.1.1 & 4.4.1.1).

The fundamental right to education is inextricably linked to other fundamental rights – rights that are universal, indivisible, interconnected and interdependent, including:

- The fundamental right to equality between men and women and to equal partnership in the family and society (section 29(1)(d)).
- The fundamental right to freedom of thought, conscience, religion and belief (section 14(1)).
- The fundamental right to an adequate standard of living (section 27).

Nevertheless, cognizance should also be taken of the fact that section 27 (UN, 1989) recognizes that State Parties only have to fulfil their obligations in accordance with national conditions and within their means. Ross and Dutscke (2006:233) explicate

that this clause is not to be used as an excuse for inaction, since section 4 (UN, 1989) explicitly requires State Parties to undertake appropriate measures to the maximum extent of their available resources and where needed for the implementation of socio-economic and cultural rights (Eiselen, 1997:230).

Pigozzi (1999:2) underscores the fact that the CRC (UN, 1989) also establishes the indivisibility of rights, i.e. that all rights must be addressed equally, which has significant implications that go to the very core of the conduct of educational activities. In addressing education in a CRC framework, it implies going far beyond sections 27, 29 and 32. Every other section needs to be considered in relation to those sections that specifically address the right to education.

Since the CRC (UN, 1989: section 18(1)) acknowledges learners' right to safety and education, but also strongly emphasizes learners' need of parental care under all circumstances, De Waal (2000:33) stipulates that an interpretation that no child needs parental assistance in the exercising of his fundamental rights would, thus, constitute a deviation from the CRC.

Pigozzi (1999:2) elucidates that the CRC clearly associates rights with responsibilities. Parents and adults have the responsibility to guard and ensure each learner's rights, while it is the responsibility of institutions, organizations, nations and the State to provide the necessary resources with which learners can grow to realize their potential and can themselves contribute to social and political change throughout the world (Clark, 2001:617-618). With regard to parental rights and obligations, Bekink (2003:248) indicates that such rights exist primarily for the benefit of the child concerned.

Moreover, section 30 (UN, 1989) protects the ethnic, religious and linguistic rights of children of minority or indigenous groups (*cf.* 2.4.1.6.5, 3.8.3 & 4.4.3). It states that the child shall not be denied the right to enjoy its own culture, profess or practise its own religion or use its own language in community with others of its own group.

In addition, the CRC (UN, 1989) is against corporal punishment in the sense that parties to the Convention undertake to ensure that learners will not be subjected to violence and degrading punishment (Oosthuizen & Rossouw, 2003:20).

2.3.3 International Covenant on Economic, Social and Cultural Rights

Section 2(2) of this Covenant (UN, 1966; hereafter referred to as the ICESCR) provides all vulnerable groups of learners with special protection, depending on what their needs are in relation to the situation they are facing progressively, to the maximum extent of available resources since States cannot be expected to do what they cannot afford. Notwithstanding this, Ross and Dutscke (2006:236-237) maintain that States are required to confirm that they have used all the resources at their disposal to the maximum extent as a matter of priority to ensure the widest possible enjoyment of the relevant rights of learners under the prevailing circumstances.

The ICESCR (UN, 1966) provides in section 13 that State Parties must recognize the right to free and compulsory education (*cf.* 3.5.2, 4.2.1.1 & 5.4.1). It recognizes the right to education and stipulates that education should be purposive and directed at the full development of the human personality and the sense of its dignity. Moreover, it should strengthen respect for human rights and fundamental freedoms, as well as facilitate effective participation in a free society, promote understanding, tolerance and friendship among racial, ethnic or religious groups. Primary education shall be compulsory and available free to all, while secondary education shall be made generally available and accessible to all.

It is important to take cognizance of the fact that South Africa did not ratify this Convention, but only signed it, with the consequence that it does not legally bind South Africa although it places an obligation on the country to refrain from acts that would defeat the object and purpose thereof (Rosa & Dutschke, 2006:226).

2.3.4 Convention on the Elimination of All Forms of Discrimination Against Women

Sections 10 and 14 of this Convention (UN, 1979) state that State Parties shall eliminate discrimination against women in order to ensure them equal rights with men in the field of education, so that women can obtain the same conditions of career and vocational guidance and gain similar access to studies in educational establishments. Access to the same curricula and teaching staff is also provided for.

In accordance to these provisions, State Parties shall especially eliminate discrimination against women in rural areas and ensure such women the right to

obtain all types of training and education, formal and non-formal, including that relating to functional literacy.

2.3.5 United Nations Convention on the Elimination of All Forms of Racial Discrimination

Section 1.2 of this Convention (UN, 1965) provides that State Parties undertake not to apply any distinctions, exclusions, restrictions or preferences between citizens and non-citizens.

2.3.6 UNESCO Convention Against Discrimination in Education

This Convention (UNESCO, 1960) aims at combating discrimination when admitting learners, defines the role of government in education and also the rights of parents and minorities with regard to education.

Section 2(b) (UNESCO, 1960) states that the establishment and maintenance of religious or linguistic separate education systems or institutions offering an education which is in keeping with the wishes of the learners' parents is not deemed to constitute discrimination if participation in such systems is optional and as long as the education provided conforms with standards laid down by the competent authorities.

In alliance with sections 3, 4 and 5 (UNESCO, 1960), State Parties must undertake to discontinue any practice which involves discrimination in education. State Parties to this Convention are obliged to formulate, develop and apply a national policy which will promote equality of opportunity and of treatment in education and, in particular, to make primary education free and compulsory. In addition, State Parties are obliged to encourage and intensify the education of persons who have not received any primary education.

This Convention (UNESCO, 1960) also emphasizes that it is essential that members of national minorities are allowed to perform educational activities in their own language.

2.3.7 World Declaration on Education for All

In the Preamble as well as in article 1 of this Declaration (UNESCO, 2000), education is regarded as a fundamental right for all people, women and men, of all ages,

throughout the world. The Declaration further provides that every person (child, youth and adult) shall be able to benefit from educational opportunities designed to meet their basic learning needs in order for them to be able to survive, to develop their full capacities, to live and work in dignity, to improve the quality of their lives and to make informed decisions.

2.3.8 Summation

Although many countries, such as South Africa, have committed themselves to international fundamental rights through the above international instruments, Rosa and Dutschke (2006:227) draw attention to the fact that the United Nations has no court structure or enforcement body that can directly penalize States for non-compliance.

To complicate matters in South Africa, section 231(2) of the SA Constitution (1996a) provides that an international agreement only binds South Africa after it has been approved by resolution in both the National Assembly and the National Council of Provinces.

The CRC, for instance, only has the power to receive reports compiled by a supervisory Committee on the Rights of the Child on the implementation of fundamental rights globally (Rosa & Dutschke, 2006:228). However, the reporting system, under which State Parties must periodically explain what has been done to implement CRC provisions, is weakened by the failure of States to pay much attention to the observations or recommendations of the supervisory bodies. In light of the latter and the fact that international Conventions do not possess a complaints system, it is very difficult to hold State Parties accountable under these treaties (Van der Vyver, 1997:39).

Notwithstanding this, international law does have an impact on South African law, as section 293 (1996a) instructs courts to afford preference to an interpretation of statutory law that is consistent with international law, which includes customary international law as well as treaty obligations, whenever such interpretation would be reasonable. As such, rights and obligations brought along by the abovementioned international agreements must be taken into account when giving effect to the fundamental rights of learners within an inclusive educational system in South Africa.

2.4 A SOUTH AFRICAN PERSPECTIVE ON THE FUNDAMENTAL RIGHTS OF LEARNERS

Together with the international attempt at striving towards the constitutionalization of human rights (*i.e.* that governmental powers derive from and are limited by a written constitution; Currie & De Waal, 2006: 8), there has been a dynamic movement in South Africa aimed at recognizing the fundamental rights of learners (De Waal & Grösser, 2005:5). As such, the SA Constitution (1996a: chapter 2) encompasses the acknowledgement of numerous fundamental rights to individuals while prohibiting the State to infringe on these rights.

Then again, Human (2000b:150) avers that achieving these fundamental rights in practice, presents an alarming challenge to the law's inexperience in formulating legal principles that not only apply to the broader community, but to individuals as well.

Although fundamental rights are positive law, Hawthorne (2001:512) cautions that their effect will only be determined by the interpretation of South African courts. In accordance, supreme law is discussed, while reference to the interpretation by courts is included where applicable.

2.4.1 Constitution of the Republic of South Africa, Act 108 of 1996

Russo (2005:46) indicates that a constitution creates the necessary governmental framework in a specific country as it outlines the rights and obligations of both the government and the citizens. A constitution empowers governmental bodies, defines and qualifies their powers and, thereby, determines the relationship between people of a country and their government (Rautenbach & Malherbe, 2004:1).

The SA Constitution (1996a) guarantees the fundamental rights of all children and therefore, of all learners. Visser (2005:401) points out that the new constitutional dispensation provides the ground rules to transform the education system by introducing fundamental rights in line with the best traditions found in developed democracies.

It is important to recognize that the SA Constitution (1996a) differs significantly from that of the United States of America and most other countries of the world, in that it expressly guarantees social-economic rights (Pieterse, 2000:56; *cf.* 3.5, 4.2.1 &

5.5.2). Broadly, two categories of socio-economic rights are constitutionally entrenched, namely fully justiciable rights, such as the right to basic education (1996a: section 29; cf. 2.4.1.6.10), which are not qualified by reference to reasonable measures, progressive realization or resource constraints (Currie & De Waal, 2006:568), and so-called access rights, such as the right to access adequate housing, health services and social security (1996a: sections 26 & 27; cf. 2.4.1.6.8), which are guaranteed progressively and are restricted by the availability of resources.

The Constitutional Court discussed the nature of socio-economic rights and the problems associated with their judicial enforcement in the *First Certification*[5] judgment, and held that socio-economic rights can, at the very minimum, be protected from improper invasion on such rights (*cf.* 2.4.1.6.10).

2.4.1.1 Preamble

According to the Preamble of the SA Constitution (1996a), it is adopted to *lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law* (*cf.* 3.2 & 3.4.2). As such, the Preamble declares that South Africa belongs to all who live in it, united by their diversity (*cf.* 3.6.2 & 4.2.2.1). It sets the purpose to, *inter alia,* improve the quality of life of all citizens and free the potential of all people (Rautenbach & Malherbe, 2004:1; cf. 1.1, 3.5, 3.6.1 & 4.2.2).

Jordaan (2001:107) emphasizes that the SA Constitution (1996a) is the only constitution to refer to the concept *open society*, thereby introducing a political scientific concept into South African jurisprudence. An open society is defined as a society which rejects the absolute authority of merely established social arrangements while trying to preserve and develop social arrangements based on the principles of freedom, reason, humaneness, rationality and diversity (Jordaan, 2001:114).

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[5] *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the RSA 1996 (4) SA 744 (CC)*

The same author (2001:107) cautions that this concept should not conveniently be treated as just part of the far better known concept of *democracy,* thus rendering the concept of an open society meaningless. The concept *open society* was regarded by Judge Sachs in *S v Solberg*[6] as one of the central features of the Bill of Rights and he interpreted it as an isolated concept inseparably linked to diversity.

2.4.1.2 Republic of South Africa

Section 1 of the SA Constitution (1996a) founded South Africa as a *democratic* state. By itself, government is required to respect the principle of democracy and, subsequently, can only be legitimate in so far as their actions rest on the consent of the governed (Currie & De Waal, 2006:13).

Consequently, as Currie and De Waal (2006:14) maintain, any law or conduct inconsistent with the principle of democracy will be invalid. It was accentuated in *The United Democratic Movement v President of the RSA*[7] that, unlike many provisions in the Bill of Rights, the remainder of the SA Constitution (1996a) does not impose obligations on private persons or institutions, but only on the State. In other words, the principle of democracy has no horizontal operation. Section 1 (1996a), therefore does not require private persons or institutions, such as private schools, to act in a democratic manner.

The researcher concurs with Lewis (cited by Kokot, 2005:469) that true democracy demands that every learner, whether superior, average or inferior in ability, be given the fullest opportunity to develop to the limit of his mental capacity. Since a free and democratic society has to rely upon the knowledge, skills and virtues of its citizens and since learners are not born with an understanding of the principles of democracy, Schoeman (2003:37) explains that learners have to be prepared for their future responsibilities as citizens of a democratic society. Each new generation should learn the skills, acquire the knowledge and develop the dispositions that underlie constitutional democracy. Therefore every democratic society faces the challenge of educating successive generations for responsible citizenship.

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[6] *S v Solberg 1997 (4) 1176 (CC)*

[7] *United Democratic Movement v Minister of the Republic of South Africa (No2) 2003 (1) SA 495 (CC)*

Section 1 of the SA Constitution (1996a) makes it clear that a democratic State is based on the values of human dignity, the advancement of human rights and freedoms, as well as the achievement of equality (cf. 1.1). These values are included in the founding provisions, according to Beckmann and Prinsloo (2004:134), to ensure accountability, responsiveness and openness. Accordingly, the SA Constitution (1996a) aspires to build one nation, but in various ways also attempts to accommodate the diversity of interests in society and to ensure justice for all (Rautenbach & Malherbe, 2004:5).

2.4.1.3 Supremacy

Section 2 grants the SA Constitution (1996a) supreme authority, and consequently all other laws and all conduct must be in accordance with it. The implication is that Parliament and all other government bodies are subordinated to the SA Constitution (1996a) and their laws and actions are invalid if they are inconsistent with this supreme law. It is the task of the independent courts, which include the Constitutional Court, to determine whether any law or action is consistent with the Constitution (1996a; Rautenbach & Malherbe, 2004:4-5).

From this it follows, as set forth by Bray (1992:45), that both the subjacent values of the new democratic dispensation and the cultivating of a human rights culture play an invaluable role in the reformation of South African education.

2.4.1.4 Citizenship

Section 3 of the SA Constitution (1996a) deals with citizenship as it entitles all citizens to rights, privileges and benefits of citizenship and equally subjects them to the duties and responsibilities of citizenship.

According to Schoeman (2003:40), citizenship involves a sense of real equality and justice for everyone. While rights and duties are concerned with formal rights, public duty requires an understanding of cultural and social inequalities. The same author (2003:41) stipulates that citizenship also entails participation in practice which refers to engagement in all decisions affecting their lives.

Pieterse (2000:53) explains that once citizenship is granted by the State, the State has certain duties towards such citizens. The relationship between the State and its citizens is a contractual one, through which the State is obliged to protect the rights

of citizens in turn for the right to determine the rules under which those rights may be exercised.

Fundamental rights imply that learners are entitled to all the rights, privileges and benefits of their citizenship, as stipulated in section 3(2)(a) of the SA Constitution (1996a). In this regard, Visser (2004a:98) points out at that non-citizen learners, such as refugees, cannot claim, under the guise of the equality provision (1996a: section 9), rights that are reserved for citizens only (*cf.* 2.4.1.6.1 & 2.4.1.6.9).

The legal position of refugee learners, as non-citizens (*cf.* 2.4.1.4), is dealt with extensively in the Refugees Act (130/1998) whereby such learners are provided full legal protection, including entitlement to the fundamental rights as set out in Chapter 2 of the SA Constitution (1996a; *cf.* 2.4.1.6). The granting of fundamental rights to learners, who are not citizens, was confirmed in the case of *Patel,*[8] as the court decided that aliens are entitled to the same rights as citizens under the SA Constitution (1996a), unless the contrary emerges from the Constitution.

Citizenship is an abstract political term aimed at denoting an essential link between a State and its permanent inhabitants. Accordingly, citizens have a privileged legal position in the state as they enjoy political participation, as well as certain civil and political rights which non-citizens do not. In turn, citizenship requires the taking on of obligations and commitments towards the community, which are difficult to describe, but felt and understood by most citizens[9] (*cf.* 4.3.1).

Pieterse (2000:51), however, stresses that all fundamental rights cannot be made dependent on geographic location only, for if it is done, there is a risk of replacing humanity with citizenship. In this regard, mention of the court's decision in the matter of *Khosa*[10] is important as it not only affirms that rights in the Bill of Rights reserved to *everyone* cannot be construed as referring only to citizens, but also highlights that unfair discrimination against non-citizens does not satisfy the SA Constitution (1996a). The court held that discrimination on the basis of non-citizenship (*in casu* the denial of acquiring state benefits) amounted to unfair discrimination. The reason for the latter being that the exclusion of foreigners to state befits would have a severe

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[8] *Patel v Minister of Home Affairs 2000 (2) SA 343 D*

[9] *Law Society of Brittish Columbia v Andrews (1989) 56 DLR (4th) 29 (per Judge McIntyre)*

[10] *Khoza v Minister of Social Development 2004 (6) SA 505 (CC)*

impact on their dignity as they would have to turn to others to enable them to meet the necessities of life.

2.4.1.5 Languages

Section 6(1) of the SA Constitution (1996a) assigns official status to eleven languages in South Africa, while section 6(2) (1996a) commands the State to take practical and positive measures to elevate the status, advance the use of historically diminished indigenous languages and ensure that all official languages enjoy parity of esteem and are treated equitably.

Henrard (2001:83) avows that the proclamation of eleven official languages has important symbolic value, particularly for the speakers of the nine African languages who were formerly deprived of such status. The same author draws attention to the striking fact that the final SA Constitution (1996a) no longer has the equal treatment of the eleven official languages as an objective, albeit distant, but merely the equitable treatment and parity of esteem of these languages (1996a: section 6(4)).

The phrase *equitable treatment* can be interpreted as strengthening the internal reference to section 6(2) of the SA Constitution (1996a) and the need expressed by the clause for positive measures by the State to elevate the status of the official indigenous languages. The term *equitable* makes explicit that there is, in view of the history of language denigration and neglect, a need for differential and preferential treatment and not merely formally equal treatment. To the contrary, Henrard (2001:83) indicates that *equitable treatment* can also be understood as an acknowledgement that not all eleven official languages should or can be used for all purposes.

Parity of esteem would, according to Strydom (2003:24), imply that considerations of practicality aside, a sincere attempt must be made to ensure that particular languages do not dominate while others are neglected. Except perhaps for English, the ten other official languages can all qualify as linguistic minorities (Henrard, 2003:17; *cf.* 4.4.3).

Conversely, Tulasiewicz and Adams (2005:49) caution that the basic problems of language status and parity of esteem coupled with users' attitudes can lead to the acceptance or rejection of a language (*cf.* 4.3). As a result, Strydom (2003:24)

highlights that the provisions embedded in section 6 (1996a) are presently at the centre of the debate on the promotion and implementation of multilingualism, which, incontestably, have spilled over to the language-in-education sphere where government policies are most distinctly in search of some direction.

Another important specification to be taken cognizance of is embedded in subsection 6(3) which subjects the practice of different languages to the consideration of factors such as its usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole. In light hereof, Strydom (2003:24) clarifies that the Bill of Rights merely allows for somewhat limited guarantees, granting to linguistic, religious and cultural communities only the right to claim some space in a dispensation largely dominated by a simple majority and individual rights paradigm.

2.4.1.6 Chapter 2: Bill of Rights

Chapter 2 of the SA Constitution (1996a) is of extreme importance to this research as it contains the Bill of Fundamental Rights which is specifically directed at guaranteeing, safeguarding, protecting and promoting the rights and freedoms of all natural persons, such as learners, and, in some cases, those of juristic persons, such as public schools. As such, the Bill of Rights incorporates a list of internationally recognized fundamental rights that are, depending on their nature and context, defined for the benefit of adults, minors, citizens and non-citizens alike (Bekink, 2003:249; *cf.* 2.4.1.4).

It is important to keep in mind that certain rights in the Bill of Rights are afforded to *everyone*, while other rights are directed at specific individuals or groups. The word *everyone*, as shown by Pieterse (2000:54), includes both citizens and aliens finding themselves in the South African territory. The same author argues that there is no constitutional indication why alien learners should not, in principle, be equally entitled to all constitutionally entrenched rights other than those reserved for citizens.

The Bill of Rights affirms the democratic founding values of human dignity, equality and freedom. It represents ideals and goals to be pursued, and sets norms against which the quality of life of all South Africans can be measured (Joubert, De Waal & Rossouw, 2004:86) In addition, the researcher applauds Bekink and Brand (2000:173) for asserting that the rights and freedoms entrenched in the Bill of Rights

are not mere ideals, as they place a firm obligation on the State to respond, protect and fulfil the rights in accordance with sections 36 and 39 (1996a).

Motala and Pampallis (2001:18) draw attention to the fact that a number of social and economic rights specified in the Bill of Rights, including rights in respect of education, are buttressed by, *inter alia*, the right to just administrative action (*cf.* 2.4.1.6.12) and access to information and to the courts.

From the provisions in the Bill of Rights Visser (2005:402) elucidates that it is apparent that a multiplicity of intersecting constitutional values and interests are involved in education, some overlapping, a few supporting each other and some even competing. To illustrate the latter the fundamental rights, as embedded in the Bill of Rights, will forthwith be discussed in detail.

2.4.1.6.1 Fundamental rights

Bekink (2003:249) views the affirmation of the values of human dignity, equality and freedom in section 7(1) (1996a) as indicating that these values form the underlying basis of the protection and evaluation of all other fundamental rights in South Africa.

Section 7(2) of the SA Constitution (1996a; *cf.* 2.4.1.4) affords citizens special protection against the power of the State as it prescribes that *the State must respect, protect, promote and fulfil the fundamental rights stipulated in the Bill of Rights.* According to Beckmann, Maree, Prinsloo and Roos (1995:6), this section provides all people (even non-citizens) with the guarantee that they will be able to exercise a certain degree of control over their own lives, since there are certain aspects which the government cannot readily touch.

The obligations set out in this section impose distinct duties on the State. Beckmann and Prinsloo (2004:136) draw attention to each duty by stipulating that the duty to *respect* is stated negatively, thus requiring the State to refrain from infringing on learners' rights, while the duty to *promote* is stated positively, requiring the State to use its power to *assist individual learners in realizing their rights.* The SAHRC (2006:9) indicates that the duty to *protect* obligates the State to protect learners' fundamental rights from third-party infringement, while the duty to *fulfil* requires more positive action from the State.

Rautenbach and Malherbe (2004:8) emphasize that section 7(3) does not, however, allow learners to exercise their rights without any constraints as they may be limited, as long as the limitations are in accordance with the relevant rules of the Bill of Rights (1996a: section 36; *cf.* 2.4.1.6.13).

2.4.1.6.2 Application

Section 8(1) (1996a) imposes a duty on the State to respect and uphold the rights of individuals. Section 8 provides that Chapter 2 of the SA Constitution (1996a) on fundamental rights is binding on all organs of the State at all levels of government, *i.e.* the legislature, the executive and the judiciary. All laws and the bodies that make them, like parliament, are thus subjected to the stipulations contained in the Bill of Rights. All legislation regarding inclusive educational settings must hence give effect to the fundamental human rights of all learners.

2.4.1.6.3 Equality

Section 9 (1996a) guarantees equality and provides learners with equal protection and benefit of the law, the full and equal enjoyment of rights and freedoms, as well as protection from any unfair discrimination (*cf.* 1.1).

The primacy of equality is underlined by the prominent position accorded to it as the first specific right to receive attention in the Bill of Rights, as well as to the fact that it features throughout the SA Constitution (1996a). It is affirmed, among others, as part of the constitutional principles in the Preamble (*cf.* 2.4.1.1), in the limitation provision (section 36; *cf.* 2.4.1.6.13), as well as in the interpretation provision (section 39; *cf.* 2.4.1.6.15). Carpenter (2001:412) draws attention to the fact that equality is expressly mentioned as a desideratum, *i.e.* that equality of all is a desired goal.

The importance of equality was also emphasized by Judge Mohamed in *Fraser v Chilren's Court* [11] as he stated that the guarantee of equality lies at the heart of the SA Constitution (1996a) and that it permeates and defines the very ethos upon which the Constitution is premised. The Constitutional Court noted that discrimination against fathers in non-Christian marriages, purely on the basis of their gender, is no

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[11] *Fraser v Children's Court, Pretoria North 1997 (2) BCLR 153 (CC)*

longer permitted. It was construed that gender equality will encourage fathers to take an active role in the care of their children while gender inequality perpetuates harmful stereotypes which require women (mothers) to shoulder the burden of child care on their own. With this section and learners with disabilities in mind, Burden (1999:13) pleads for an approach in which the well-being of all learners will be the main concern in education, striving for all learners to be valued equally.

The right to equality generally implies that all learners can claim equal treatment and equal opportunities, since these aspects are not limited on the grounds of belief, race, colour, gender or origin, but through the recognition of and respect for the similar rights of others (Joubert & Prinsloo, 2001:23; *cf.* 3.6 & 4.2.2).

Although specific grounds are listed in section 9(3) of the SA Constitution (1996a) on which the State may not unfairly discriminate directly or indirectly, the Constitution Court in *Harksen v Lane*[12] held that differentiation on grounds that are analogous to those listed in section 9(3) will constitute discrimination. The court explained an equivalent ground as one that is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them in a comparably serious manner. In this regard, Carpenter (2001:421) affirms that, even though there is no textual support for the contention that the SA Constitution (1996a) recognizes different levels of scrutiny in discrimination cases, the possibility exists that certain forms of discrimination (such as on the basis of race and gender) may attract stricter scrutiny than others (such as language, disability or religion) in practice.

In South Africa, in particular, questions regarding equality in education are naturally intertwined with the redress of the racial discrimination and inequalities of apartheid. Equality, conversely, comprises more than redress. It is about creating opportunities for learners to realize their potential (*cf.* 1.1, 3.2 & 3.6.1 & 4.2.2), irrespective of race, gender, age, poverty or disability. It is about treating people with respect for their inherent dignity, freedom and uniqueness. Equality concerns human relations and the responsibility of the State as well as the individual to promote what is fair and just to everybody (Malherbe, 2004:10).

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[12] *Harksen v Lane NO 1998 (1) SA 300 (CC)*

Within the South African school context, section 9 of the SA Constitution (1996a) boils down to matters such as the admission criteria of learners (De Waal, 2000:37) since it implies that all learners have the right to enjoy equal access to quality education, irrespective of their perceived potential or circumstances (Burden, 1999:10).

In this regard, Currie and De Waal (2006:231) state that it is wrong, for example, to deny learners with blindness a right to education, since blind and sighted learners are in all relevant respects in the same position and should be treated the same when it comes to access to education. The same authors question, to the contrary, whether it is sufficient simply to provide learners with blindness a right of access to the same schools as sighted learners, or does the commitment to equality (which includes the idea that learners who are different in significant ways should not be treated the same as everybody else) rather require the State to create special schools which take the particular educational needs of learners with blindness into account. This matter will be expounded on in the course of this thesis.

Visser (2005:406) maintains that equal access to educational institutions is clearly governed by the equality clause (1996a: section 9) although it is not stated specifically in section 29 (1996a, *cf.* 2.4.1.6.10). The same author shows, and rightly so, that any measure or conduct unfairly discriminating against any learner as far as access is concerned, and which does not constitute a legitimate limitation of the right to equality, would be unconstitutional.

In contrast, Visser (2005:406), as well as Currie and De Waal (2006:231), reminds everyone that section 9 (1996a) sanctions affirmative action programmes that could provide for the preferential admission of learners disadvantaged by past discriminatory laws (*cf.* 3.6). Relevant to the latter, Judge O'Regan in *Brink v Kitshoff*[13] acknowledged that black learners in South Africa have historically been denied access to established schools. Instead, separate and inferior facilities were provided for such learners, which left deep scars (such as poverty and illiteracy) still visible in society today.

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[13] *Brink v Kitshoff NO 1996 (4) SA 197 (CC)*

The aspect of equal access to schools was addressed in *Matukane v Laerskool Potgietersrus*[14] where it was decided that an admission policy which did not allow black learners to be admitted, was unconstitutional in that it discriminated unfairly on the grounds of race and colour. As a result, the High Court found that the school's admission policy (ostensibly based upon language and culture) violated the black learners' rights to equality and could not be justified on the grounds of cultural, minority or associated rights.

Malherbe (2004:10) accentuates the fact that the promotion of equal learning opportunities is crucially important, not because the inherited inequalities are more serious than in other fields, but because quality education (*cf.* 3.5.1 & 4.2.1) is vital to the improvement of the general quality of life of millions of people. The virtues of education in preparing learners for life, for meaningful interaction with other human beings, for constructive civic and political involvement, and for successful economic participation, stand beyond reason.

It is furthermore important to remember that the provision of education in accordance with section 9 (1996a) ought to provide for equal opportunities and not for equal outcomes, since the latter amount to a dangerous denial of individual responsibility (Carpenter, 2001:412; *cf.* 3.6). According to Kamper (1998:80), education can only guarantee equality at the lowest possible level and therefore the equality of schools cannot be judged merely on results, as their test performance will depend on what the learners were like to begin with (Lawton & Gordon, quoted by Joubert *et al.*, 2004:140).

In this regard, Currie and De Waal (2006:232-233) wisely distinguish between formal and substantive equality. Substantive equality requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve its goal. Formal equality, on the other hand, simply requires that all persons should be equal bearers of rights and that the law should treat individuals in similar circumstances the same (*cf.* 2.4.1.6.9).

Based on a formal conception of equality, equality is achieved if all learners are educated according to the same school curriculum. In contrast, substantive equality

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[14] *Matukane v Laerskool Potgietersrus 1996 (3) SA 223 (T)*

would require equality of outcome. If learners with disabilities undergo the same school programme as other learners, they may end up receiving an education that is inadequate for their special needs. According to Loenen (1997:410), it may therefore be necessary to treat learners with disabilities differently from everybody else in order to realize their rights to equality.

The right to equality hinges, as pointed out by Joubert and Prinsloo (2001:23), mainly on the rights of persons not to be discriminated against. Currie and De Waal (2006:24), to the contrary, warn that the right to equality seeks to outlaw the elements of fairness and therefore does not prohibit discrimination, but rather unfair discrimination.

In view hereof, Van der Vyver (1997:304) points out that section 9 (1996a) is an example of a situation where certain limitations are inherent in the very definition of the concept *equal protection,* requiring, per definition, that un-equals (such as learners and educators) should be treated unequally. Another example of mere differentiation in education is presented by Bray (2000b:286), as treating learners with disabilities differently from other learners. In short, the researcher contends that the concept of equality cannot, as illuminated by Davis (1994:197), be used to deny the law the ability to prescribe differentiated treatment to different individuals.

Oosthuizen (2004a:18) and Van Marle (2000:600) underscore this by stressing the importance that section 9 of the SA Constitution (1996a) does not imply that all differences between people have suddenly disappeared and that all people should be treated in an identical way. In other words, it is not wrong to differentiate, as long as such differentiation is neither unfair, unreasonable nor unjustifiable. This aspect was confirmed by the court in the matter of *Christian Education,*[15] as it was stated that the essence of equality under the SA Constitution (SA, 1996a) is that it does not require that we treat everyone in the same way, but that we treat everyone with equal concern and respect. Joubert and Prinsloo (2001:23), on the other hand, emphasize that the difficulty lies in determining when discrimination constitutes unfair discrimination and when not.

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[15] *Christian Education of South Africa v Minister of Education 2002 (2) SA 794 (CC)*

The Constitutional Court examined this issue in detail in *Harksen v Lane*[16] and found that there are basically three ways of treating people when it comes to equality, namely differentiating, discriminating unfairly and discriminating fairly, which can be justified.

In connection with *differentiation,* Currie and De Waal (2006:239) illustrate that it is impossible to regulate society without differentiation as it is necessary to put people in different categories in order to provide them with different treatment. Joubert and Prinsloo (2001:24; *cf.* 3.3), though, remind everyone that differentiation can amount to discrimination if the differentiation is not rationally connected to a legitimate governmental purpose. Bray (2000b:286) provides an example of fair discrimination as being the advancement of previously disadvantaged learners to achieve the full and equal enjoyment of their right to education in line with the constitutional aim at redressing past inequalities.

To give effect to equality, the Court in *President of South Africa v Hugo*[17] stated that equality entails nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences or of membership to particular groups. Equality implies that society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend their human dignity (*cf.* 2.4.1.6.4).

Discrimination on the basis of disability is specifically mentioned in section 9(3) of the Constitution (1996a). As a result, learners with disabilities are guaranteed the right to be treated equally and to enjoy the same rights as other learners. In this regard, Visser (2005:406; *cf.* 3.6) explains that unfair discrimination on the basis of disability, and thus a denial of equal access to educational institutions, would be unconstitutional.

2.4.1.6.4 Human dignity

Section 10 of the SA Constitution (1996a) protects and respects the human dignity of, *inter alia,* all learners.

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[16] *Harksen v Lane* (note 12 above)

[17] *President of South Africa v Hugo 1997 (4) SA 1 (CC)*

Since learners are regarded as having inherent dignity, they do not have to earn or deserve it, as stated in *S v Makwayane and Mchunu*[18] Motala and Pampallis (2001:19) explain that particular rights, such as the right to life and human dignity, are *non-derogable*, giving them the status of inviolability. Human dignity, as pointed out by Currie and De Waal (2006:275), is not only a justiciable and enforceable right that must be respected and protected, it is also a value that informs the interpretation of possibly *all* other fundamental rights, and that is of central significance in the limitation clause (1996a: section 36; *cf.* 2.4.1.6.13).

In complying with section 10, the High Court ruled in *Danielle Antonie v Governing Body, the Settlers High School and Head Western Cape Education Department*[19] that a school's code of conduct for learners must always be drawn up to elevate the human dignity and mutual respect of all learners. With specific reference to a school's code of conduct for learners, Van der Bank (2000:305) maintains correctly that the enforcement of a reasonable and lawful code of conduct can be seen as a way of protecting the fundamental rights of learners and education at schools.

2.4.1.6.5 Freedom of religion, belief and opinion

Section 15 (1) (1996a) guarantees, *inter alia,* learners' right to freedom of conscience, religion, thought, belief and opinion. This section is of relevance to inclusive educational settings as the governance of schools will in future be confronted to deal with learners having diverse religions beliefs in the same school.

Currie and De Waal (2006:339) interpret *religious freedom* as including the right to have a belief, to express that belief publicly and to manifest that belief by worship and practice, teaching and dissemination. The same authors (2006:338) purport that religious freedom also extends to the freedom to reject religious beliefs.

In *S v Lawrence,*[20] the Constitutional Court held that section 15(1) of the SA Constitution (1996a) requires the State to acknowledge the value of religious diversity and pluralism among learners. It was also stressed that the Bill of Rights affirms the right of learners to be who they are without being forced to subordinate

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[18] *S v Makwayane and Mchunu 1995 (3) SA 391 (CC)*

[19] *Danielle Antonie v Governing Body, the Settlers High School and Head Western Cape Education Department (case 3791/2000) Cape of Good Hope Provincial Division of the High Court of SA 2000 (4) SA 738*

[20] *S v Lawrence 1997 (4) SA 1176 (CC)*

themselves to the religious norms of others, and highlights the importance of individuals and communities being able to enjoy what has been called the right to be different.

The Constitutional Court has recognized, in the matter of *Christian Education*[21] that parents have a general interest in living their lives in a community setting according to their religious beliefs and a more specific interest in directing the education of their children. The Court also held that section 15(1) of the SA Constitution (1996a) prohibits coercion or constraint that might force learners to act or refrain from acting in a manner contrary to their religious beliefs. However, it was also stated that members of religious communities may seek to use the freedom of religion as a shield to fend off attacks on constitutionally offensive group practices. It was thus decided, after applying the limitation clause (1996a: section 36; *cf.* 2.4.1.6.13), that corporal punishment at schools is unconstitutional as it violates learners' right to human dignity (1996a: section 10; *cf.* 2.4.1.6.4) and their right to be protected against cruel, inhuman and degrading treatment or punishment (1996a: section 12), even though the parents may have consented to it on the basis of their religious beliefs.

According to Bray (1992:38), the primary aim of section 15, with regard to education, is to enable learners to perform or to participate in collective action and to practise their religious beliefs. The aim is not as such to provide for religious instruction, but to signify the State's duty to build society's norms and values into its education system.

In this regard, section 15(2) of the SA Constitution (1996a) makes it clear that religious observances at state or state-aided (including private institutions that receive some support from the state) institutions will not give rise to constitutional complaints if such observances are established under rules made by an appropriate authority (School Governing Bodies in the case of schools), if observances are equitable and attendance is free and voluntary.

In the case of *Wittman*[22] it was decided that religious observances refer to acts with a religious character, which are not similar to religious education. Currie and De Waal (2006:353) indicate that the State will not easily accede to the demand for fully-subsidized denominational schools in which religious education takes place, as such

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[21] *Christian Education of South Africa v Minister of Education* (note 15 above)

schools may not be cost effective and government schools serve to bring learners from different backgrounds and religions together. Such demands have, in fact, already been rejected by the Constitutional Court in the *Christian Education*[23] case. The consequence hereof is that such schools should be established at own expense by private institutions.

2.4.1.6.6 Freedom of expression

Section 16 of the SA Constitution (1996a) guarantees learners freedom of expression which includes freedom to receive or impart information or ideas, freedom of artistic, as well as academic freedom.

According to Currie and De Waal (2006: 362), freedom of *expression* includes activities such as displaying posters, painting and sculpturing, dancing and the publication of photographs. Also included within its scope are symbolic acts such as the wearing of certain items of clothing and physical gestures.

2.4.1.6.7 Environment

Section 24 (1996a) affords everyone the right to a healthy, protected environment and therefore all learners, regardless of their abilities or disabilities, have the right to a school environment that is not harmful to their health and well-being. The implications for inclusive education are discussed in Chapters 3, 4 and 5.

2.4.1.6.8 Housing, health care, food, water and social security

Sections 26 and 27 of the SA Constitution (1996a) make provision for general socio-economic rights, among others, for social security.

These two sections imply that every learner has the right to benefit from social security, including social assistance. Benefits should be granted where appropriate, taking into account the resources and the circumstances of the learner and persons who have responsibility for the maintenance of the child, as well as any other consideration (Du Plessis & Conley, 2005:15).

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[22] *Wittmann v Deutscher Schulverein, Pretoria 1998 (4) SA 423 (T)*

[23] *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)*

Fundamental rights are classified into first, second and third generation (environmental) rights. First generation rights entail political and civil rights, while second generation rights are concerned with the various aspects of social, cultural and economic rights (socio-economic rights) such as the rights to employment, social security, shelter, family assistance, education, mother-tongue education and State support of cultural activities (Bekink & Brand, 2000:172; Yacoob, 2003:v)

During the negotiations on the content of the SA Bill of Rights (1996a: Chapter 2; *cf.* 2.4.1.6), there were disagreements on the inclusion of second and third generation rights. Ultimately a compromise was reached; hence the SA Bill of Rights incorporates limited second and third generation fundamental rights.

Arguments against the inclusion of second and third generation rights were that they are not enforceable in a Court of Law and that they would create unnecessary expectations such as free education (Bekink & Brand, 2000:172; *cf.* 3.5.2 & 4.2.1.1). To the contrary, the Constitutional Court has affirmed, in the cases of *Grootboom*[24], *Soobramoney,*[25] and *Ngxuza,*[26] that socio-economic rights are in indeed justiciable and enforceable in accordance with section 2 of the Constitution (1996a) which provides that obligations imposed by the constitution must be fulfilled, and section 7(2) which obliges the State to respect, protect, promote and fulfil the rights set out in the Bill of Rights. Moreover, it was decided in the matters of *Chairman of the Constitutional Assembly*[27] and *Treatment Action Campaign and others*[28] that these rights are justiciable even though their inclusion may have direct financial and budgetary implications.

Additionally, Olivier, Khoza, Van Rensburg and Klinck (2003:54-55) maintain that no reference is made in the Bill of Rights (1996a: chapter 2) to the distinction between first, second and third generation rights. Therefore socio-economic rights have exactly the same status as civil and political rights. This is underscored by the fact that the Bill of Rights provides extensive recognition and indeed entrenches socio-economic rights, particularly in the area of education.

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[24] *Government of the RSA and others v Grootboom and others 2000 (11) BCLR 1169 (CC)*

[25] *Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC)*

[26] *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza 2001 (4) SA 1184 (SCA)*

[27] *Ec parte Chairman of the Constitutional Assembly In re: Certification of the Constitution of the RSA 1996 (4) SA 744 (CC)*

[28] *Minister of Health and others v Treatment Action Campaign and others 2002 BCLR 1033 (CC)*

Conversely, those in favour of the inclusion of first and second generation rights argued that socio-economic rights should be included in order to confront social and economic ills such as extreme poverty brought about by the legacy of apartheid (Tibitts, 2006).

Accentuating the above, Mandela, previous President of the RSA (1991:12), maintains that the key to the protection of any minority is to put core civil and political rights, as well as some cultural and economic rights beyond the reach of temporary majorities, and to guarantee them as fundamental individual rights. Issues such as poverty, want, deprivation and inequality must be addressed in accordance with international standards which recognize the indivisibility of human rights. Accordingly, Yacoob (2003:vi) avers that the provision of the right to vote, without providing food, shelter, education and health care, is to use first generation rights as a smoke-screen to obscure the deep underlying forces which dehumanize people. The denial of socio-economic rights is to create an appearance of equality and social justice, while by implication socio-economic inequality is entrenched. For this reason, Mandela (1991:12) emphasizes that provision must be made for all fundamental rights and freedoms associated with a democratic society.

It was, nonetheless, underlined by the Court, in the matter of Soobramoney, that socio-economic rights are qualified by the *available resources* restriction. In other words, there is no unqualified obligation on the State to meet existing needs. Limited resources may, therefore, as pointed out by the Court, justify giving priority to larger needs of society, rather than to specific needs of particular individuals.

The court held in the case of *Grootboom and others*[29], while deciding on whether a municipality should be obliged to produce shelter for families in desperate need, that the fundamental rights as set out in the Bill of Right are interrelated. The court expounded that neither section 26 nor section 27 of the SA Constitution (1996a) obliges the State to go beyond its available resources or to realize such socio-economic rights immediately. It was, nevertheless, stressed that the State has a duty to give effect to these rights progressively and to put in place reasonable legislative and other measures to meet these rights (*cf.* 2.4.1.2 & 4.2).

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[29] *Government of the RSA and others v Grootboom and others* (note 24 above)

Consequently, Du Plessis and Conley (2004:16) postulate that schools must act as community watchdogs against any form of abuse and ensure that learners are safe. Schools must work closely with the community on learner rights-related issues to protect and promote the interests of all learners in their care.

2.4.1.6.9 Children

Section 28 of the SA Constitution (1996a) has often been described as a mini charter of rights, creating additional protection for children under 18 (Bekink, 2003:253), especially in situations where they are particularly vulnerable (Prinsloo & Beckmann, 2000:322), such as poverty, disability and being part of a minority group (Olivier, 2003:26). The appreciation of learners' fundamental rights is significant, as Human (2000b:154) emphasizes, because it accords them respect and acknowledges their value.

Haupt and Robinson (2001:24) point out that the unique needs, dependence and vulnerability of children (*cf.* 2.4.1.6.4) have led to the necessity of providing specific fundamental rights in the form of children's rights. As a consequence, two categories of rights protection can be distinguished. On the one hand, as confirmed by Bekink and Brand (2000:173), there is the broad protection of children under the wide-ranging provision of the Bill of Rights (rights that are bestowed on everyone) and on the other, the protection afforded by the rights applicable to children only, in section 28 (1996a). It is, forthwith, important to concede that these rights do not limit, but rather compliment each other (*cf.* 2.2.1).

It is important to note that section 28 does not distinguish between learners who are citizens and learners who are not (*cf.* 2.4.1.4). Therefore, Pieterse (2000:57) stipulates that whenever alien learners are involved, care must be taken that section 28(1)(c) of the SA Constitution (1996a) is adhered to.

Often when children's rights are applied, the duties that such rights impose operate within an uneasy triangular relationship between the child, the parent and the State, as the socio-economic rights offered to children are unqualified and are therefore directly enforceable (Bray, 2000:283). In most cases, the primary duty to respect and fulfil children's rights rests on the parents or legal guardians, and such duty would normally only shift to the State when the parents are unable to provide the necessary protection (Bekink, 2003:253). In support, Prinsloo and Beckmann (2000:322) explain

that the additional rights provided for children in section 28, place a duty on the State to ensure that children are provided with basic requirements, while placing a constitutional duty on parents to provide for their children's basic needs.

In this regard, De Waal (2000:33) explicates that it would certainly not be in the best interest of the child to interpret these provisions as placing the child in a direct oppositional relationship *vis-à-vis* the State (*cf.* 4.2.3).

Since the SA Constitution (1996a) does not create any particular hierarchy of fundamental rights and freedoms, as clarified by Bekink and Brand (2000:172), it provides through section 28(2) that a child's best interests are of paramount importance in every matter concerning the child. According to Alan and Harty (2005:78; *cf.* 4.2.3), this section seeks to protect or establish only such rights which are in the child's best interest.

The Constitutional Court, in the matter of *Fitzpatric*[30] stressed that the *best interests of the child-test,* as manifested in the SA Constitution (1996a) and case law, demands more than only preventing harm done to children. What is more, Bekink and Brand (2000:195) assert that despite the *best interests-rule* being stated in the SA Constitution (1996a) in its widest possible formulation - *every matter concerning the child* – there must be some limit to the operation of this principle.

As the exact meaning and scope of the concept *best interest of the child* are not constitutionally defined, Currie and De Waal (2006:618) notice that it is not without difficulties. Bekink and Brand (2000:194) explicate that the most serious difficulty lies in the scope of the application of the *best interests-rule* since it is questionable as to which decisions the rule should be applied to and to which not. In the past, the concept has failed to provide a reliable standard, as pointed out by Currie and De Waal (2006:618), thus causing controversy which may lead to social engineering by allowing educators, among others, to determine what is in the best interest of learners (*cf.* 4.2.3).

To prevent this, Bekink (2003:255) stresses that judicial interpretation is required by way of which the court can set sound guidelines and give effect to the duties imposed by section 28 of the SA Constitution (1996a). In view of the above, it is submitted that

when children's rights are balanced against the rights of others (1996a: section 36; *cf.* 2.4.1.6.13), *the best interest of the child-test* would mostly triumph. Because of this, Bekink (2003:255) postulates that the scale will be significantly tipped in the child's favour in almost all cases.

Since quality education is in the best interest of the child and his future, the right to education could be linked to the rights of children in section 28 of the SA Constitution (1996a; Oosthuizen, 2004a:21). It is, accordingly, imperative that education must address the best interests and ongoing development of the learner as a whole. This involves that, in addition to being learner-centred, education must comprise more than paying attention to learners' cognitive development. Education must rather be conceptualized from the learner's point of view and with an understanding of the inter-related nature of the learner's needs which vary accordingly to the level of individual development (Pigozzi, 1999:1).

Accentuating the above, Oosthuizen (2004b:25) asserts that educators should, as a motive of service and as one of the fundamentals of their profession, always regard the best interest of learners, as their clients, as of primary importance. The fact that children's rights are specifically mentioned in section 28 of the SA Constitution (1996a) underscores the importance of the acknowledgement of learners as full legal subjects (Haupt & Robinson, 2001:29; *cf.* 2.4.1.6.3).

2.4.1.6.10 Education

Section 29 (1996a) provides everyone a right to basic education, a right to further education, a right to receive education in the language of their choice in public educational institutions (*cf.* 4.4.3) and the right, at own expense, to establish independent schools.

Pigozzi (1999:1) stresses that the right to education is also an enabling right as it facilitates learners' access to many of their other rights throughout their lifetimes. In this regard, education has an important role to play in empowering learners for democratic action, for enforcing their rights and for living successful lives (*cf.* 4.3).

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[30] *Minister of Welfare and Population Development v Fitzpatric 2000 (7) BCLR 713 (CC)*

2.4.1.6.10.1 Basic and further education

Section 29(1) provides every learner with the right to a basic education and to further education. Accordingly, even non-citizens and persons without permanent residence may be entitled to the right to education (Burden, 1999:19) which, according to Visser (2005:406), puts even more pressure on State resources available to education.

It is important, as illuminated by Bekink and Brand (2000:179), to take cognizance of the fact that section 29(1) distinguishes between basic education and further education (*cf.* 4.2.1). The section 29(1)(a) fundamental right to basic education provides learners with an immediate entitlement. As such, learners have an immediate claim against the State for making education available and accessible (Malherbe, 2006) since, as pointed out by Rosa and Dutschke (2006:243), it is not qualified by reference to reasonable measures, progressive realization or resource constraints. In concurrence, Motala and Pampallis (2001:19) conclude that the State is clearly obliged to provide and secure the right to basic education which cannot remain unfulfilled or ignored, as it would constitute a breach of the constitution. Any attempt in this direction could only be defended by reference to the specific conditions of the limitation clause (1996a: section 36; *cf.* 2.4.1.6.13).

As the SA Constitution (1996a) does not provide a definition of basic education, reference is made to the interpretation thereof by various academics.

Pigozzi (1999:4) defines basic education as the right of every learner to the core of primary education, *i.e.* to language (reading and writing), Mathematics, and basic Science, which includes Natural Science, Social Science and life skills. According to Malherbe (2006), basic education entails education up to a level of functional literacy, in other words, reading, writing, arithmetic and an elementary knowledge or awareness of economics, culture and politics.

Contrary to the above, the right to further education, as embedded in section 29(1)(b), obliges the State to make further education progressively available through reasonable measures. As such, it is not an immediate entitlement. This qualification, similar to those rights found in sections 26(2) and 27(2) (*cf.* 2.6.1.6.7 & 2.4.1.6.8), as enlightened by Bekink and Brand (2000:180), entails that the State is allowed a certain degree of latitude in its implementation. The latter is acknowledged by Visser (2004c:93) as not surprising in view of the scarcity of State financial resources (*cf.*

3.8.1 & 4.4.1) which is naturally highly relevant in preventing the full realization of an inclusive education system.

2.4.1.6.10.2 Education in the language of choice

The intense debate regarding the language medium in education was, as explicated by Du Plessis (2003:112), one of the burning issues which caused a deadlock in the negotiations on the final SA Constitution (1996a). As a consequence, section 29(2) of the SA Constitution (1996a) is formulated in terms of providing that every learner has the right to be educated in the official *language of his choice* at a public educational institution *if reasonably practicable*.

The inclusion of the inherent limitation, *if reasonably practicable* entails, as highlighted by Bekink and Brand (2000:180), that it is a qualified right which limits the claims of learners on the choice of language of instruction (Tulasiewicz & Adams, 2005:13). Accordingly, the court stated in *Mikro,*[31] that it does not provide a right to receive education in the language of choice at each and every public educational institution. In this case, the Public School Governing Body of an Afrikaans-medium school refused to accede to a request by the Minister of Education to change the language policy of the school so as to convert it into a parallel medium school, so that it would become a fully inclusive school. The Supreme Court of Appeal upheld the decision of the court *a quo* that the school could not be ordered to admit certain learners and to have them taught in English.

Relevant to the aforesaid, Henrard (2003:17) criticizes the embedded limitations, *wherever possible* and *take appropriate measures*, as being vague escape clauses, providing the State with too many options and discretionary powers which could have the effect of enabling the State to frustrate the implementation of mother-tongue education and the inclusive process. The same author maintains that such limitations may assist the State to argue that it does comply with its responsibility by providing inclusive education that is reasonably possible, thus doing only what it can do.

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[31] *Western Cape Minister of Education and others v Governing Body of Mikro Primary School and another 2005 (3) All SA 436 (SCA)*

Although Oosthuizen (2004a:21) interprets section 29(2) (1996a) as providing for education through the medium of the mother tongue *per se*, Van der Vyver (1997:312), Currie and De Waal (2006:636), as well as Malherbe (2006) state that this section only permits education in one of the accredited official languages (including Sign Language, according to the New Language Policy; Department of Education, 1997a) which may, coincidentially, be a learner's mother tongue, as enunciated in section 29(2).

Despite the latter, the Constitutional Court, in the matter of *Laerskool Middelburg*[32], acknowledged the importance of mother-tongue education as it regarded it as the most powerful instrument for extending equal educational opportunities to all South Africans within an inclusive educational system. Congruently, Webb states that the fundamental right of learners to choose the language of instruction should be regarded as of elementary importance since it, in essence, concerns learners' quality of life, their accessibility to all other fundamental rights and privileges, their struggle against the unequal distribution of resources and their struggle against prejudice, discrimination and exploitation (Rademeyer, 2006c:4). Elaborating on this, Alexander (1989:13) asserts that the right of learners to choose (*cf.* 4.6) represents the litmus test for participatory democracy in South Africa and also for inclusion.

The right of choice with regard to the language of instruction at schools poses a formidable challenge in a country with the linguistic diversity of South Africa (Currie & De Waal, 2006:637). The SA Constitution (1996a) itself does not define a policy on language in education and no attempt is made to provide an indication of how education authorities will ensure preferred language medium of instruction or what is considered to be *reasonably practicable* (De Waal, 2000:43).

The above is a shortcoming in the SA Constitution (1996a) which necessitated the Department of Education to define the concept *reasonably practicable* and set Norms and Standards as guidelines for language in education (*cf.* 3.8.3).

Since education in all the official languages of South Africa is not freely and adequately accessible throughout the country, this right can *only* be insisted on where it is indeed reasonably practicable, as illuminated by Van der Vyver

(1997:312). Phatlane (2006) criticizes the practical limitations imbedded in section 29(2) as being incorporated exclusively to let the incoming African learners know that they cannot claim to be instructed through their mother tongue, thus making the inclusion of everybody impossible. Accentuating this argument, Heugh asserts that black parents send their children to English schools because they merely do not have a choice (Rademeyer, 2005:23).

The researcher will, conversely, show that there are numerous other reasons why such parents prefer that their children be educated through the medium of English (*cf.* 4.4.3).

In order to adhere to section 29(2) of the SA Constitution (1996a), the State has an obligation to consider all reasonable educational alternatives (including single-medium institutions) when deciding how to provide education in the language of choice. According to Du Plessis (2003:112), the latter has some, albeit not significant, potential for the realization of single medium Afrikaans institutions. Although section 29(2) does not seem to support the concept of single medium Afrikaans institutions *per se,* institutions were mostly advantaged rather than disadvantaged by past racially discriminatory laws and practices.

In the case of *Laerskool Middelburg,*[33] the High Court was confronted with a conflict between the right to a single-medium school and the right to be educated in the official language of a learner's choice. In deciding that the minority learners (requiring education in a different medium of instruction) must be accommodated, the Court concluded that the right to a single-medium school is clearly subordinate to the right of all learners to education in a similar institution and to a clearly proven need to share education facilities with other cultural societies. The court agreed that education in the language of one's choice is a fundamental right, and even when a single medium institution proves to be impracticable in the particular instance, the obligation remains squarely on the State to provide such education, in whichever way it can justify its action.

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[32] *Laerskool Middelburg en 'n ander v Departementshoof: Mpumalanga Departement van Onderwys en andere 2002 (4) All SA 745 (T)*

[33] *Laerskool Middelburg v Departementshoof, Mpumalanga Department van Onderwys* (note 32 above)

According to Labuschagne (2000:520), South Africa's language policy is currently uncertain. Congruently, Sachs (2005:16) comments that whether or not the provisions of the SA Constitution (1996a), together with other provisions dealing with language in education, achieve the multilingual inclusion of all learners that is so desperately sought to make inclusive education possible, is a question of the future.

Time has, however, caught up with South Africa: a decision on this is already vital.

2.4.1.6.10.3 The establishment of independent educational institutions

Section 29(3) expressly sanctions the right to establish privately-funded education institutions which, according to Bray (2000a:281), is a reflection of freedom of choice (*cf.* 4.6) in education institutions. This implies that parents now have the freedom to choose the kind of school best suited for their children (Paizes, 2006:27).

Within the parameters of section 29(3), the State may not interfere with the establishment of independent schools which may be based on particular needs of culture, linguistic and religious communities.

Although this section refers specifically to independent educational institutions, Malherbe (2004:13-14) explicates that it does not impose an obligation on the State to allow parents to educate their children at home, since it cannot be logically inferred from this section. To clarify matters, the SA Schools Act (84/1996c: section 51(1)) provides for learners to receive education at home as long as such education is in the interest of the learner, meets the minimum requirements and is of a standard not inferior to the standard of education provided at public schools. Despite the failure of section 29 to address aspects such as home schooling which is particularly relevant to inclusive education, numerous other shortcomings were also identified as will be discussed forthwith.

2.4.1.6.10.4 Section 29 inadequacies

Section 29 of the SA Constitution (1996a) does not address the right of equal access to educational institutions. According to Beckmann and Prinsloo (2004:140), the right to equal educational opportunities is probably encapsulated by the right to a basic education and the right not to be discriminated against unfairly (SA, 1996a: section 9; *cf.* 2.4.1.6.3). Supportive hereof, Maithufi (1997:240) explicates that the provision relating to *effective access to educational institutions* is closely related to the equality

provision of section 9 which forbids discrimination based on any of the grounds mentioned therein in relation to access to public schools.

This section is, furthermore, criticized as it does not refer to all universally accepted education rights. Compulsory education is still not part of the right. Unlike the international norm (*cf.* 2.3), it does not guarantee a right to free education (Oosthuizen 2004a:21) either. No general freedom of choice is recognized, although the right to choose between public and private education is provided for, as well as the right to be educated in a preferred language, if reasonably practicable.

Additionally, Visser (2004c:85) acknowledges that yet more criticism may be levelled against section 29. The lack of a sufficient wide provision of freedom of choice in all relevant areas in public education is one such a point. The researcher wishes to add that the vagueness and complexity of the language provision is another, for example the meaning of the concepts *basic education* and *further education* is somewhat obscure. This confuses the issue of clear-cut decisions.

Concurrently, Malherbe (2004:13-14) elucidates that the SA Constitution (1996a) does not make provision for the right of parents to have their children educated in public schools according to their own religious and philosophical convictions. It is therefore important to take notice that there is no express provision which requires the State to respect the right of parents to ensure education in conformity with their own religious convictions in the educational sphere (Liebenberg, 1997:302 *cf.* 2.4.1.6.5).

Because of the above-mentioned and other flaws, Malherbe (2004:13) maintains that section 29 does not enjoy the unqualified support of all stakeholders in education. Underscoring this, Bengu (quoted by Joubert & Prinsloo, 2001:18) emphasizes that the education provisions of the Constitution (1996a), however important, are by no means comprehensive, which requires something more than the Constitution to make complete provision for inclusive education.

2.4.1.6.11 Just administration

Section 33 of the SA Constitution (1996a) provides everyone with the right to lawful, reasonable and procedurally fair administrative action and reasons in writing if his rights are adversely affected by administrative actions. With regard to learners,

Chaskalson correctly stressed that other rights may be withdrawn and granted again, but the rights to life and dignity must always be preserved.

A balancing act of weighing rights and interests against one another in a fair way within the framework of democratic values is, as asserted by Oosthuizen *et al.* (2004:22), required a decision to determine which rights are to take preference. This balancing of interests often creates tension between the parties concerned, which in turn has further negative implications for either one or for both of them. In such events, the question regarding which rights should take preference is a difficult question to answer, since both sides usually rely on their rights which are afforded constitutional recognition and protection in terms of the SA Constitution (1996a).

2.4.1.6.13 Enforcement of rights

According to section 38 of the SA Constitution (1996a), everyone has the right to approach a competent court for relief if it is alleged that a right has been infringed or threatened. The word *threatened* is included to clarify that an applicant may also approach the court to obtain an interdict to prevent future violations of a fundamental right (Currie & De Waal, 2006:85).

The same authors (2006:87) indicate that persons such as parents, educators or persons acting in the public interest may act on behalf of a learner who cannot act in his own name, provided that the represented person consents to the action, or, if this is not possible (in the case of some learners with disabilities), it must be clear from circumstances that he would have consented to the action and that the represented person has a sufficient interest in the remedy requested. The court may then provide relief, which may also include a declaration of rights aimed at resolving a dispute between the parties (Joubert & Prinsloo, 2001:23).

2.4.1.6.14 Interpretation of the Bill of Rights

Section 39 of the SA Constitution (1996a) requires that, when the Bill of Rights is interpreted, such an interpretation must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

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[35] *S v Makwanyane and Mchunu* (note 18 above)

According to Joubert and Prinsloo (2001:16), the challenge lies in trying to furnish meaning to the values and promoting a society that will celebrate them, rather than trying to get people to follow these values by threatening them with the law if they do not. The same authors are of the opinion that there are, unfortunately, no clear criteria for understanding what these values imply, nor have any guidelines been provided for distinguishing between competing values such as *equality* and *freedom*. Joubert and Prinsloo (2001:16) put forward the difficulty of many different answers when it comes to competing fundamental rights.

Section 39 (1)(b) (1996a) provides that international law on fundamental rights must be considered by courts, while the law of other countries may be considered. Rosa and Dutschke (2006:244) maintain that the value attached to international law will vary, since a binding international law such as the CRC (*cf.* 2.3.2) should, in principle, be directly applicable in Courts, whereas non-binding agreements are technically only of influential value.

Since the constitutional supremacy (1996a: section 2; *cf.* 2.4.1.3) has fundamentally changed South Africa's approach to the interpretation of laws, courts have to ask specific questions in terms of section 39(2) when they interpret and apply ordinary laws (Bray, 2000:270). The consequences hereof are that a normative approach (to find the purpose) has to be followed though which the courts shall aim at promoting constitutional values and norms while pursuing the ideals as expounded in the SA Constitution (1996a).

2.5 SUMMATION

In Chapter 2 emphasis was placed on the fundamental rights of learners in general. Specific reference was made to the most relevant international instruments applying to these rights, since section 39(1)(b) of the SA Constitution (1996a) prescribes that courts must consider international law when interpreting the Bill of Rights. It is also important to note that this is not confined to international instruments that are binding on South Africa. The fact that South Africa is at present party to relatively few international human rights agreements is therefore not an obstacle to invoking international human rights law for the purposes of section 39(1)(b) (1996a).

Various international instruments call for equal education opportunities and access to schools without unfair discrimination, and a right to education, which must be free

and compulsory. International documents prescribe that education must be directed at the full development of learners and at the strengthening of respect for the fundamental rights and freedoms of each learner.

Since the SA Constitution (1996a) is regarded as the supreme authority in South Africa, and since it contains the Bill of Fundamental Human Rights, the Constitution was discussed in length. One of the foremost challenges set by the SA Constitution is to *free the potential of each learner* and to equalize the education system in order to produce equality or equity in outcomes for all learners who pass South African school gates.

From the discussion in Chapter 2, it not only became clear that the fundamental rights of learners are protected as being of cardinal importance within the overall educational sphere, but also that learners are independent bearers of rights and obligations. In adapting a constitution based on democracy, equal citizenship and the protection of fundamental rights, South Africans have created a completely new basis for policies towards the provision of schooling in future.

It also became apparent that the right to basic education, which the State has the primary responsibility to ensure, unlocks many other rights and is a right that ultimately will decide whether, in a sense, the wonderful sentiments expressed in the SA Constitution (1996a) can be given effect to.

The SA Constitution (1996a) provides South Africa with a new dream regarding the acknowledgement and protection of the fundamental human rights of learners. This is of particular importance as the theme of reducing the discrepancies in the life chances of all South Africans runs right through the SA Constitution (1996a), from the forceful opening words of the Preamble to the reminder of the past contained in the powerful postscript.

In light hereof, Chapter 3 concentrates on the provision and protection of learners' fundamental rights by subsequent legislation and policy documents in South Africa within an inclusive education system aiming at realizing such a dream.

CHAPTER THREE

INCLUSIVE EDUCATION WITHIN A SOUTH AFRICAN LEGAL FRAMEWORK

3.1 INTRODUCTION

Since the SA Constitution (1996a; *cf.* 2.4) has a significant effect on the study and practice of law and education in South Africa (Davis *et al.*, 1997:231), the fundamental rights of learners within a constitutional framework were addressed in Chapter 2. Attention was also drawn to international instruments, as international and South African perspectives regarding the principle of inclusion are closely related to a wider social concern about fundamental rights (Engelbrecht *et al.*, 2004:viii; cf. 2.3).

According to Pottas (2005:23), the implementation of inclusive education should, first of all, be evaluated against the framework of relevant education policies. In this context, Motala and Pampallis (2001:14) expound that the priorities of national governments can be determined through an examination of their legislation and other policy documents.

The purpose of Chapter 3, therefore, is to enumerate and explain existing South African education policies and subsequent legislation, as well as accompanying White Papers, relevant to an inclusive education system propounding the effective implementation of the fundamental rights of all learners in South Africa. Education policies and subsequent legislation are discussed, as they represent the basis for the establishment and coordination of the education system (Steyn, Steyn & De Waal, 2001:7). In addition, various White Papers are dealt with, given that they aim at extending, rather that replacing them (SA, 2001:56).

First of all, it is necessary to scrutinize the background to the composition of policies on inclusive education.

3.2 BACKGROUND TO THE COMPOSITION OF POLICIES ON INCLUSIVE EDUCATION

According to Bray (2000a:267), education was the hardest hit by the harsh apartheid system in South Africa. Within the purview of the fundamental rights of learners

enshrined in the SA Constitution (1996a, *cf.* 2.4), a fundamental rights culture must be created in South Africa. Subsequently, the State is obligated to develop policies as a basis for the creation of plausible conditions for the implementation of a new unified, inclusive system of education and training (Monyooe, 2005:3).

The SA Constitution (1996a) has vested substantial powers in the provincial legislatures and departments to run educational affairs subject to a national framework. The Department of Education is responsible for matters that cannot be regulated effectively by provincial legislation or that need to be coordinated at a national level and also for preparing government policy on education for South Africa as a whole (South African Yearbook, 1999; *cf.* 3.5.1).

In line with the above, the National Education Policy Act (27/1996b; hereafter referred to as the SA Policy Act) empowers the Minister of Education to formulate policy and to determine national norms and standards for education planning, provision, governance, monitoring and evaluation.

In establishing an education and training system for the twenty-first century, the State carries a special responsibility to implement the values enshrined by the SA Constitution (1996a) and to ensure that all learners, regardless of their individual abilities, pursue their learning potential to the full (SA, 2001:11; *cf.* 2.4.1.6.3). In this regard, Rademeyer (2006b:19) refers to Mbeki's (President of South Africa) view that the respect a society has for fundamental rights, can be measured against the way in which such a society treats its most vulnerable members such as the disabled and children (*cf.* 3.3.1.1 & 4.3.5).

In order for South Africa to give effect to the fundamental rights of all learners equally, changes to existing practices in the sphere of education are essential (Peel, 2005). The education system has to move from one of segregation and discrimination to a unified, centralized, national system (SA, 2001:Introduction) which serves the needs and interests of all learners and upholds their fundamental rights (27/1996b: Preamble; *cf.* 3.4.2).

Since 1994, the South African government has been committed to transforming the education policy (Muthukrishna, 2000) which must be evaluated against the background of the reality of a negotiated settlement. It must also be examined in respect of the constitutional injunction to heal the divisions of the past and to

establish a society based on democratic values, social justice and fundamental rights (271996b: Preamble; *cf.* 2.4.1.1 & 3.4.2).

Pottas (2005:23) highlights the positive information that policy development has consequently received attention, resulting in policy documents, subsequent legislation and White Papers emerging to reflect the commitment of the government to address diversity among the learner population, to provide a continuum of support within a democratic South Africa and to uphold the fundamental rights of all learners.

According to Bray (2000a:267), there is no doubt that education can (and will) provide the key towards attaining a democratic, open and accountable government for South Africa. Section 3 of the SA Policy Act (27/1996b) provides that a national policy will be determined through broad public participation, while the representation of stakeholders in the governance regarding all aspects of the educational process will be ensured. In this regard, Bray (2000a:273) stresses the importance that all educational role players and institutions need to exercise on-going self-examination and continuously measure their policies and practices against fundamental rights values.

The National Education Policy Act (27/1996b: section 4(a)) is directed at the advancement and protection of the fundamental rights of every learner and at enabling the education system to contribute 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 (27/ 1996b: section 4(b)).

In addition, education policy and legislation with respect to learners with disabilities reflect a move away from a welfare approach to a rights and developmental approach (*cf.* 2.1). In view of the legacy of racial discrimination, and the neglect and marginalization of various sectors of the population previously, the State is now committed to restoring the fundamental rights of all marginalized groups (*cf.* 3.3.2 & 4.3.5). As a result, a strong human rights emphasis is evident in all educational policy and legislation (Muthukrishna, 2000).

It is the responsibility of the Department of Education to translate various education and training policies consistent with the provisions of the SA Constitution (1996a) into a national education policy and legislative framework and to ensure that all levels of

the system adhere to national policies and laws, that mechanisms are in place to monitor and enhance quality in the system, and that the system is on par with international development (South African Yearbook, 2005/6:209).

The above-mentioned functions are essential, since legislation is an imperative tool which can be used to promote the fundamental rights of learners as a reference point for redress and to offer enforceable support. However, to have legislation in place, but no mechanisms to translate it into reality (Department of Education, 1997a:57; *cf.* 4.1), is meaningless as it may lead to legislation that will only become something that is an ideal without any practical use (Judge Madala; Soobramoney-case)[36].

In this regard, Pigozzi (1999:3&5) advises that there must be an enabling legislative framework that does more than pay lip service to guaranteeing all learners' rights. Such a framework must facilitate the necessary changes in the education system, both at macro and micro levels, while being more sensitive to meeting learners' fundamental right to education.

Moreover, despite the constitutional framework being in place, Thro (2004:9) recognizes that there is still a long way to go before educational opportunities will have been created that enable learners with different backgrounds, needs, abilities and preferences to achieve their potential within the complexities of modern society (*cf.* 4.4). Tobin (2005), equally, states that the constitutional recognition of learners' fundamental rights offers no guarantees with respect to the enjoyment of their rights. At a minimum, it legitimates political discourse on children's rights, allowing children to be seen and, increasingly, heard.

In a paper read at the South African Principals' Association's Annual Conference, Pendlebury (2002) pointed out that although South Africa is a new democracy with one of the most progressive constitutions in the world, there are still numerous recent examples of brutality such as wide-spread violence, rape, vandalism and even the refusal by pre-schools to admit HIV positive learners.

Another difficulty, as illuminated by Visser (2004a:150), is that there appear to be too many educational experiments, especially in school education. Although everyone

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[36] *Soombramoney v Minister of health, KwaZulu-Natal.* (note 25 above)

should naturally support continued review, renewal and improvement in education, the introduction of certain unrealistic or ill-advised educational programmes or approaches may create obstacles to achieving meaningful quality and equality. The same author explains that education is so important that it is, in any event, hardly the place for ill-advised experimentation.

Pigozzi (1992:2), however, cautions that it must be recognized that continued attention to supporting learners' fundamental rights does not mean that education systems must change overnight, as it would be unrealistic. Congruently, Fullan and Stiegelbauer (1982:xiii) allude that educational reform entails much more than just putting the latest policy into place, it means changing the culture of, among others, classrooms and schools.

All this information attests to the encouraging fact that education experts and State authorities are orientated in the right direction. It is now essential to probe the basic concepts of this study.

3.3 THE CONCEPTS OF EXCLUSION, MAINSTREAMING, AND INCLUSION

In order to assess the efficacy of an inclusive educational system as the best to give effect to learners' fundamental rights, it is necessary to establish precisely what is meant by concepts such as exclusion, mainstreaming and inclusion.

3.3.1 The concept exclusion

Young (quoted by Pendlebury, 2002) distinguishes between external and internal exclusion. Externally excluded groups remain outside both the domain of distribution for public services and outside public deliberative arenas. External exclusion can be imposed in many different ways, for example through policies, practices (such as the domestic confinement of women in some societies) and, in the case of some learners with disabilities, through their parents' shame to acknowledge their existence or even through sheer public differences.

Internal exclusion, on the other hand, can be much more insidious. Here there is a pretence at inclusion where previously excluded groups may have been brought into the public domain, sometimes in response to their own protests at exclusion, but who, nonetheless, remain on the margins of deliberation, silenced or ignored by

dominant terms of discourse and privileged styles of action and expression (Pendlebury, 2002; *cf.* 4.7).

According to Sookrajh, Gopal and Maharaj (2005:2), many vulnerable learners are destitute and often denied basic education because they cannot gain access to schooling. Bray (2000a:274), equally, points out that the history of South Africa is chequered with examples of differentiation which serves the purpose of exclusion rather than of inclusion. It is also recognized that the schooling system has for decades been a brutal instrument of oppression against the intellect and aspirations of South Africa's youth (Department of Education, 2003c:2-3; *cf.* 2.4.1.6.3). In the past there were, for instance, extreme discrepancies in the provision of specialized education for the different race groups and virtually no provision for black learners with disabilities at preschool level (WCED, 2002; *cf.* 4.4.5.1).

Social and educational justice also challenges several widely held assumptions sustaining exclusion, which include deeply-held, false beliefs about the impossibility of ever including all learners at regular schools and the so-called sanctity of parental choice (CSIE:1).

3.3.1.1 Sustained exclusion of learners with special educational needs

Learners who need special resources, curriculum adaptations or different assessment strategies to assist them with their learning are often referred to as *learners with special education needs*. They are tested by school psychologists and, depending upon their Intelligence Quotient score, receive instruction either in special classes at mainstream schools or at special schools or are totally excluded from all education opportunities on the grounds that they are *too severely disabled* (SA, 1997b:4; *cf.* 3.7.2, 3.7.3 & 4.3.2).

In the past, not all education departments made provision for learners with special educational needs while disadvantaged communities were totally marginalized. Such learners were separated and categorized not only on the grounds of their educational needs, but also on the basis of race and culture (WCED, 2002).

It is tragic to think that the vast majority of learners with disabilities were excluded from society and were prevented from accessing fundamental social, political and economic rights, due to the fact that society has hitherto regarded them as incapable,

ill and as deficit-laden dependants on society (SA, 1997b:2; *cf.* 3.8.2 & 4.4.2). Such learners were seen as a problem to be dealt with separately from other learners' issues (SA, 1997b:4). They were often born and grew up perceiving themselves as worthless and believing that their disability was an economic and social curse and a burden on their families, as well as on society.

Social arrangements routinely and systematically marginalized and disadvantaged learners with disabilities. Therefore disability was often not an affliction from which individual learners suffer, but rather something which was created by the refusal of dominant groups in society to create social conditions in which learners with disabilities might exercise the full rights of citizenship and receive their full benefits of social participation (Dyson & Forlin, 2004:27; *cf.* 4.3.2).

Consequently, the majority of young learners with disabilities are currently accommodated in Early Childhood Development centres, while learners with intellectual disabilities are often housed in informal community-based care centres run by parents of children with disabilities (SA, 1997b:39).

The Department of Education (Department of Education, 1997a:2&7) affirms that aspects such as poverty, unemployment, inaccessible public transport services and social isolation are some of the key forms of exclusion responsible for the cumulative disadvantage of learners with disabilities which continue to give rise to the so-called *out-of-school, out-of-work* youth with disabilities who have little or no access to formal education.

In connection hereto, Monyooe (2005:1) tells the story of how a girl whose physical disability and the systematic disregard for her constitutional fundamental rights dashed her life-time dream and passion to become a lawyer in a democratic South Africa. As a consequence of her disability, she was excluded from life, lost her identity and was denied many developmental opportunities as a South African.

In order to prevent continuation of the above, the National Disability Strategy (SA, 2001:10) condemns the exclusion of persons with disabilities from the mainstream of society and emphasizes the need for including persons with disabilities in the workplace, social environment, political sphere and sport arenas. The Ministry of Education supports this direction and regards the establishment of an inclusive

education and training system as a cornerstone of an integrated and caring society (SA, 2001:10).

Fortunately, all learners, regardless of their abilities or disabilities, are now entitled to a basic education (1996a: section 29; *cf.* 2.4.1.6.10). This is in accordance with the CRC (UN, 1989; *cf.* 2.3.2) which indicates that no learner should be discriminated against and that every learner has the right to receive education.

3.3.2 The concept mainstreaming or integration

Mainstreaming refers to one of the more complex changes on the education scene, as it highlights the dimension of change and the magnitude of the task in bringing about major education reform (Fullan & Stiegelbauer, 1982:41; *cf.* 2.1).

In mainstream education, priorities include multi-level classroom instruction, so that educators can prepare main lessons with variations that are responsive to individual learners' needs, as well as cooperative learning, curriculum enrichment and dealing with learners with behavioural problems (SA, 2001:18; *cf.* 3.8.5.5 & 4.4.5.2).

According to Swart and Pettipher (2005:7), mainstreaming is the educational equivalent of the normalization principle which suggests that learners with special educational needs have a right to life experiences that are the same as, or similar to, those of others in society. Engelbrecht (2004:7) and Sullivan (2005:1) expound that mainstreaming concerns the selective integration of learners with special needs into mainstream classes on a case-by-case basis, depending on the needs of each learner and the demands of the specific class (*cf.* 4.3.4). It does not challenge or alter the organization and provision of the curriculum for all learners, but focuses on an individual or small group of learners for whom the curriculum is adapted, different activities devised or support assistants provided. In support, Shirk, Slavin, Meier, Rudd and Potter (2005) refer to mainstreaming as the placement of learners who experience barriers to learning and development in the general education classroom, only for those areas of instruction in which the learners' academic and behavioural performance is within the range of their peers and is not negatively impacted by their special needs.

Conversely, supporters of mainstream education, as affirmed by Fredericks and Cline (2002:65; *cf.* 3.6.2 & 4.3), assume that learners must earn the opportunity to be

mainstreamed by demonstrating the ability to keep up in mainstream classes which remain unaltered and do not need to be ready to receive or accommodate all learners.

White Paper 6 (SA, 2001:17) describes mainstreaming or integration as focusing on changes that need to take place within learners so that they can fit into a particular system or be integrated into an existing system by providing them with extra support to adapt to the normal classroom routine. Learners are assessed by specialists who diagnose and prescribe technical interventions, such as the placement of learners in certain programmes. Accordingly, the promise of an integrating system tolerating and incorporating differences in abilities among learners, remains largely unfulfilled within mainstream education (Swart & Pettipher, 2005:7).

To the contrary, courts in the USA have, on several occasions, reflected on the benefits of regular classroom placements. In the *Oberti*[37]case the court, for example, compared the education benefits that a learner would receive in a regular classroom along with supplementary aids and services to the benefits he would receive in a special classroom. *In casu,* the court decided in favour of a more inclusive placement, while referring to the fact that schools must include learners in school programmes to the maximum extent possible and that schools are required to make greater efforts to mainstream learners with disabilities.

Conversely, the USA court in *Clyde K v Puyallup School District*[38] decided that a learner with Tourette Syndrome should rather be placed in a special education class, since he would not benefit academically or socially from regular classroom placement. Consistent with the latter decision, the court found, in *Poolaw v Parker*[39], that the benefits of regular classroom placement were minimal and that the learner's educational needs could be met appropriately only by placement offered by special classroom placement.

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[37] *Oberti v Board of Education of the Borough of Clementon School District (3rd Circuit Court) 1994*

[38] *Clyde K. v Puyallup School District 1994 USA*

[39] *Poolaw v Parker Unified School District (Federal District Court) 1994 USA: Arizona*

The Court concluded, in the case of *Daniel,*[40] that academic achievement is not the only purpose of mainstreaming. It was accentuated that the integration of a learner with a disability into a non-disabled environment such as a regular classroom where he can receive a satisfactory education, even if it is not the best academic setting, may be beneficial in and of itself, even if the learner cannot flourish academically. Therefore, it was accentuated that non-academic benefits must also be considered when placing learners into mainstream schools (*cf.* 3.8.1.2). When deciding on whether learners with disabilities should be included in regular classes, the court concluded that there are four aspects that should be taken into account, namely the educational and socialization benefits for the learner in question, the implication of such placement on the other learners and the cost of such placements.

3.3.3 The concept inclusion

The effectiveness of current educational systems is questioned as a result of changing needs. This leads to the concept of inclusive school practices as a philosophical basis for the development of one education service delivery system to serve all learners equally (Pottas, 2005:19; *cf.* 1.2).

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[40] *Daniel R.R. v State Board of Education 1989 USA: Texas*

However, Swart and Pettipher (2005:3) warn that the term inclusion can easily become a cliché if individuals do not possess an in-depth understanding of its meaning and examine closely the underlying values it is based on. In this regard, Muthukrishna (2000) suggests that many educational managers and educators involved in the inclusion process are not acquainted with the fundamentals thereof. Many of them come from a system where learners who experienced learning breakdowns were merely referred for remedial support - only available to advantaged communities - provided outside the ordinary class by specialists (Muthukrishna, 2000).

Inclusiveness which, according to Landsberg (2005:v) involves an ideology that liberates people from their own prejudices and short-sightedness, is no new idea. Swart and Pettipher (2005:3), on the other hand, emphasize that inclusion is a complex concept which requires a comprehensive theoretical and philosophical framework, drawing on theories of educational change and analysing paradigm shifts in educational support to understand it and what it entails fully.

Draft White Paper 5 (Department of Education, 2002) defines inclusion as:

- a never-ending process of increasing the participation of learners and reducing their exclusion from culture, curricula and communities of local centres of learning;
- the acknowledgement that all learners can learn and that all learners need support;
- the enabling of educational structures, systems and learning methodologies to meet the needs of all learners; and
- a process which acknowledges and respects differences in learners, whether due to, among others, age, gender, ethnicity, language, class, disability or HIV status.

Consistent with White Paper 6 (SA, 2001:16-17), inclusive education and training are concerned with the following aspects:

- accepting and respecting that all learners are different in some way and have different learning needs which are valued equally and an ordinary part of our human experience;

- changing attitudes, behaviour, teaching methodologies, curricula and the environment to meet the needs of all learners;
- maximizing the participation of all learners in the culture and the curricula of educational institutions, as well as uncovering and minimizing barriers to learning;
- empowering learners by developing them to participate critically in the process of learning;
- recognizing and respecting the differences among all learners and building on the similarities;
- supporting learners, educators and the system as a whole so that the full range of learning needs can be met. The focus is on teaching and learning factors, with the emphasis on the development of good teaching strategies that will be of equal benefit to all learners; and
- focusing on overcoming barriers in the system that prevent it from meeting the full range of learning needs and on the adaptation of support systems available in classrooms.

In order to hold to the above-mentioned aspects, the transformation to a new education system is necessary.

3.4 AN INCLUSIVE EDUCATION SYSTEM

Inclusive education is not understood as merely the reform of special education, but rather as an attempt to restructure educational systems as a whole, to meet the needs of a changing society and to adapt special educational systems (Pendlebury, 2002; *cf.* 1.2 & 4.2). It therefore needs to be put into perspective.

3.4.1 Introduction

UNESCO (1994:ix) proclaims that a unified education system with an inclusive orientation is the most effective means of giving effect to the fundamental rights of learners by combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all (*cf.* 4.3.1). Moreover, UNESCO propounds that a unified system will provide education to the majority of learners and will improve the efficiency and ultimately the cost-effectiveness of

education provision. Enlisting these benefits, White Paper 6 (SA, 2001:10) promotes a systematic move away from using segregation according to categories of disabilities as a principle for the organization of education institutions.

Additionally, the Policy Paper on Quality Education for All (Department of Education, 1998b) expresses a commitment to the development of inclusive sites of learning. This includes a commitment to include learners who have been excluded from ordinary schools thus far (Lazarus, Daniels & Engelbrecht, 2004:46).

The approach of addressing barriers to learning and exclusion, as set forth by White Paper 6 (SA, 2001:19), is consistent with a learner-centred approach (*cf.* 1.2) to learning which recognizes that developing all learners' strengths, empowering learners and enabling learners to participate actively and critically in the learning process involve identifying and overcoming the causes of learning difficulties. It is also consistent with international approaches that focus on providing quality education for all learners (*cf.* 2.3, 3.5.1 & 4.2.1).

3.4.2 Adopting a unified education system

Inclusive education aims at establishing a unitary system that has educational benefits for both typical learners and learners with special education needs, and will thus provide quality education for all learners (Pendlebury, 2002; *cf.* 3.5.1).

In 1995, the South African Federal Council on Disability called for the development of a single inclusive education system. The central theme of this Council was that learners with special education needs have a right to equal access to education which is responsive to diversity and accommodates different learning styles and different languages, while ensuring quality education for all learners through appropriate curricula, organizational arrangements, technical strategies, the use of resources and partnership with the community (SA, 2001:11; *cf.* 3.6).

In line herewith, the National Education Policy Act (27/1996b) accepts that it is necessary to adopt legislation to facilitate the democratic transformation of the national education system into one which serves all learners' needs and interests and which upholds learners' fundamental rights. Section 4 of this Act (27/1996b) refers to certain directive principles aiming at protecting the constitutional rights of everybody in respect of education, contributing to the full personal development of

each learner and to the development of the nation at large, achieving equity in educational provision, providing opportunities for life-long learning and cultivating skills, disciplines and capacities necessary for reconstruction and development (*cf.* 2.4.1.1, 3.2, 3.6 & 4.2.2).

The aim of section 4(m) of this Act (27/1996b) is to ensure broad public participation in the development of an education policy and the representation of stakeholders in the governance of all aspects of the education system (*cf.* 3.4.3).

In accordance, the SA Schools Act (84/1996c: Preamble) aims at the implementation of a uniform national education system for the organization, management and financing of schools, as well as at matters connected to these which will redress past injustices, promote acceptance of accountability and set uniform standards for education.

The long-term goal of White Paper 6 (SA, 2001:5) is the development of an inclusive education and training system which will promote education for all by uncovering and addressing barriers to learning and by fostering the development of inclusive and supportive centres of learning that would recognize and accommodate the diverse range of learning needs. Such centres will enable learners to develop optimally, to extend their potential and to participate as equal members in society.

The Department of Education (Department of Education, 2003c:7), which drives a shift away from disability theories, assumptions, practices and models to a non-disability inclusive system of education, recognizes (Department of Education, 2003c:26) that the implementation of White Paper 6 (SA, 2001; *cf.* 2.4.1.6.3) initiatives will create the conditions for real redress and equity for the recipients of educational service delivery in South Africa.

3.4.3 Inciting changes towards an inclusive education system

White Paper 6 (SA, 2001:11) outlines how the education system must transform itself to accommodate the full range of learning needs and the mechanisms that should be put in place in order to establish a caring and humane society. As a result, this White Paper provides a framework for establishing an inclusive education and training system, details a funding strategy and lists key strategies to be adopted over a

twenty-year period to build an open, lifelong and high-quality unified education system in South Africa (SA, 2001:5; Department of Education, 2003c:14).

Moreover, White Paper 6 (SA, 2001:12; *cf.* 3.4.2) recognizes that the implementation of policy into practice will require a vigorous participation of all social partners in order for social exclusion and negative stereotyping to be eliminated. Public awareness and acceptance of inclusion, the uncovering of negative stereotypes, advocating unconditional acceptance and winning support will therefore be essential for the successful establishment of an inclusive society and education system (SA, 2001:33).

Likewise, Bengu, a previous Minister of Education (SA, 1995:2), maintains that education and training must change and that everyone must accept the challenge to create a system which cultivates and liberates the talents of all learners without exception. In addition, White Paper 6 (SA, 2001:24; *cf.* 1.2, 3.7.2 & 4.4) explains that the establishing of an inclusive education system will require changes to mainstream education so that learners experiencing barriers to learning can be identified early and, accordingly, be provided with appropriate support.

The Department of Education (SA, 2001:25) believes that the inclusion of most learners with disabilities will require minor curriculum adaptations, rather than major structural adjustments or sophisticated equipment. In 2003 it was, once more, emphasized that government remains committed to a schooling system that is inclusive and widely representative of society, and to quality enhancement across the entire spectrum of the system (Department of Education, 2003c:2).

These attributes are essential because very child has a fundamental right to education.

3.5 THE FUNDAMENTAL RIGHT TO EDUCATION

Referring to the right to education in particular, it is argued in the White Paper on Education and Training in a Democratic South Africa (SA, 1995:40) that such a right applies to everyone, that basic education is a legal entitlement to which every learner has a claim and that attaining availability of the opportunity for basic education will be an immense achievement in the reconstruction and development of South Africa (*cf.* 3.6, 4.2.2 & 4.3).

Accordingly, the National Education Policy Act (27/1996b: section 4(d); *cf.* 1.1) aims at ensuring that no learner is denied the opportunity to receive an education to the maximum of his ability. Since compulsory education is the cornerstone of any democratic society that aims to offer all citizens a fair start in life and equal opportunities as adults (Department of Education, 2003c:4; *cf.* 2.3, 2.4.1.6.3, 3.6 & 4.2.2), the SA Schools Act (84/1996c) makes schooling compulsory for all learners aged seven to fifteen. The latter was amended through the Education Laws Amendment Bill of 2002 (SA, 2002a), as adjusted in 2003. The compulsory school-going age of learners in Grade 1 was altered to age five if they turn six on or before 30 June in their Grade 1 year.

Section 3 of the SA Schools Act (84/1996c), which forms the legal foundation for compulsory school attendance in the country, specifically protects learners' right to education. Section 3(1) provides specifications concerning the period of compulsory education adequate in satisfying any reasonable interpretation of *basic education.* According to Joubert and Prinsloo (2001:39), this section imposes a duty only on parents (and not on learners) to ensure compliance with the provisions of compulsory school attendance. Therefore it is the legal responsibility of parents to ensure that their children attend school every day. It is clear that at some stage, school principals and governors will have to abide by the SA Schools Act (84/1996c) in order to provide learners of school-going age the opportunity to exercise their right to receive basic education.

Section 3(3) of the same Act (84/1996c) contains the provision that it is the duty of each Member of the Executive Council to ensure enough place to accommodate all learners of compulsory school age at schools in that province. Beckmann and Prinsloo (2004:137) draw attention to the fact that section 3(3) also stipulates that Members of the Executive Council should report annually to the Minister of Education concerning what they have done to correct the shortage of schools, which implies that the immediate access to the full scope of the right to education was not envisaged (*cf.* 2.4.1.6.10). Additionally, section 3(4) of the SA Schools Act (84/1996c) confers on the Head of Department the power to exempt a learner entirely, partially or conditionally from compulsory school attendance if it should prove to be in the learner's best interest according to section 28(2) of the SA Constitution (1996a). In order to provide education to all learners to develop their full potential in accordance

with the fundamental right to education, quality education is essential (*cf.* 2.4.1.6.10 & 4.2.1).

3.5.1 A strive for quality education

The main objectives of the South African Qualification Authority Act (58/1995) are to oversee the development of a National Qualifications Framework and to enhance the quality of education and training. In addition, this Act sets national standards to assure quality education.

According to the SA Constitution (1996a), basic education is a fundamental right and is regarded as one of the most important of a child's moral and legal rights, as children may not be able to develop their personalities, talents and mental or physical abilities to the fullest of their potential without it (Malherbe, 2006; *cf.* 2.4.1.6.10).

The importance of education, as a component of human dignity, is also emphasized by Tibbitts (2006), as well as by Du Plessis and Conley (2006), who regards education as an indispensable means to appreciate and exercise fundamental rights, to develop the ability to make political and civil choices, and to be able to access economic and social rights.

Concurrently, the National Education Policy Act (27/1996b: section 4(l); *cf.* 3.2) aims at enhancing the quality of education and educational innovation through systematic research and the training of educators and educational managers. This Act (27/1996b) also provides for the monitoring and evaluation of the standard of education through sections 8(3) and 8(4). A report will be issued on the results of each investigation, in accordance with section 8(5). In this regard, section 8(6) provides that if a report prepared in terms of subsection 8(5) indicates that the standards of education provision, delivery and performance in a province do not comply with the SA Constitution (1996a) or with the policy determined in terms of section 8(3) of the SA Policy Act (27/1996b), the Minister shall inform the provincial political head of education concerned and require the submission within ninety days of a plan to remedy the situation.

With reference to quality education, section 20(1)(a) of the SA Schools Act (84/1996c) stipulates that Public School Governing Bodies must promote the best interests of the school and strive to ensure its development through the provision of

quality education for all learners at the school. Additionally, Muthukrishna (2000) explicates that the emphasis on quality education for all learners suggests that schools have to meet the diverse needs (*cf.* 3.6.2, 4.2.2.1 & 4.4.1) of all learners.

Whirter *et al.* (2004:31), however, show that schools and communities too often fail to allow learners to affirm their worth to themselves and others by not providing them with meaningful roles to assume responsibility or to participate effectively. In this regard, the SAHRC (2006:36) indicates that where education experiences impact negatively on a learner's dignity, his right to a basic education is not fulfilled. Similarly, Theron and Dunn (2006:492) point out that when learners are not stimulated sufficiently or are inactive or not exploratory, their cognitive development lags.

Whenever the State does not provide quality or adequate education to all learners, especially to those among the very poor in the townships and rural areas, Malherbe (2006) posits that it violates not only the right to basic education (*cf.* 2.4.1.6.10), but also the right to equal protection and benefit of the law (*cf.* 2.4.1.6.3), and is thus definitely not in the best interests of learners (*cf.* 2.4.1.6.9 & 4.3).

Visser (2005:414) cautions that the dangerous illusion may exist that, since there is a sufficient number of public schools at which millions of learners can be accommodated without fear of discrimination, the State is indeed fulfilling its constitutional obligations. However, access to schools with low quality education or which are poorly managed, is obviously not what learners' fundamental right to basic education entails, since quality is as necessary as equality in education, extrapolate to inclusive education.

Following this, Nieuwenhuis (2005:193) stresses that the numerous overcrowded, poorly resourced and poorly managed schools provided by the State are clearly not ready to provide the quality of education needed to ensure that learners, who complete their education at such schools, will not have inferior education in comparison to learners who attend well-resourced, well-managed schools.

Despite various activities on the policy and structural front, Parker (2003:18) asserts that they have, thus far, resulted in few improvements in the quality of education available to the majority of the population.

Visser (2004d:283) expounds his conviction that, if education provision to learners falls below the standard to be expected in terms of the SA Constitution (1996a) and other applicable laws, learners and/or parents could possibly have a delictual claim in respect of patrimonial loss such as wasted expenditure, loss of earning capacity and other losses caused by misrepresentation, as well as non-patrimonial loss associated with poor educational practices.

3.5.2 Free education: an unfulfilled dream

The Department of Education declared in 2003 (Department of Education, 2003c:24) that the State does not believe that a complete school fee ban is the optimum solution. It is deemed that abolishing school fees would lead to privileged classes leaving public schools and rather creating a separate schooling system. Another reason is the anticipation that such funds could be used to supplement the resources of poorer schools (SAHRC, 2006:12).

Although free education in line with international documents (*cf.* 2.3) is not yet a reality in South Africa, the Department of Education reiterated its commitment to provide the basic fundamental right to free education of a high quality to all learners in South Africa in future (Department of Education, 2003c:4; *cf.* 3.8.1.1, 4.2.1.1 & 4.3.2).

3.6 EQUAL EDUCATIONAL OPPORTUNITIES

Even though section 29 of the SA Constitution (1996a, *cf.* 2.4.1.6.10) does not refer to the right of equal access to educational institutions, Visser (2005:405) suggests that it is clear that equal access to schools and, therefore, equal learning opportunities are governed by section 9 of the SA Constitution (1996a, *cf.* 2.4.1.6.3) which, among others, outlaws any form of discrimination, including the marginalization of certain learners (Monyooe, 2005:20).

Beckmann and Prinsloo (2004:140) agree with Visser as they point out that the right to a basic education (1996a: section 29; *cf.* 2.4.1.6.10), the right not to be discriminated against unfairly (1996a: section 9) and claims to redress, encapsulate the right to equal educational opportunities (*cf.* 1.2 & 4.2.2). The State's obligation to provide basic education to all learners is also guided by the recognition that a new

unified education system must be based on equality, on redressing past imbalances and on the progressive raising of the quality of education and training (SA, 2001:11).

Moreover, Visser (2005:405) points out that any denial of access to schools which does not constitute a legitimate limitation of the right to equality, will be unconstitutional according to section 36 of the SA Constitution (1996a; *cf.* 2.4.1.6.13).

Correspondingly, the SA Policy Act (27/1996b) commits itself to protect every learner against unfair discrimination within or by an educational department on any ground whatsoever (27/1996b: section 4(a)(i)) and to advance and protect the fundamental right of every learner to basic education and equal access to education institutions (27/1996b: section 4(a)(ii)), while aiming at achieving equitable educational opportunities, redressing past inequality and advancing the status of women (27/1996b: section 4(c)).

The fundamental right to equality and to a basic education, as laid down by the SA Constitution (1996a: sections 9 & 29), has been translated into the SA Schools Act (84/1996b: Preamble). The purpose and objectives of this Act are set out in the Preamble which is of vital importance in understanding its provisions, as providing education of a high quality, of combating racism and sexism, as well as protecting and advancing diverse cultures and languages, and upholding the rights of learners, their parents and educators.

In order to strengthen equal and fair access to educational institutions further, provisions have been included in the Promotion of Equality and Prevention of Unfair Discrimination Act (4/2000). For example, unfair practices such as excluding learners, withholding scholarship or failure to accommodate diversity in education reasonably and practically, are specifically prohibited (Visser, 2005:406).

The aims of the Standard Rule on the Equalization of Opportunities for learners with disabilities, as contemplated in a White Paper (SA, 1995:16), are to imply a strong moral and political commitment by the State to take action for the equalization of opportunities for learners with disabilities, to offer an instrument for policy-making and action in order to ensure that all learners with disabilities may exercise the same rights and obligations, and to outline crucial aspects of social policies in the field of

disability and provide models for the political decision-making process required for the attainment of equal opportunities.

The White Paper on a National Disability Strategy (SA, 1997b:10) stresses that an understanding of disability as a fundamental rights and development issue will lead to the recognition and acknowledgement that learners with disabilities are equal citizens and a natural and integral part of society as a whole and should therefore enjoy equal rights and responsibilities. Such learners have equal obligations, should be given support to enable them to exercise their responsibilities and should have equal opportunities to contribute their experiences, talents and capabilities to national and international development. This implies that society must raise its expectations of them.

The same White Paper (SA, 1997b:39) acknowledges that all South Africans should have equal access to the widest possible education and social opportunities, receive education in as normal an environment as possible and be provided with the adequate and appropriate resources necessary to realize their highest potential, irrespective of the severity of their disability. It also stresses (SA, 1997b:18) that the needs of all learners should constitute the basis for planning and policy, and that general systems and institutions of society should be accessible to *all in a society for all*. By accommodating the structures of society so that they function in a way that meets the needs of everybody, society will mobilize the potential of all learners and consequently strengthen their developmental potential. Accordingly, this Paper (SA, 1997b) places emphasis on access strategies to the curriculum for learners with impairments, which imply a paradigm shift towards a change in society to accommodate the diverse needs of all learners.

Consistently, the vision of the Department of Education, as set out in White Paper 6 (SA, 2001), is to build a South Africa in which all learners have access to equal life-long educational opportunities, which will, in turn, contribute towards improving the quality of life and building a peaceful, prosperous and democratic society (Department of Education, 2003b:13; *cf.* 1.1). This vision underscores the optimal participation and social integration of all learners, equal access for all learners to a single, inclusive education system, access of all learners to the curriculum which will enable them to engage meaningfully with the teaching and learning process, equity and redress of past inequalities.

Changes necessary to provide equal opportunities would include: a shift from pathological medical or individual explanations to understanding system deficiencies located within an understanding of barriers to learning; a shift from organizing services according to the category of disability towards determining the level of support needed, a completely new approach towards admission, based not on the category of disability, but on whether learners really require higher levels of support; a shift from standardized tests, mainly psychometric tests, to predominantly educator-produced diagnostic tests that determine the learner's learning potential and identify how it can be improved; a shift from a pedagogy of exclusion to a pedagogy of possibilities that takes into consideration barriers to learning, different intelligences and learning styles, and an end to discriminatory admission procedures which impede access to schools on the basis of language, race and severity of disability (Department of Education, 2003b:13).

Nevertheless, it is important to take notice of the fact that section 9 of the SA Constitution (1996a; *cf.* 2.4.1.6.3) sanctions affirmative action concerning persons, and therefore learners, disadvantaged by past discriminatory laws. Affirmative action or positive discrimination is used as a broad concept which includes all measures directed at improving the position of sensitive groups (e.g. blacks, women and learners with disabilities) previously disadvantaged by unfair discrimination. This underscores the UNICEF (UN, 1994) commitment to reach out to those who have been traditionally un-reached, including the poor, working children, girls, children with disabilities and those with nomadic lifestyles (Pigrozzi, 1999:1).

The affirmative action provision in section 9(2) of the SA Constitution (1996a) must, according to Bray (2000b:285; *cf.* 2.4.1.6.3), be seen in the substantive context of equality. In this context an affirmative action programme does not encroach upon the right against unfair discrimination, but it is regarded as a manifestation of the right to equality in its substantive sense. However, *to promote the achievement of equality*, a rational relationship should exist between ends and means. Therefore it must be shown that both the purpose of redressing and the means selected for its implementation are reasonably capable of meeting the purpose (Bray, 2000a:51). However, Bray (2000b:286) explicates that substantive equality in the context of education means that over and above the abolition of laws on racial discrimination,

all social, economic and political stumbling blocks which hamper access to education should also be removed.

3.6.1 Policies regarding the admission of learners to schools

Section 5(1) of the SA Schools Act (84/1996c) protects learners' fundamental rights, such as the right to equality, since it forces public schools to submit to admitting learners and serving their educational needs without unfair discrimination in any way whatsoever (*cf.* 4.2). As such, it was decided in matter of *Matukane*[41] that a school's admission policy, if based on race, constituted unfair discrimination (*cf.* 2.4.1.6.3).

One of the basic aims of the SA Schools Act (84/1996c: Preamble; *cf.* 1.1, 2.4.1.1 & 3.4.2) is to transform education by creating and managing a new national school system which must, as far as is reasonably possible, provide everyone an equal opportunity to develop his talents. Therefore, section 5(2) of the SA Schools Act (84/1996c) also bars School Governing Bodies from administering any *test related to the admission of a learner to a public school.* Learners with a disability may, as such, not be denied access to public schools based on pre-testing procedures.

Consistent with the fact that it is a learner's fundamental right to attend school, he cannot be denied admission to a public school in terms of section 5(3) (84/1996c; *cf.* 3.5.2 & 4.3.2) if his parent is unable or unwilling to pay school fees set by the public School Governing Body, or does not subscribe to the school's mission statement, or refuses to release the school from liability for damages arising out of the education of the learner.

In addition, it is particularly important that the Admission Policy (Department of Education, 1998:9), submitting to the directive that all eligible learners of compulsory school going age must be accommodated at public schools, determines that no admission policy of schools may unfairly discriminate in any way against a learner who applies for admission. This policy also acknowledges that learners must be admitted to total school porgrammes and may not be suspended from classes, denied access to cultural, sporting or social activities of the school, or be denied school reports or transfer certificates, or otherwise victimized on the grounds of their

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[41] *Matukane v Laerskool Potgietersrus* (note 14 above)

parents being unable to pay school fees or unwilling to subscribe to the mission statement and code of conduct of the school (Department of Education, 1998:10; *cf.* 3.8.1.1 & 4.4.1.1). In an attempt to ensure that parents' lack of financial means would not prejudice the admission of their children, any decision by a SGB on school fees must provide for the total or partial exemption of school fees in certain circumstances (Visser, 2005:407; *cf.* 3.5.2).

The SA Schools Act (84/1996b) does not specify the maximum age at which the fundamental right to attend school terminates, although section 5(4) does confer on the National Minister of Education the power, after consultation with the Council of the Education Minister, to specify the maximum age of admissibility to schools. In this regard De Waal (2000:24) postulates that it would be in the best interests of learners if the maximum age of learners for admissibility to schools were to be officially specified.

As far as the age of learners is concerned, the Constitutional Court in the matter of *Harris*[42] has declined to examine the constitutionality of a ministerial notice in which an age requirement of six years was imposed for admission and chose to strike down the notice since it was *ultra vires*. The Court held that a notice setting the age at seven for admittance to Grade 1 was unconstitutional, since it constituted unfair discrimination on the basis of age and it did not serve the *best interests* of the learner (a fundamental right in terms of section 28(2)), as well as because the respondent had failed to discharge the onus resting on him to prove that the limitation of the learner's rights was justified in terms of section 36 of the SA Constitution (1996a; *cf.* 2.4.1.6.1.3).

The Department of Education's Admission Policy (Department of Education, 1998a:31) recommends that, if a learner is admitted to a public school and is above the normal age for that grade, the school must make an effort to place the learner in line with his peer group. Sections 5(5) and 5(8) of the SA Schools Act (84/1996c) provide for an admission policy to be set by Public School Governing Bodies consistent with the SA Constitution (1996a) and the Admission Policy (Department of Education, 1998a:8). According to the Admission Policy, Public School Governing

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[42] *Doreen Harris v Minister of Education 2001 JOL 8078 (CC)*

Bodies must ensure that all eligible learners are suitably accommodated in terms of the SA Schools Act (84/1996c). Section 5 of the same Act (84/1996c) also provides for the Head of Department to inform parents in writing, providing relevant reasons if the learner has been refused admission. From these sections it is clear that it is obligatory for a school to admit all learners who apply for admittance.

The Admission Policy (Department of Education, 1998a:19) applies equally to learners who are not citizens of the Republic of South Africa (*cf.* 2.4.1.4). This Policy makes provision for home schooling (Department of Education, 1998a:41-42) and determines that a learner who lives outside the feeder zone of a public school is not precluded from seeking admission at whichever school he chooses. However, access to a chosen school cannot be guaranteed (Department of Education, 1998a:34). For non-South African citizens, a study permit, temporary or permanent residence permit, or evidence of application for permission to stay in South Africa, is required. Therefore learners classified as illegal aliens must show evidence that they have applied to legalize their stay in the country (Department of Education, 1998a:19-20).

In addition, section 5(9) of the SA Schools Act (84/1996c) provides parents with the right to appeal against a decision of a school not admitting their child. Appeals should, however, comply with the basic principles of just administrative action (1996a: section 5(7); *cf.* 2.4.1.6.12).

3.6.2 Diversity among learners

The South African community consists of a number of races, cultures and religions in which learners are expected to respect diversity among fellow learners as individuals who might be pursuing similar goals and ideals to themselves (Van der Bank, 2000:308).

Flowing from the above, the researcher is convinced that inclusive education has, as its fundamental principle, the valuing of diversity within a human community. When inclusive education is fully embraced, the idea that learners have to become *normal* in order to contribute to the world, should be abandoned. The South African community must agree with Tomko (1996:1) that, when looking beyond typical ways of becoming valued members of the community, everyone will begin to realize the

achievable goal of providing all learners with an authentic sense of belonging (*cf.* 1.2, 3.3.2 & 4.3.2).

According to Swart and Pettipher (2005:9), inclusive policies aimed at developing schools to respond to diversity are necessary in order for an inclusive education system to be successful. Diversity must not just be acknowledged as a reality that must be tolerated and accommodated, but as a reality that must be valued.

Kearney (1996:4) reports that one of the most troubling findings of an investigation held in 1993 on the status of gifted American learners was the sheer depth of anti-intellectualism at schools. Taunts of gifted learners as *nerds* and *dweeb* are common. African-American gifted learners are even accused of *acting white* by other black learners. It was also recognized that epithets based on race, ethnicity, gender or disability must not be allowed to continue and that slurs on ability must not be permitted either. Part of establishing an inclusionary school environment is to make sure that social interactions respect intellectual diversity and are not harmful to *any* learner (Kearney, 1996:4).

In 1995, the Department of Education (SA, 1995:55) defined inclusive education as a system that is responsive to the diverse needs of learners and introduced key initiatives on how to accommodate diversity among learners. These initiatives are to restore respect for diversity and the culture of teaching and learning, to develop a curriculum that responds to the diverse needs of learners, respects individuality and is based on the belief that all learners can achieve success, and to develop a holistic and integrated approach regarding educational support services.

The fundamental rights to equality, non-discrimination and human dignity as provided by the SA Constitution (1996a: sections 9 & 10) do not denote that everyone should be the same, but rather that no-one may be unfairly discriminated against on the basis of one or more differences. Judge Sachs summarizes this idea in *Ex parte Gauteng Provincial Legislature*[43] as follows: the dominant theme of the SA Constitution (SA, 1996a) is the achievement of equality, while considerable importance is also given to cultural diversity and language rights, which means that

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[43] *Ex Parte Gauteng Provincial Legislature: In Re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC)*

the fundamental problem is to ensure equality in a balanced way which shows maximum regard for diversity.

The National Commission on Special Needs in Education and Training together with the National Committee for Educational Support Services, who were requested by the National Department of Education to put forward policy recommendation on inclusion (hereafter referred to as the NCSNET/NCESS Report; Department of Education, 1997c), promotes a two-prong and three-tier approach to support schools and other educational institutions. The two-prong approach includes a focus on:

- Interventions aimed at facilitating transformation of institutions and curricula through institutional and curriculum development initiatives to address the diverse needs of learners, barriers to learning and development in a preventative and health-promotive way.

- Additional support that will be required by some learners either throughout or at some point in their learning journey.

A three-tier approach comprises (Department of Education, 1997c):

- Competencies of all sections of national and provincial departments to address diversity and barriers to learning and development, providing the framework for service delivery at district and learning-style level.

- District support teams with the primary responsibility of developing the capacity of learning sites to understand and address diversity and barriers to learning and development.

- Site-based support teams with the responsibility of managing the process of addressing barriers to learning and development at local level.

In 1997, a White Paper (SA, 1997b:39-40) provided that respect for diversity should be promoted in order to enable *all* learners to benefit from learning in an environment that acknowledges and appreciates diversity. Consistent herewith, the Department of Education (Department of Education, 2000a:12) avowed in 2000 that the fundamental right to equality guarantees the right to live in a diverse society and the right of each person to make his unique contribution to that society. It was also acknowledged that diversity does not only refer to cultural, linguistic and religious

differences, but also to differences between people or groups, which includes gender, pregnancy, marital status, sexual orientation, age, disability and HIV status (1996a: section 9(3)).

According to the Department of Education (Department of Education, 2000a:7), diversity is the rich mixture of differences that make up a society. At schools, diversity starts with the diverse nature of the school as organization, which consists of different stakeholders such as the parents, learners, community members, the public School Governing Body, educators and support staff. The end result is a diverse mixture of many different kinds of personalities and needs. Therefore, it must be accepted that the learner population in any given class comes from different cultural backgrounds, has different beliefs, social and communication skills and different mental, physical, emotional and spiritual needs which should be respected (*cf.* 1.2).

The Department of Education (Department of Education, 2000a:10) suggests that schools adopt a *diversity perspective* which includes a commitment to recognize and respect all differences. As each individual learner has a unique contribution to make, schools should provide environments in which individuality is encouraged and in which a learner can be allowed the opportunity to develop fully into the unique individual he was meant to be (Department of Education, 2000a:8).

White Paper 6 (SA, 2001:12; *cf.* 1.2 & 4.3.1) arose out of the need for changes to be made to the provision of education and training in order to be responsive and sensitive to the diverse range of learning needs. This White Paper recognizes that particular attention must be paid to achieving objectives through a realistic and effective implementation process that moves responsibility towards the development of a system that accommodates diversity. Therefore the central objective of White Paper 6 (SA, 2001:24) is to extend the policy foundations of existing policies regarding education.

Accordingly, the Department of Education (Department of Education, 2003v:10) acknowledges that assessment practices must also be in line with national policy guidelines and fully exploit the flexibility to accommodate diversity that is an integral component for policy guidelines.

In order to accommodate diversity among learners successfully, it is essential to assess the special needs learners may have, as well as the barriers to learning that they may have to encounter.

3.7 SPECIAL EDUCATIONAL NEEDS AND/OR CRITICAL BARRIERS TO LEARNING AND DEVELOPMENT

Human beings, regardless of whether they have disabilities, have basic needs that must be met in order for them to feel fulfilled. Education can help to meet the need to learn and grow. When these needs are met in an integrated way, each area adds strength in the ability to achieve fulfilment in the other areas (Tomko, 1996:1; *cf.* 1.2).

3.7.1 Special educational needs

Muthukrishna (2000) indicates that legislation and education policy documents which emerged after 1994 imply that there are two distinct categories of learners at schools: those who are the majority with *ordinary needs* and a minority with *special needs* who require support and specialized programmes to engage in some form of learning. In education policy documents, the term *special needs* is used specifically to refer to learners with disabilities and those experiencing learning difficulties (Muthukrishna, 2000).

As emphasized by the Department of Education (SA, 1995:10), the needs of every individual learner are of equal importance. Therefore the needs of learners must be made the basis of all planning. In line herewith, the SA Policy Act (27/1996b: section 4(h); *cf.* 1.2) aims at recognizing the different aptitudes, abilities, interests, levels of prior knowledge and experiences of all learners. The Admission Policy for learners (Department of Education, 1998a:32) determines that learners' needs must be attended to through the efforts of both learners and educators with the support of the learners' family and peers, and not by educators alone.

It was accepted in the White Paper on Special Needs in Education and Training (SA, 1997b:38-39) that every learner has unique interests, abilities and learning needs and consequently the following aspects were highlighted:

- Not all learners with disabilities have special needs in education, as they do not all experience breakdown in learning.

- Special needs in education exist both in ordinary ventures of learning (mainstream) and in specialized centres of learning, both inside and outside classrooms.

- Various stakeholders play important roles in responding to special needs in education.

- Special needs in education include support in the form of life skills and independence training, assistive devices, specialized equipment and access to the curriculum.

Section 3 of the Norms and Standards for Educators, as found in the SA Policy Act (27/1996b), accords seven roles to educators, which make it clear that teaching and learning need to comply with the learning needs of learners as well as with their fundamental human rights. Accordingly, educators are, *inter alia*, to:

- mediate learning sensitive to learner's needs;

- pace the learning sensitive to learner's needs;

- demonstrate responsiveness to the changing needs of learners;

- uphold the SA Constitution; and to

- know and use appropriately different approaches to teaching and learning.

The NCSNET/NCESS Report (Department of Education, 1997c) was the first document to challenge the conceptualization of *special needs* and to enlighten the limitations thereof in a developing context. The Report found that, while attention was given to the schooling phase with regard to special needs and support, other levels or bands of education seriously neglected this aspect.

The Report also indicated that the notion of *special educational needs* has, thus far, been used to categorize learners who, for various reasons, did not fit into the mainstream system and to identify deficiencies in these learners. It is also highlighted that little effort is made to explore the causes of breakdowns in learning that may be embedded in the education system itself (Pottas, 2005:27; *cf.* 3.3.2 & 4.3.1).

In 2001, White Paper 6 (SA, 2001:24; *cf.* 1.2 & 4.3.4) brought about a conceptual change to existing policies as it stressed that the development of education must be premised on the understanding that all learners have the potential to learn within all bands of education and that they *all* require support. This gave rise to the concept *barriers to learning.*

3.7.2 The identification of barriers to learning and development

The NCSNET/NCESS Report (Department of Education, 1997c) made a huge contribution to the development of an understanding of concepts such as *special needs* and *education support,* as well as to the understanding of the nature and extent of *barriers to learning and development.*

The concept *barriers to learning and development* thus emerged from this Report (Department of Education, 1997c) in which it was found that this concept entails that the emphasis must not be on *what is wrong with the learner*, but rather on what barriers are being experienced by learners and how these can be addressed, either in terms of problem-solving or preventative and health-promotive strategies.

The Department of Education (Department of Education, 2003b:3) accepted the concept *barriers to learning*, referring to factors which hinder teaching and training as a new theory which must be imposed on the intellectual landscape if all learners are to be taken seriously.

Additionally, White Paper 6 (SA, 2001:24) acknowledges that many learners experience barriers to learning and development. Some of these barriers lie within the learners themselves (intrinsic), while some barriers are systematic, socio-economic and cultural. The same Paper (SA, 2001:18) also recognizes that it is important to acknowledge that the learners who are most vulnerable to barriers to learning and exclusion in South Africa are those who have been historically termed *learners with special education needs.* Their increased vulnerability has arisen largely because of the historical nature and extent of the educational support provided.

Therefore the NCSNET/NCESS Report (Department of Education, 1997c) explicates that it is imperative to identify the causes for breakdown in learning within the education system, to challenge the social inequalities and to focus on the need for

educational support rather than merely on the support of individual learners. This resulted in the realization that a range of needs exists among learners, as well as within the education system, which must be met and addressed if effective learning and development are to be provided and sustained.

This Report (Department of Education, 1997c:12) forthwith provides information on where breakdowns in learning within the system occur, as well as on the inability of the education system to accommodate diversity which prevents learners from accessing educational provision, therefore creating barriers to learning and development (*cf.* 3.6.2 & 4.4).

Accordingly, White Paper 6 (SA, 2001:18) identifies socio-economic inadequacies (such as the lack of funds and other resources; *cf.* 3.5.2, 3.8.1 & 4.4.1.1), factors which place learners at risk (such as violence), negative attitudes towards differences and stereotyping, an inflexible curriculum, inappropriate language and communication channels and competencies, inaccessible and unsafely built environments, lack of appropriate transport, lack of parental recognition and involvement, disability, inappropriate and inadequate support service provision, inadequate or inappropriate utilization and development of human resources, lack of human resource development and inadequate policy and legislation as the most critical aspects which create barriers to learning and development.

In 2003, emphasis was placed on the following factors as causing barriers to learning (Department of Education, 2003c:15):

- Factors relating to specific individual learners (relating to specific learning needs and styles) or individual educators (personal factors, as well as teaching approaches and attitudes).
- Various aspects of the curriculum such as content, language or medium of instruction, organization and management of classrooms, the pace of teaching and time available, learning materials and equipment, and assessment procedures.
- The physical and psychological environment in which learning occurs. This includes buildings as well as management approaches.

- Dynamics and conditions relating to the learners' home environment, including issues such as family dynamics, cultural and socio-economic background or status.
- Community and social dynamics which either support or hinder the teaching and learning process.

Moreover, in 2004 the following barriers to learning were identified by the Department of Education (Department of Education, 2004a:39):

- Pedagogical barriers, calling for sufficient educator support to all learners, fair assessment procedures, flexible curricula and linking teaching to the preferred learning style of the learner.
- Medical barriers, calling for attention to sensory, physical and cognitive disabilities in the classroom.
- Societal barriers, calling for support to learners coming from backgrounds characterized by severe property, abuse, crime and violence.
- Systematic barriers, calling for adequate facilities at school, the availability of appropriate teaching and learning support material, and proper attention to each learner.

It therefore became evident that it is possible to identify barriers to learning operative within the learner and/or within the education and training system arising during the learning process.

3.7.2.1 Recommendations on preventing barriers

White Paper 6 (SA, 2001:18) stresses the importance that interventions or strategies at different levels, such as the classroom, the school, the district, the provincial and national departments and systems, will be essential to prevent and avoid barriers from causing learning to be ineffective or to the exclusion of certain learners. As a result, an inclusive education and training system must be organized so that it can provide various levels and kinds of support to learners and educators (SA, 2001:16).

Accordingly, the Department of Education (SA, 1995:10) has called for all barriers to learning to be removed and all forms of unfair discrimination to be eliminated. At the beginning of 1998, the Department of Education (Department of Education, 1998b:32) resolved to intensify its efforts to bring visibility, urgency and participation to the Ministry of Education's commitment to quality education throughout the system

by lodging the Culture of Learning, Teaching and Service (COLTS) campaign. This campaign aimed at encouraging schools to confront all barriers to learning and teaching (South African Yearbook, 1999).

The policy framework contained in White Paper 6 (SA, 2001:11) outlines the Ministry's commitment to the provision of equal educational opportunities, in particular to those learners who experience barriers to learning and development or who have dropped out of learning because of the inability of the education and training system to accommodate the diversity of learning needs, and those learners who continue to be excluded from it.

Therefore, addressing barriers to learning and participation lies at the heart of school-based change and school improvement (Department of Education, 2003b:22) and in the provision of strengthened education support services (Department of Education, 2003a:7&16; *cf.* 3.8.5 & 4.4.5).

3.7.2.2 Encouraging the provision of adequate education support services

In 2003, the Department of Education (Department of Education, 2003b:5) stated that terminology such as *learners with special education needs* and *remedial education* constructs particular negative identities. The need to examine possibilities and pedagogical support instead of a disabling identity construction was enlightened as past experiences confirmed that the labelling of certain learners and the subsequent placement of such learners in special classes does not provide a solution (Department of Education, 2003b; *cf.* 4.4.5).

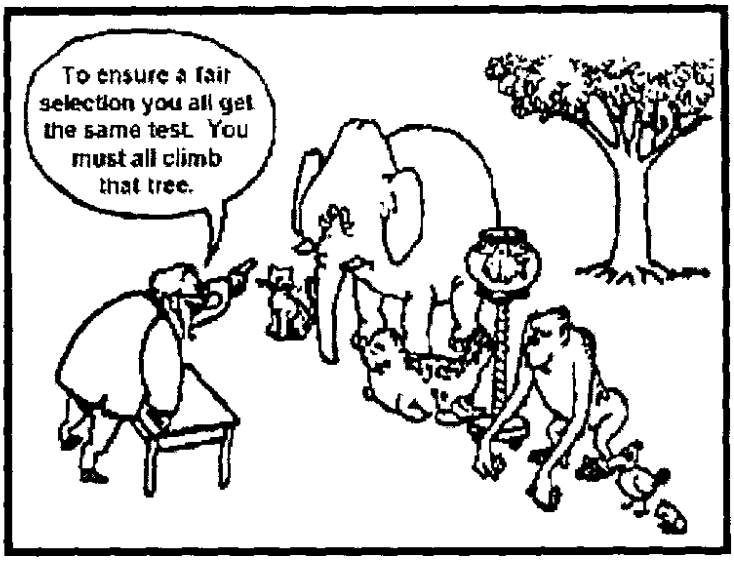
White Paper 6 (SA, 2001:16; *cf.* 1.1) acknowledges that some learners may require more intensive and specialized forms of support to be able to develop to their full potential. It is recognized (SA, 2001:17) that different learning needs arise from a range of factors, including physical, mental, sensory, neurological and developmental impairments, psycho-social disturbances, differences in intellectual ability, particular life experiences or socio-economic deprivation. Subsequently, the same Paper (SA, 2001:10) states that the provision of education for learners with disabilities should be based on the intensity of support needed to overcome the debilitating impact of their disabilities.

For this purpose, an Assessment Task Team will be commissioned to (Department of Education, 2003b:14-15):

- develop a framework for support services;
- ensure that individual diagnostic assessment tools are available to determine the level and nature of support needed by individual learners, relating to the way they can access the curriculum;
- develop assessment indicators to determine the levels of support needed;
- develop indicators to assess contextual and systemic barriers;
- develop a protocol for the administration of the assessment procedures;
- describe the functions of the District-based support teams;
- draw up a research plan for the field testing of assessment plans; and
- develop admission procedures for the short, medium and long term to ensure that access is provided to learners who have been excluded from facilities and support.

Furthermore, a Plan of Action (Department of Education, 2003c:2) proposes to ensure that all barriers to access be removed in the next three years. Prior to the finalization of the assessment plans, a short-term objective will be to develop an interim instrument that will stem the flow of learners to special schools as resource centres (*cf.* 3.8.5.1 & 4.4.5.1) as well as to regulate the enrolment of learners to full-service schools (Department of Education, 2003a:14; *cf.* 3.8.5.2).

The above objectives can only be met if learners who experience barriers to learning or who have special education needs are identified as early as possible.



3.7.3 Promoting the early identification of needs and barriers

White Paper 6 (SA, 2001:32) realizes that it is during the pre-school years that hearing and vision-testing programmes should reveal organic impairments which create barriers to learning and development. Accordingly, it is established (SA, 2001:49) that the Ministry will investigate measures to raise the capacity at primary schools for the early identification and support of learners with special education needs or who experience barriers to learning and require special learning support (*cf.* 4.5.2). The Department of Education (Department of Education, 2003b:14) also recognizes that one of the key strategies of an inclusive education system is to develop early identification and intervention programmes in the Foundation Phase of schooling.

The identification of special needs or barriers to learning without measures to address or remove them will be meaningless. Therefore, special attention is given to addressing various barriers to learning and development.

3.8 ADDRESSING VITAL BARRIERS TO LEARNING AND DEVELOPMENT

The Department of Education (SA, 1997b; SA, 2001:18; Department of Education, 2003c:15; Department of Education, 2004a:39; *cf.* 3.7) identified the following aspects as contributing to barriers of learning.

3.8.1 Difficult socio-economic barriers

Judge Chaskalson acknowledged in the case of *Soobramoney*[44] that South Africa comprises a society in which there are great disparities in wealth. Millions are living in deplorable poverty due to a high level of unemployment. Such people experience inadequate social security, while many do not even have access to clean water or to adequate health services.

3.8.1.1 Limited financial means

The CRC (UN, 1989), among others (*cf.* 2.3.2), calls for free compulsory education. It is recognized that this might not be possible immediately in many countries, but plans must be put in place and immediate action initiated toward this end (*cf.* 3.5.2, 4.2.1.1

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[44] *Soobramoney v Minister of Health, KwaZulu-Natal* (note 25 above)

& 4.4.1). In the short-term, it is essential that any costs of education be equitable (Pigozzi, 1999:3).

In this regard, Bengu (SA, 1995b:2) puts forward that the Ministry is acutely aware of the heavy responsibility it bears for managing the transformation and redirection of the system of education within the terms of global requirements and the SA Constitution (SA, 1996a; *cf.* 3.5.2) under severe budgetary pressure.

One of the explicit purposes of the SA Schools Act (84/1996c) is, therefore, to provide a uniform system for the organization, governance and funding of public and independent schools in South Africa. According to section 34(1) of this Act (84/1996c), the State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities.

Section 37 of the SA Schools Act (84/1996c) obliges public School Governing Bodies, *inter alia,* to establish a school fund in the name of the school and to see to it that school funds are used for the education purposes of such a school. Furthermore, section 36 of this Act (84/1996c) provides that a public School Governing Body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.

As the SA Schools Act (84/1996c) awards responsibility to public School Governing Bodies to supplement school funds, there are no attempts to hold principals accountable for the management of school funds. In the case of *Schoonbee*[45], the court found that the managing of school funds is indeed not the principal's responsibility and, accordingly, that principals are not accountable in this regard.

In the purview of limited financial means, the SA Policy Act (27/1996b: section 4(n)) aims at achieving the cost-effective use of education resources and the sustainable implementation of education services. In addition, White Paper 6 (SA, 2001:28) stipulates that National Norms and Standards for School Funding will apply to the new inclusive education system and its application will be customized to ensure

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[45] *Schoonbee and another v MEC for Education, Mpumalanga and another 2002 (4) SA 877 (T)*

equity and redress. Because of financial restraints, it is important that available resources be used to target those with the greatest need. Therefore some degree of targeting on the basis of poverty, income or socio-economic status will be required (SA, 2001:28).

Concerning the above, the same Paper (SA, 2001:38) realized that the costs of implementing a system of institutional structures need to be investigated. Therefore further investigation will be undertaken regarding the magnitude of expenditures and how they can be phased in over an eight-year period (SA, 2001:51; *cf.* 3.5.2).

White Paper 6 (SA, 2001:40) proposes that new conditional grant funding from the National Government will be used, firstly, in both special and full-service schools (*cf.* 2.8.5.1 & 3.8.5.2) to provide the necessary facilities and other material resources needed to increase access for those currently excluded, and secondly, to provide some of the non-educational resources required to ensure access to the curriculum, such as medication, devices such as wheelchairs, crutches, hearing aids, guide dogs, interpreters and voice-activated computers, as well as social workers.

Contrary to these expectations, in the context of the current low growth rate of the South African economy and the relatively large slice of the budget that is already allocated to education in nominal terms, it is unlikely that significantly more public resources in real terms will be allocated to the education sector in the next few years. The emphasis must, therefore, be on more cost-effective usage of available resources (SA, 2001:37).

In 2003, the Department of Education (Department of Education, 2003b:14) identified the development of a revised funding strategy to facilitate the inclusion of all learners as one of the key strategies of an inclusive education system. It was pointed out that economics often view the education process as a production process, with the chief inputs being educators, learner support materials and other non-personnel items, as well as physical infrastructure. The output of the production process is considered to be learner performance or the skills and knowledge that learners have acquired at the end of a school year or at particular exit points from the system. The State, on the other hand, considers education as much more, namely as the builders of communities and the nation as the centre of community life (Department of Education, 2003c:7).

In the course of the Dakar Framework for Action (UNESCO, 2000), to which South Africa is a signatory, South Africa committed itself to combating poverty and uplifting its people through the provision of basic education which is compulsory, of good quality and in which financial capacity is not a barrier to access for any learner by the year 2015 (*cf.* 3.5.2). With regard to funding public schools, the Department of Education (Department of Education, 2003c:5) promulgated a pro-poor funding policy in 2000 which places emphasis on funding mechanisms to bring about adequate funding for all poor schools by 2005, at the latest. Through this plan, a schooling system that is free and of good quality for the poor in South Africa is envisaged (Department of Education, 2003c; *cf.* 4.2.1).

However, the State will continue to make a significant investment in public resources to all schools, although more will be spent on poor schools than on rich schools, to bring about cross-subsidization of poor learners by parents of rich learners through fee exemption mechanisms to allow all learners to attend the same schools. This will occur within the broader framework of the State's transfer of resources towards the historically disadvantaged as a condition for nation building and social cohesion, against which background the move towards free education for the poor in South Africa must also be seen (Department of Education, 2003c:5).

It is also recognized that quality education for everyone implies the following (Department of Education, 2003c:8):

- sufficient public funding of schools to cover the cost of all the basic inputs;
- providing all learners with knowledge and skills that will empower them to take part fully in the economic, political and cultural life of the country; and
- no learners, especially those of compulsory school-going age, should experience any economic, physical or other barriers to attending schools.

3.8.1.2 Scarce resources

In this regard, the Department of Education (SA, 1995:12) acknowledges that education resources must be made available to a more diverse environment. Additionally, resources must be employed to ensure that every learner has equal opportunities for participation in society (SA, 1997b:10; *cf.* 3.6 & 4.4.1.1).

Nonetheless, to achieve the aforesaid goal, a wide range of specialized services is needed (SA, 1997b:8). Equity for learners with disabilities implies the availability of additional support mechanisms (*cf.* 3.8.5, 4.3.2 & 4.4.5) within an inclusive learning environment, such as appropriate technology, interpreter services, sign language instruction for the deaf (*cf.* 3.8.3 & 4.4.3), flexible curricula (*cf.* 3.8.5.5 & 4.4.5.2), respect and understanding for diversity and fundamental rights (*cf.* 3.6.2 & 4.2.2.1), well equipped educators (*cf.* 3.8.5.7 & 4.4.7), and barrier-free environments (SA, 1997b:39; *cf.* 3.3.2, 4.4 & 4.4.7).

Correspondingly, education support services should be seen as an integral part of special education needs with the purpose of providing back-up or support services. In this regard, the Education Department (SA, 1997b:41; *cf.* 3.3.2 & 3.8.5.3) prescribes that every learner, irrespective of his age or centre of learning, should have access to educational support services which involves the partnership and co-ordination of special education needs in a continuum. Such services must involve professionals and non-professionals in assisting learners to derive maximum benefit from the curriculum through differentiated education (*cf.* 3.8.5.5 & 4.4.5.2).

Therefore Asmal (SA, 2001:3) insistend that the resources of special schools would also be made available to neighbourhood schools, especially full-service schools (*cf.* 3.8.5.2) and colleges by making special schools, in an incremental manner, part of district support services where they could become resource centres for all schools.

Embracing this, White Paper 6 (SA, 2001:30) determines resources and well developed programmes to support social welfare needs, including the provision of devices such as wheelchairs and hearing aids to be provided. Attention is also directed at statistics which show that the distribution of learner expenditure demonstrates inefficiency in the use of available resources, as well as the absence of a uniform re-sourcing strategy and national provision norms for learners with disabilities (SA, 2001:15).

Accordingly, White Paper 6 (SA, 2001:15; *cf.* 3.8.5.1) propounds a wider spread of educational support services to be created in line with what all learners require. As a result, learners requiring low-intensive support will receive this in ordinary schools and those requiring moderate support will receive support in full-service schools,

while learners who require high-intensive educational support will continue to receive such support in special schools.

The Department of Education (SA, 2001:16) will evaluate what resources are already available and how they can be strengthened and transformed in order to contribute to the building of an inclusive system. This Department will also determine where the immediate priorities lie and put in place mechanisms to address these first. Materials and equipment, in particular devices such as hearing aids and wheelchairs, will be made progressively accessible to those learners who cannot gain access to learning because of a lack of appropriate resources (SA, 2001:33).

The Curriculum Adaptation Team has the important task of identifying, extending and developing resources and materials, along with special schools as resource centres (*cf.* 3.8.5.1 & 3.8.5.7). This team should also develop comprehensive costing and application guidelines for the full range of assistive devices that can be used within the South African context (Department of Education, 2003a:23). The team will, in addition, assist in developing a strategic plan to ensure the maximum usage of exciting human resources and play an important role in the professional development of educators at mainstream schools (Department of Education, 2003a:24).

The Department of Education (Department of Education, 2003a:7) places emphasis on the fact that educators without adequate learner support materials cannot teach effectively. It is, conversely, also recognized that costly support material in dilapidated school buildings are an anomaly. Schools should be managed efficiently so that resources can be utilized successfully to empower learners with relevant skills and knowledge. It is imperative that improved resourced schools should lead to improved learner performance, and that improved budgets should lead to more educated citizens and a better trained nation. Anything short of this represents a waste of public resources and a betrayal of learners.

Resources are shifted to improve the quality of education for the majority of learners. For this reason, a plan for a better schooling system places significant emphasis on the measurement of learner performance and on the need for improved management, to ensure that education resources are translated into quality education and into the meaningful economic, political and cultural empowerment of all learners (Department of Education, 2003a:7). As a result, the principle of equity,

incorporating equal access and competencies, should inform the Department of Education's approach and provide an alternative basis for supplying access to information and the allocation of resources (Department of Education, 2003c:4.2).

The extent to which there has been a major shift of resources towards the poor since 1994, leading to a better and more equitable per learner expenditure, is highlighted by the Department of Education (Department of Education, 2003c:2). It is, conversely, also recognized that problems persist in terms of closing the gap between current levels of expenditure and levels that can be regarded as adequate (*cf.* 4.4.1).

The Department (Department of Education, 2003c; *cf.* 3.5.1) furthermore recognizes that there are problems in the way resources are allocated and, very importantly, in the translation of resources into quality education for all learners. Therefore the need is also expressed that it should be ensured that available resources, yet limited, are used effectively to accomplish the education mission.

3.8.2 Negative attitudes as decisive barriers to overcome

Since culture plays an important role in the perception people have of others, society often regards learners with disabilities or with other special educational needs as being different or as being outsiders (SA, 1997b:24; *cf.* 3.3.1.1, 4.3.2 & 4.3.4).

It was established that negative attitudes (*cf.* 4.4.2) are some of the greatest hurdles learners with disabilities face when trying to gain access to mainstream schools, since it continually reinforces the fact that disability is portrayed as a *problem.* Consequently learners with disabilities are seen as helpless and dependent, ill and in constant need of care and medical treatment, or as tragic victims (*cf.* 3.3.1.3 & 4.3.2).

Due to the existence of these negative attitudes which create barriers to learning for a variety of learners, as they lead to social exclusion and marginalization (SA, 1997b:23), one of the main objectives of an Integrated National Disability Strategy (SA, 1997b:19) is to institute a programme of public education and awareness aimed at changing fundamental prejudices[46] in the South African society.

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[46] *Prejudice* is described as an unreasonable like or dislike of someone or something. It is based on a negative or positive feeling about some characteristics that make persons different (Department of

The South African Council for Educators Act (31/2000b: Preamble), aiming at promoting the professional development of the *teaching* profession, acknowledges that the attitude, dedication, self-discipline, ideals, training and conduct of the teaching profession determine the quality of education in South Africa and that all educators should uphold and promote basic fundamental rights, as embodied in the SA Constitution (1996a).

The Department of Education (SA, 1997:24) realizes that the changing of attitudes will not happen automatically or spontaneously, since it is a complex process which involves moving from one set of assumptions to another. Therefore public education and awareness will be central to the changing of society's attitudes (*cf.* 4.4.2).

Enlisting this, the Department (Department of Education, 2003a:18) also points out that training in order to alter attitudes must be linked and interlinked with other processes and developments which include linking training with dealing hands-on with learners who experience barriers to learning and achieving success, since many educators' attitudes change when they work with learners who require support and experience success.

3.8.3 Insufficient language and communication at schools

The use of inappropriate language(s) as medium of instruction and inappropriate communication are recognized as barriers to training and learning by the NCSNET/NCESS Report (Department of Education, 1997c:11) and White Paper 6 (SA, 2001:7&18).

Congruently, the South African Languages Bill (SA, 2003) proposes to regulate into statute the language provisions as contemplated in section 6 of the SA Constitution (1996a; *cf.* 2.4.1.5). In terms of these provisions, the State is obliged to provide a legislative framework within which all eleven official languages in South Africa are afforded equitable treatment, and the status of the previously marginalized black indigenous languages is enhanced (*cf.* 4.4.3.6).

Even though South Africa is recognized as a multi-lingual society (eleven official languages), it is essential that the needs of the society are given express reference

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Education, 2000:8).

to. A particular sensitive issue with regard to the right to education is the policy concerning language of instruction, as exemplified by the constitutional negotiations on the relevant subsection (1996a: section 29(2); *cf.* 2.4.1.6.10). The non-discrimination clause (1996a: section 9(3) and (4); *cf.* 2.4.1.6.3), which prohibits direct or indirect discrimination on the basis of language, also has specific relevance in this regard.

Section 29(2) of the SA Constitution (1996a) provides that every learner has the right to receive education in the official language(s) of his choice in public educational institutions where that education is reasonably practicable (*cf.* 2.4.1.6.10.1.2).

Strydom (2003:27) postulates that the development of an appropriate language policy will consist overall of a harmonizing process which attempts to strike a balance between the accommodations of linguistic diversity on the one hand and concerns of national unity and limited resources on the other.

In accordance with section 6(2) of the SA Schools Act (84/1996c), public School Governing Bodies may determine the language policy of a public school subject to the SA Constitution (1996a), this Act and any other applicable provincial law. In this regard, section 6(3) of the SA Schools Act (84/1996c) protects the learner from racial discrimination when it indicates that the language policy adopted by a public School Governing Body should be free from any such violation (*cf.* 4.8.3.5). Section 6(4) of the same Act (84/1996c) awards learners the right to be instructed in Sign Language, since it is given the status of an official language for the purposes of learning at a public school with profound implications for inclusiveness.

Nothing is, conversely, clearly documented in the SA Schools Act (84/1996c) about a learner's right to receive education in the language of his choice. It is, therefore, implied by the fact that this Act is subject to the SA Constitution (1996a). The Norms and Standards Regarding Language Policy (Department of Education, 1998b), aimed at striking a balance between the protection of individual language rights, the rights and duties of public School Governing Bodies and the rights and duties of provincial education departments, explicitly provides for learners, represented by their parents or guardians, to choose the language of teaching.

Moreover, the SA Policy Act (27/1996b: section 4(a)(v)) commits itself towards the advancement and protection of every learner to be instructed in his language of

choice, while section 4(a)(viii) acknowledges the right of every person to use his language and participate in the cultural life of his own within an education institution.

The Language in Education Policy (Department of Education, 1997a; hereafter referred to as the Language Policy) in terms of section 3(4)(m) of the SA Policy Act (27/1996b) should be seen as part of a continuous process by which policy for language in education is being developed as part of a national language plan encompassing all sectors of society, including the deaf community.

The Language Policy (Department of Education, 1997a) operates within the following paradigm:

- In terms of the SA Constitution (1996a), the Department of Education recognizes that South Africa's cultural diversity is a valuable national asset, As such, it aims at promoting multilingualism, at developing all official languages and at respecting all languages used in the country, including South African Sign Language.

- The inherited language-in-education policy has been fraught with tension, contradictions and sensitivities, and underpinned by racial and linguistic discrimination. A number of these discriminatory policies have affected either the access of learners to the education system or their success within it. Consequently, the Language Policy (Department of Education, 1997a) is directed at creating an environment in which respect for all languages would be encouraged.

- The learning of more than one language should be general practice.

- The right to choose the language of learning and teaching, which has to be exercised within the overall framework of the obligation on the education system to promote multilingualism, is vested in the individual learner.

- Although it is noted that there are arguments for and against multilingual and bilingual education, the underlying principle is to maintain home language(s) while providing access to and the effective acquisition of additional language(s).

The main aims of the Language Policy (Department of Education, 1997a; *cf.* 4.4.3.1) for language in education are to:

- promote full participation in society and the economy through equitable and meaningful access to education;
- pursue the language policy most supportive of general conceptual growth among learners, and hence to establish additive multilingualism as an approach to language in education;
- promote and develop all the official languages;
- support the teaching and learning of all languages required by learners or used by communities in South Africa, including languages used for religious purposes, languages which are important for international trade and communication and South African Sign Language;
- counter disadvantages resulting from different kinds of mismatches between home languages and languages of learning and teaching; and
- develop programmes for the redress of previously disadvantaged languages.

The South African Language Bill (SA, 2003) confirms that learners have a fundamental right to be taught in a language of their choice (South African Yearbook, 1999), while providing that only official languages may be used as medium of instruction, that language may not be used as a barrier to admission of learners and that public School Governing Bodies must stipulate how their schools will promote multilinguism.

Along the lines of the provisions set out in section 6(1) of the SA Schools Act (84/1996c), the Minister may, by notice in the Government Gazette, determine norms and standards for language policy in public schools. This was done through Government Gazette number 18546 (Department of Education, 1998b).

The National Norms and Standards (Department of Education, 1998b) can be considered a genuine attempt to realize, as much as possible, the individual learner's choice concerning the medium of his instruction, while taking resource and other practical constraints duly into account (D'Oliveira, 2003:132). These Norms and Standards (Department of Education, 1998b: 5.4.3) make explicit what is meant by the phrase *where reasonably practicable* (SA, 1996a: section 29(2); *cf.* 2.4.1.6.10) as it determines that it is reasonable practicable to provide education in a particular

language of learning and training if at least forty learners in a particular grade within Grades 1-6 or thirty-five learners in a particular grade within Grades 7-12 request instruction in a specific language at a particular school.

The Language Policy (Department of Education, 1997a) also makes provision for interested learners and/or public School Governing Bodies who are dissatisfied with any decision regarding the language of instruction, to appeal against the decision.

Henrard (2001:90) points out that, while the Language Policy (Department of Education, 1997a) seems rather progressive, the principles can, nevertheless, be criticized regarding some of its components (*cf.* 4.4.3.1). There is, for example, no attention given to non-official languages such as Indian languages, while little attention is paid to the way in which African languages should be promoted and developed, as is demanded by section 6(2) of the SA Constitution (1996a).

In addition, the Report of the Working Group on Values in Education (Department of Education, 2000b) has raised another series of considerations for which educators and administrators will have to find answers. It has been pointed out that schools are increasingly enrolling learners from diverse backgrounds, especially within an inclusive education system, thereby creating a need for the development of knowledge on how such diversity (*cf.* 3.6.2 & 4.2.2.1) should be managed and the multilingual competence of learners should be enhanced.

In the current context, the Report (Department of Education, 2000b) considers, as a distinct possibility, the introduction of dual-medium classes where the choice is between English and any of the other official languages listed in the SA Constitution (1996a: section 6; *cf.* 2.4.1.5), depending on the linguistic demography of the area and the resources available (*cf.* 3.8.1.1.2 & 4.4.1.1). This approach is considered to be in harmony with known parental influences as compared to the use of the mother tongue as medium of instruction. Nevertheless, the Report (Department of Education, 2000b) is clear about the two main values that it wishes to promote in the area of language, namely the opportunity for learners to study through the language they are most familiar with (*cf.* 4.4.3.5) as a pedagogically sound approach to learning and the fostering of multilingualism.

According to Strydom (2003:27), the above-mentioned laws and policies on language that followed in the wake of the new constitutional dispensation brought about two

positive aspects. Firstly, they have provided insight into the extent of the issue and problems arising from the language question in South Africa and into the scope of the measures that should be taken. Secondly, the existing framework, more particularly with regard to language in education, has reinforced the need for an approach that aims at striking a balance between a triad of rights and interests, namely the constitutional obligation of the government to promote multilingualism, the fundamental right of the individual's choice of language and the right of public School Governing Bodies to decide on a suitable language policy for each school (Strydom, 2003:27).

In 2006, the SAHRC (2006) proposed that the power to determine the language policies of schools must be taken away from public School Governing Bodies and given back to the State (*cf.* 4.4.3.2). If this is to happen, Colditz (quoted by Fourie, 2006:10) warns that it may lead to another major strike, similar to the Soweto riot of 1997. Underscoring this statement, Heugh (2003:121) pointed out that the power of public School Governing Bodies should rather be expanded, to enable them to do more with regard to their rights and duties.

3.8.4 Inaccessible and unsafe physical environment barriers

Since ordinary mainstream services, such as day care, transport, health, recreation and education, are generally designed and planned on the assumption that they will not be used by people with disabilities (SA, 1995:10), structural barriers, such as stairs leading into buildings, rather than wheelchairs, handicap people. Therefore a paradigm shift is needed concerning physical barriers.

Many school environments are not suitable for education and are not adapted to the needs of learners with physical and/or sensory disabilities (*cf.* 4.4.4). These defects were acknowledged by NCSNET/NCESS Report (Department of Education, 1997c:11) which discusses and outlines a number of recommendations regarding the provision of *barrier-free* access to built environments. The Report (Department of Education, 1997c: 71-72) also notes that the way in which the environment is developed and organized, either contributes towards the independence and equality of people with disabilities or acts as a barrier to achieve this.

Enlisting the above, the Department of Education (Department of Education, 2002:53) acknowledges that not all schools currently adhere to new building

standards and that accessibility needs to be enhanced. Emphasis is placed on the fact that accessibility needs to be viewed in terms of the geographical location of schools and other support services, which should be situated in areas which are accessible to the community and which are within easily reachable distance (Department of Education, 2002:53), as learners must not be expected to travel more than one hour to or from schools (Department of Education, 2003c:22). Moreover, The Department of Public Works is currently implementing a job creation project to provide ramp access to schools for learners in wheelchairs (SA, 2001:25).

Further physical furniture requirements and changes, such as overhead projectors for educators (not to turn their back on, inter alia, deaf learners), seating arrangements (for full participation in class activities), good lighting and wooden or carpet floors, is also identified (Department of Education, 2002:45).

Inputs required for the physical accessibility of schools, with particular reference to learner transport, are dealt with (Department of Education, 2003c:8), owing to the close relationship between the physical location of schools and their accessibility to learners. It is recognized as important to build and improve schools situated in the right locations and to target expenditure that will most effectively and rapidly address barriers to quality education (Department of Education, 2003c:21).

In line herewith, it is acknowledged that the goal should not be just to build new schools, but also to ensure that existing infrastructures are upgraded to make schooling easily accessible to all learners of school-going age (Department of Education, 2003c:22; *cf.* 4.4.4).

3.8.5 Inadequate support services creating serious barriers

The NCSNET/NCESS Report (Department of Education, 1997c:11) recognizes that the inappropriate and inadequate provision of support services to schools is creating barriers to learning and development. In line herewith, White Paper 6 (SA, 2001:40) aims at the provision of adequate and appropriate education support services for all learners.

3.8.5.1 A new role for special schools

For years, traditional education systems worldwide have provided special education and related services to learners with disabilities (Pottas, 2005:19; *cf.* 1.2).

Special needs education is recognized by White Paper 6 (SA, 2001:9) as a sector where the ravages of apartheid remain most evident. Exclusion of learners on the basis of race is extended to incorporate segregation on the basis of disability. Therefore learners with disability experience great difficulty in gaining access to education. It is also recognized that special education is skewed towards a restricted pedagogy that imposes restrictions on learners (Department of Education, 2003b:4).

The analysis of data (Department of Education, 2003b:4; *cf.* 4.8.5.1) reveals disparities in the provision of education for learners with disabilities. It divulges a mismatch between needs and the provision for such needs. Most schools providing for learners with disabilities are centralized within the Western Cape and Gauteng, which leads to the vast majority of learners attending such schools in a province other than their own, since no facilities are available in their province of residence (SA, 2001:14). This inevitably also results in significant numbers of learners, who should be receiving educational support in special schools, not getting it (Department of Education, 2003b:15).

The NCSNET/NCESS Report (Department of Education, 1997c) and White Paper 6 (SA, 2001:9&15) maintain that statistics indicate that only approximately 64 200 learners with disabilities or impairments from an estimated 400 000 are currently accommodated in approximately 380 special schools in South Africa. This indicates the disquieting fact that 280 000 learners with disabilities or impairments are unaccounted for.

White Paper 6 (SA, 2001:36) regards special needs education as clearly inefficient and inequitable while very costly. It is imperative that the continuing inequalities in the special schools sector be eradicated and that the process, through which the learner, educator and professional support service population become representative of the South African population, be accelerated (SA, 2001:9).

Conversely, the same Paper (SA, 2001:24) acknowledges that the establishing of an inclusive education system will require changes to special schools and specialized settings so that learners who experience mild to moderate disabilities can be adequately accommodated within mainstream education through appropriate support from district-based support teams (*cf.* 3.8.5.3). This will require that the quality of provision of special schools and specialized settings be upgraded so that they can

provide a high-quality service for learners with severe and multiple disabilities (SA, 2001:24). In practice, policy implementation will concentrate on making existing special schools part of an integrated education system (Department of Education, 2003b:11).

Accordingly, White Paper 6 (SA, 2001:21) sets forward a new place and role for special schools in an inclusive education system in which:

- critical education services will be provided for learners who require intense levels of support;
- the quality of education will be raised;
- expertise and support, especially professional support in curriculum, assessment and instruction, will be provided as part of the district-based support team to neighbourhood schools, especially full-service schools. New approaches will focus on problem-solving and the development of learners' strengths and competencies, rather than focusing on their shortcomings only;
- there will be a qualitative upgrading of services; and
- the staff will be trained for their new roles.

Special schools are, therefore, currently, albeit belatedly, undergoing a radical transformation process, laid out White Paper 6 (SA, 2001) that involves inclusion, wherever possible, of learners with special needs in ordinary public schools.

The Admission Policy (Department of Education, 1998a:22), in addition, determines that the rights and wishes of the parents of learners with special educational needs must be taken into account at the admission of such learners to an ordinary public school, while the SA Schools Act (SA, 1996c) requires ordinary public schools to admit learners with special education needs, where reasonably practical. Schools are also encouraged to make the necessary arrangements to make their facilities accessible to such learners.

Where the necessary support, which would facilitate the integration of a learner in a particular educational context, cannot be provided, the principal of the school must refer the application for admission to the Head of Department to have the learner

admitted to a suitable school in that province (Department of Education, 1998a:23). The placement should be handled as a matter of urgency, thereby ensuring that the learner is not prejudiced in receiving appropriate education.

The exact nature of inclusion of such learners is currently being piloted in a sample of school districts, and therefore has a slightly separate planning trajectory (Department of Education, 2003b:6). In response to concerns about the indiscriminate closure of special schools, White Paper 6 (SA, 2001:52) reacts that the Ministry has already taken steps to reverse this situation. However, special education as it existed within the special education model will cease to exist (Department of Education, 2003b:6). In the new framework of thinking, reference will be made to special schools as resource centres (Department of Education, 2003b:3).

As support-based resource centres, special schools will assist in the ongoing evaluation and monitoring of learners with disabilities at mainstream schools (Department of Education, 2003b:24). As such, their future role is acknowledged by White Paper 6 (SA, 2001) as critical to the transformation towards inclusive education.

The process of providing educational support is a dynamic one which makes provision for learners to move to special schools as resource centres for high level of support and then back to ordinary schools. For example, a learner with a permanent visual impairment may require to learn Braille and then move back to an ordinary or full-service school depending on other forms of support that are required (Department of Education, 2003b:10).

The qualitative improvement of special schools also embodies a review of curricula to ensure that all schools apply Curriculum 2005 (*cf.* 3.8.5.5). Learning support materials must be developed in line with Curriculum 2005, and be adapted to meet the particular needs of learners. All learners must strive to attain all outcomes, and not be subjected automatically to a watered-down curriculum. Curriculum adaptations do not mean a *separate* curriculum for learners with disabilities (Department of Education, 2003b:10).

Besides, the notion of strengthening special schools does not necessarily mean that more special schools should be built. Within the framework of de-linking site from support, it would be more appropriate if more support programmes are made

available at the local level at full-service schools (*cf.* 3.8.5.2) and through site-based support teams at ordinary schools. Consideration can even be given to eventually transforming some existing special schools into full-service schools (Department of Education, 2003b:11).

In view of the transformation process, new roles for educators with specialized training are also envisaged (Department of Education, 2003b:19), which implies that:

- all special, remedial and aid classes will be converted into learning support services;
- educators will not be attached to a permanent class, but will provide learning support services for all learners in the school;
- support will be provided to educators in all areas of curriculum and assessment adaptation, learning material development and on how to identify and address barriers to learning;
- pulling out certain learners from classes will be phased out; and
- mal-practices such as testing learners for admission will stop immediately.

3.8.5.2 Promoting full-service schools

In full-service schools, priorities will include the orientation and training of educators in their new roles by focusing on multi-level classroom instruction, cooperative learning, problem-solving and the development of learners' strengths and competencies, rather than focusing on their shortcomings (SA, 2001:19).

According to White Paper 6 (SA, 2001:22), full-service schools will be equipped and supported to provide for the full range of learning needs among learners and to address barriers to learning. The Ministry will designate and convert a number of primary schools throughout the country into full-service schools which will be closely monitored and evaluated. Such schools will be provided with physical and material resources, as well as professional development for staff members. Full-service schools will also receive special attention from district-based support teams (*cf.* 3.8.5.3) so that they can become beacons of the inclusive education system (SA, 2001:23).

Contained by an inclusive education system, it is expected that the majority of learners experiencing barriers to learning will be integrated into full-service schools. This will achieve a natural geographic distribution of such learners and a more efficient system with respect to the usage of both limited financial resources and specialist staff. When schools are fully inclusive, a situation should ensue that, on average, a school's population will comprise no more than a small percentage of individuals with special education needs. Given the latter, specialist educators will not be based at each school, but at the district level to be drawn upon by each school as required (SA, 2001:39).

3.8.5.3 Establishing District-Based Support Teams

District-based support teams refer to an integrated professional support service, provided at district level by support providers employed by the Department of Education, who draw on the expertise from education institutions and various community resources in the area (Department of Education, 2003a:7). These teams will be developed in the nine provinces of South Africa (Department of Education, 2003a:8). The way in which provinces and districts further develop these guidelines depends on identified local needs and available resources, since the support systems will have to be flexible and responsive to specific community needs.

As such, the idea of district-based support teams fits in with the move towards a *school-based management* approach, as outlined by the SA Schools Act (84/1996c), according to which the capacity of schools is developed so that they can take responsibility for managing themselves and responding to local needs (Department of Education, 2003a:18).

White Paper 6 (SA, 2001) commits itself to establish district-based support teams as a central part of the overall strengthening of education support services, aiming at the optimal development of all learners. The key functions of such teams will be to assist educational institutions, to identify and address barriers to learning, and to promote effective teaching and learning in local educational institutions (Department of Education, 2003a:7&9). Support rendered by these teams will include both classroom and organizational support, while focusing on the provision of specialized learner and educator support, as well as curriculum, institutional development and administrative support (Department of Education, 2003a:9).

To deliver these services, the support personnel will be trained in their new roles. Training will focus on supporting all learning factors, the developing of good teaching strategies that will benefit all learners, identifying and overcoming barriers in the system and on adaptation of support systems available in the classroom (SA, 2001:19).

One of the main tasks will be to assist educators in creating greater flexibility in their teaching and assessment methods in order to accommodate different learning needs and -styles. Educators will also be provided with illustrative learning programmes, learning support materials and assessment instruments (SA, 2001:20).

3.8.5.4 A place for independent schools

The National Education Policy Act (27/1996b; section 4(a)(vii)), in line with the SA Constitution (1996a: section 29(3); *cf.* 2.4.1.6.10), provides for the right of everyone to establish, where practicable, education institutions based on a common language, culture or religion, as long as there is no discrimination on the ground of race.

3.8.5.5 Ineffective Curricula

White Paper 6 (SA, 2001:19) recognizes the curriculum of schools as one of the most significant barriers to learning and development, arising from different aspects, such as the content (what is taught), the language or medium of instruction, the way in which classrooms are organized and managed, the pace of teaching and the available time, the learning material and equipment that are used, and the assessment of learning.

The SA Constitution (1996a) provides the fundamental framework for curriculum configuration, as it outlines in the Preamble, *inter alia*, that the quality of all citizens must be improved and that the potential of each person must be realized.

One of the key areas, enlightened by Education White Paper (SA, 1997b:39), is curriculum development to ensure flexibility and adaptation according to needs of individual learners, regardless of the category to which they belong. The NCSNET/NCESS Report (Department of Education, 1997c) recommends that the curriculum must be flexible regarding the teaching and learning process, since it has, as pointed out by Pottas (2005:27), as well as Lazarus, Daniels, and Engelbrecht

(2004:51), in the past, generally failed to respond to the diverse needs of learners, resulting in massive numbers of drop-outs, push-outs and failures.

The SA Constitution (1996a) places a huge premium on the Bill of Rights for the citizens of a democratic society. Accordingly, the Revised National Curriculum Statement for Grades R-9 to (Department of Education, 2004b; hereafter referred to as RNCS) states that the revised curriculum aims to develop the full potential of each learner as a citizen of democratic South Africa. It seeks to create lifelong learners who are confident and independent, with the ability to participate in society as critical and active citizens (SA, 2001:8).

Curriculum 2005 with its Outcomes-Based approach (hereafter referred to as OBE) is regarded as a powerful tool in developing practices for inclusion (Department of Education, 2002:73).

On the other hand, educators and learners will only be able to have access to an OBE curriculum if they have access to learning resources. This has implications for the way school libraries conceptualize, manage and provide resources. Unfortunately, the current status of school libraries is inadequate to support resource-based learning. Therefore, the Department of Education (Department of Education, 2003c:4.31) aims at promoting access to digital libraries, while the draft document on the Policy Framework for School Libraries of July 2004 recommends different models of school libraries to provide learners with access to resources and draws attention to the relationship between the school library, the curriculum and learning resources. It also stresses that school libraries are ideally suited to providing learners with a range of curriculum-orientated resources in diverse media forms, as required by an OBE system (South African Yearbook, 2005/6:229).

3.8.5.6 Lack of parental recognition and involvement

The SA Policy Act (27/1996b: section 4(a)(iii)) acknowledges the right of a parent or guardian in respect of the education of his child, while the Final NCSNET/NCESS Report (Department of Education, 1997c:40) provides specifically for parents' rights and preferences to be taken into account in the placement of learners with special education needs, while White Paper 6 (SA, 2001:30) stipulates that the Ministry will put into place a public education programme to inform parents and to educate them.

Moreover, section 22 of the Admission Policy for Ordinary Schools (Department of Education, 1999a) clearly states that the rights and wishes of learners, experiencing barriers to learning, must be considered on their admission to ordinary public schools. Visser (2005:408) also draws attention to the fact that common law accords a parent with decision-making powers relating to education, such as choosing the school, as well as the medium of instruction (*cf.* 4.4.6).

Through the SA Schools Act (84/1996c), access for all learners to a school of their parents' choice was legislated. Section 5(1) (84/1996c) provides that a public school must admit learners and serve their educational requirements without any unfair discrimination. In the Preamble of this Act (84/1996c), the important role of parents is acknowledged, as it is stated as an aim that the rights of parents must be upheld, while their acceptance of responsibility for the organization, funding and governance of schools in partnership with the State is promoted.

The Department of Education (SA, 1997b:40) also allows for parents' rights and preferences to be taken into account in the placement of learners with special education needs. However, reference is given to the argument of the deaf community that the rights of deaf learners should be protected and that the rights and preferences of parents should not be allowed to violate a deaf learner's basic fundamental rights to free access to his own language and culture (SA, 1997b:40).

Section 15 of the SA Schools Act (84/1996c) provides that every public school is a juristic person with legal capacity to perform functions in terms of the Act. As with all juristic persons, a school has to act through its executive organ, i.e. the School Governing Body, which mainly consists of parents (Visser, 2003:111). The SA Schools Act (84/1996c: section 16(1)) empowers parents by determining that the governance of every public school is vested in its School Governing Body. This principle of decentralization of power is constitutionally rooted in democracy, since it is enshrined as a constitutional value in section 7 of the SA Constitution (1996a). Such a decentralization of power to all stakeholders, which includes parents and learners in contemporary South African education, has to be regarded as one of the major directives for education policy.

Visser (2003:111), however, points out that the demarcation between the governance of a school and its professional management by the school's principal under the

authority of the State education authorities, is unclear since the term *governance* is not defined. The same author feels that vague provisions such as sections 16(1), 20(1)(m), 20(1)(e) and 36 of the SA Schools Act (84/1996c) contribute to confusion or create the potential for future confusion. It is, however, stipulated that a School Governing Body may only perform such functions and obligations and exercise only such rights as prescribed by the SA Schools Act (84/1996c) which may be an attempt to limit implied legal powers (Visser, 2003:111).

3.8.5.7 A lack of human resource development causing barriers

Given the serious human resource constraints in South Africa, which cause barriers to learning and development, there is an onus on the State to ensure that all human resources are developed to their fullest potential.

The Department of Education (Department of Education, 2003a:14) acknowledges that one of the key strategies of an inclusive education system is to provide human resource development for educators in mainstream and special schools. In this regard, White Paper 6 (SA, 2001:10) introduces strategies that will assist educators to cope with a diversity of learning needs in order to ensure that transitory learning difficulties are ameliorated.

It is recommended, as part of a strategic implementation plan, that human resource development should take place to ensure that all personnel are retrained over a period of ten years (SA, 1997b:141). On-going pre-service and in-service training will aim at improving educators' skills and knowledge and developing new ones (SA, 2001:18).

White Paper 6 (SA, 2001:18) indicates that classroom educators will be the primary resource for achieving the goals of an inclusive education system. Therefore the ongoing assessment of educators' needs through developmental appraisals, followed by structured programmes to meet these needs, is crucial (*cf.* 4.4.7).

In practice, the State has accordingly actively sought to address the lack of human resource development through extensive in-service training programmes (although experienced by some as being inadequate). In this regard, the Department of Education (Department of Education, 2003c:13) emphasizes that the task of re-equipping educators to provide quality schooling is undeniably a mammoth task,

which depends not only on State programmes, but also on initiatives from school level.

White Paper 6 (SA, 2001:37) recognizes the need for lower learner-educator ratios, as well as for expanding access and provision to learners with special educational needs, who where previously excluded from schools, as putting considerable burdens and demands on all professionals. Given current financial capacity, as well as the education system's inability to produce adequate numbers of educators in the short term, progress towards the inclusive education system will be dependent heavily on more effective usage of current skills in the special needs sector (SA, 2001:37).

The redistribution of educators was pursued as part of a strategy to tackle the problem of unacceptably large classes in especially poor schools as a clear barrier to quality schooling (Department of Education, 2003c:13). Although there are still instances of unacceptably high learner-educator ratios, the average learner-educator ratio in poor schools has already dropped considerably since 1996 (Department of Education, 2003c:9).

Studies have shown that improving school management is one of the most, if not the most, effective way of bringing about quality education at schools (Department of Education, 2003c:12). In this respect, the State also remains committed to attaining school management who can manage their finances well and who can translate financial resources into physical resources that will most cost-effectively promote quality education (Department of Education, 2003c:19). It is envisaged that the training of educators and management, conducted in relation to the timeline and focus of the short, medium and long-term steps provided by White Paper 6 (SA, 2001), will be provided at all levels by various providers and will involve in-service and pre-service training (Department of Education, 2003a:5).

It is also documented that educators themselves need to possess a clear understanding of the SA Constitution (1996a) and fundamental rights in general, regardless of their subject field. An educator, who does not understand the nation-building task at hand, cannot effectively provide quality education. Discrimination by educators, both overt and covert, against learners is unfortunately a reality in our

schooling system, and it is something that needs to be eradicated (Department of Education, 2003c:11).

Educationists in South Africa need to be imaginative and creative in translating theory into practice (Department of Education, 2003b:3). Educators require flexibility in order to develop confidence in their ability to meet barriers to learning. They need time and opportunity to develop relevant organizational and curriculum responses (Department of Education, 2003b:18; *cf.* 4.4.7).

3.9 SUMMATION

The successful implementation of inclusive education requires a clear appreciation of the pertinent policies and subsequent legislation on which this chapter concentrated.

The various policies in education designate the first initiatives towards moving away from a dual, social and/or general education system in order to be acquainted with and attend to the diverse learning needs of all learners, as well as to give effect to their fundamental rights.

From the literature reviewed in Chapter 3, it became quite apparent that the South African policies and succeeding White Papers, as discussed, can present an opportunity for learners with disabilities or other special educational needs to be located in educational settings if the recommendations can be put into practice. Conversely, the definite realization of inclusive education will not be easy. It will be something to be fought for, instead of assuming that it will become a reality without hard work.

On the other hand, it is crucially important to take cognizance of the fact that inclusive education, as an international movement, will have to develop differently in South Africa with its unique circumstances which create critical barriers to learning and development as identified in this chapter. Therefore, care should be taken to ensure that the shaping of international experiences do not degenerate into a sort of educational imperialism whereby the version of inclusion which suits dominant countries is adopted *per se* by the South African educational system to which it may be inappropriate.

Regarding this, Malherbe (2004:10) elucidates that, although the constitutional and legal framework to redress the education, to achieve greater equity and to move pro-

actively towards the realization of equal opportunities in education is more or less in place, its execution, so far, leaves much to be desired.

In light hereof, Chapter 4 propounds to probe the unique expectations of an inclusive education system in South Africa.

CHAPTER FOUR

AN OVERVIEW OF THE EXPECTATIONS CREATED BY INCLUSIVE EDUCATION

4.1 INTRODUCTION

Although South Africa arguably has one of the most progressive constitutions in the world, Kollapen (SAHRC, 2006:1) proposes that the litmus test of the SA Constitution (1996a; *cf.* 2.4) cannot lie in the adequacy of its text, but in the reality of the lives of its citizens. Carl (2000:170) also discloses that it is wrong to assume that the most important work has been done once legislation and policies have been finalized, since the real success can only be evaluated by the degree to which it is feasible in practice. Supportive hereof, Bray (2000a:283) maintains that, despite the introduction of basic democratic values and principles into the new education system by the SA Constitution (1996a), transformation of school education is a slow and ongoing process, as it occurs within the socio-economic and political realities of South Africa – realities which have often prevented the achievement of educational ideals.

Consequently, Pottas (2005:33) urges that practical educational reform is essential for the future well-being of society and therefore schools are expected to meet the challenges based on the rapid changes in demographic, economic and social spheres of today and tomorrow.

In light of the above, the previous chapter included a discussion on the relevant Acts, Policies and emerging White Papers giving effect to the fundamental rights of learners within the parameters of the SA Constitution (1996a). Relevant international documents endeavouring to transform education into a single inclusive education system were also addressed. The comprehensive education plan, drawn up in alignment with these Acts, Policies and White Papers, is described by Lockwood (2003:4) as one that would be expected of a developed country and therefore evident of the fact that the Ministry of Education did its homework thoroughly.

On the other hand, Bray (2000b:284) informs us that the transforming of education into a single democratic and non-discriminatory system has proved to be one of the most challenging items on the State's political and educational agenda. To

complicate matters, Pendlebury (2002; *cf.* 1.2) points out that there is too often talk about empowerment and policies that announce a commitment to social change, adding up to little more than rhetoric. In line herewith, the SAHRC[47] (2006:3) makes it clear that the daily reality at schools for many learners in South Africa, with particular reference to those learners in rural and township schools, is incongruous with legislation and policies. This sentiment is underscored by principals who feel that policies have not been realized in practice yet (Rademeyer, 2006a:19).

Necessarily so, Pendlebury (2002) points out that, without political will, rhetoric fails to become reality while token responses to genuine concerns frequently lead to policy statements that make little or no impact on the lives of learners, as learners are repeatedly treated as objects of policy, rather than as agencies (*cf.* 2.1).

Joubert (2006) reflects that a significant lack of reliable, comprehensive baseline databases and other relevant knowledge underpinning systemic, coherent policy frameworks still hinder schools and education systems incorporate constitutional values which have become part and parcel of education values and are indispensable for the cultivation of a human rights culture of tolerance and respect. In this regard, the Department of Education (KwaZulu-Natal, 2002:102) emphasizes that society will be richer and more effective if learners who are different, are integrated, rather that simply being tolerated.

Visser (2005:413) warns that, although the SA Constitution (1996a) causes a host of challenges regarding its implementation, it must be remembered that it is still very young, thus lacking experience in the handling of fundamental rights effectively. In line herewith, Pendlebury (2002) draws attention to the fact that young democracies like South Africa tend to make a great rhetoric show of redressing the inequalities of their shameless past. Monyooe (2005:13), moreover, submits that there seems to be serious systematic imbalances between the legislative framework, support and national expectations, referring to the belief that something good or exciting should happen.

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[47] The SAHRC is an independent constitutional body supporting democracy with the power, in terms of section 184(2) of the SA Constitution (1996a), to investigate alleged violations of fundamental human rights, to observe human rights and to take steps to secure appropriate redress where fundamental rights have been violated.

The implementation of the South African legal framework (*cf.* Chapters 2 & 3) would, as noted by Visser (2004c:92-93), pose challenges to any developing country emerging from a history where the denial of human rights was enshrined in law. The latter is further complicated by the diverse and pluralistic nature of the South African nation, as well as by society's desire for rapid changes in accordance with sometimes exaggerated expectations.

Bearing the above in mind, Chapter 4 focuses on the expectations of society regarding the ability of inclusive education to provide effectively for the fundamental rights of all learners, as well as on the gaps between the theoretical ideals and expectations on the ground or, as pointed out by Oosthuizen and De Waal (2003:328), on how the constitutional values and fundamental rights are unfolding in educational practice.

4.2 LEGAL EXPECTATIONS FOR MEETING THE CHALLENGE

Bray (2000a:82) points out that the right to education, according to the SA Constitution (1996a: section 29; *cf.* 2.4.1.6.10), offers a legal framework for the development of an education system that houses the legitimate concerns, needs and aspirations of all learners (*cf.* 3.4). Du Toit (2006:18) maintains that a learner's total situatedness and not just his individuality must be taken into account in any effort to meet his needs. This would imply that a learner's individual circumstances should be noted and that the cooperation of everybody involved would be essential.

In building an education system, Schouwstra (2006:1) emphasizes that the SA Constitution places a special burden on the State for the achievement of equality and non-discrimination (1996a: section 9; *cf.* 2.4.1.6.3) by requiring that the fundamental right to a basic education be developed further. These clauses are significant as they protect all learners, irrespective of their abilities or non-abilities. Conversely, Engelbrecht (2004:7) expounds that this goal has not been met yet, since differences are still accentuated through separate instruction time in separate school settings.

Moreover, Visser (2004c:93) expresses the view that a lack of relevant management experience has no doubt caused problems and delays in the full implementation of the new education laws and, consequently, the realization of certain fundamental rights to education.

To fulfil the legal expectations of the State, it is essential that the entire school community be involved in a thoughtful, carefully researched transition. Dramatic top-down legal directives will polarize parents and educators and will create environments that are hostile to change. Similarly, Pottas (2005:34) sets out that changes should be supported from the top to the bottom, aiming at making a difference and bringing about change that is tailored according to the unique circumstances of each school.

For schools to be effective, Monyooe (2005:12) avers that staff members should share commitment to excellence and assist one another in moving schools forward. In support hereof, Fullan and Stiegelbauer (1982:14) explicate that regular classroom educators must have the strong and coordinated backing of, *inter alia*, special education educators and support personnel for inclusive education to be successful.

It is also important that the transformational expectation of achieving equality through the SA Constitution (1996a) should, according to Sachs (2005:10), be achieved through processes that are both fair and participatory. Such processes will endow everyone with a voice and a chance to be heard. The creating of a democratic participatory decision-making process will, as said by Monyooe (2005:4), ensure social justice.

Sayed and Carrim (1997:96) explain that inclusiveness is inextricably tied to discourses about democracy, which privileges the notion of participation (participatory democracy), through which, it is assumed, inclusiveness will be achieved in ways that are considered by all to be appropriate. Correspondingly, Carl (2000:171) postulates that all role players must have maximum opportunities to make an input in envisaged changes which will inevitably lead to better support during the implementation phase.

Pottas (2005:36), moreover, indicates that shared ownership among staff is a prerequisite for successful inclusive education. This entails that staff members, as a team, are responsible for supporting learners to reach their maximum potential (*cf.* 1.1). To the same extent, Niemann and Kotze (2006:618) accentuate the role of principals to build relationships of trust and goodwill, predicated on respect, mutual advantage and responsibility, and to cultivate the disposition of all members of the school community to think things through and act accordingly.

Smith and Greyling (2006:595) submit that empowerment has too often been over-promised or used as a *quick fix* to educational problems, while in reality, the hierarchical chain of command (often regarded as social injustice) persists to hamper the effective implementation of empowerment.

Equally important, Human (2000b:151) asserts that it is easy to declare that learners have fundamental rights and to pass legislation, or ratify international conventions as a framework for the implementation thereof. However, the same author cautions that assertions or legislation will fail to be persuasive and the ideal of learners' rights will yield to the erroneous belief of adult decision-makers always acting as *in the best interests* of learners, without a sound set of justifiable principles.

Unfortunately, the cooperation of all parties concerned has not been realized yet. Illustrative hereof, the SAHRC (2006:30) received numerous concerns over the lack of community and parental involvement in the governance of schools or the dysfunctionality of governance structures (*cf.* 3.8.5.6). The Committee reports that this concern stems from the persistent exclusion of parents due to structures that do not facilitate the participation of all parties (*cf.* 4.4.6). For example, both the blind community and the Deaf Federation of South Africa (2006:27; hereafter referred to as DeafSA) express the belief that there is a lack of consultation with them, while no attempt has yet been made to engage them in any matter sufficiently.

In addition, Monyooe (2005:10) asserts that the voices of parents and learners with disabilities must be encouraged, listened to and taken seriously, since only then will the brokenness, poverty, sadness and self-hatred give way to the vast array of resources, gifts, skills and visions of people with disabilities. The same author puts forward that a failure to embrace disability as a national challenge has serious ramifications on the overall societal infrastructure. Moreover, Van Rooyen (2006:11) points out that the voices of educators, parents and learners, who may have different beliefs and values and who do not want a basic education for everybody, but rather aspire to quality education (which meets not only their needs, but also their aspirations and wants) are not heard or listened too.

With the move towards inclusive education, as highlighted by Schouwstra (2006:1; *cf.* 3.6.1), it is implicit in the legislation that no learner should be prevented from participating in the system, regardless of his physical, intellectual, social or emotional

abilities, language or any other barrier that he may encounter. Schoeman (2003:37) submits that, although it has been argued that the establishment of proper systems is sufficient to maintain a free and democratic society, world events have proved that even well-designed systems are not always sufficient.

The above statement can be illustrated with reference to the *Grootboom*[48]case in which it was, *inter alia,* decided that systems, policies and programmes must be reasonable, both in their conception and in their implementation. The Court noted that the formulation of systems is only the first stage in meeting the State's obligations in terms of the SA Constitution (SA, 1996a) - *in casu* to provide homes – which will similarly apply to the State's obligation to provide education for all. Systems also need to be reasonably implemented otherwise they would not constitute compliance with the State's obligations (*cf.* 2.4.1.6.8). In line herewith, the State is obliged to allocate a reasonable part of the national budget to realize socio-economic rights (*cf.* 3.8.1).

In the wider sense, inclusion must, according to Mittler (2000:10), be about developing an inclusive community and education system based on a value system that invites and celebrates diversity (*cf.* 3.6.2) arising from gender, nationality, race, language, socio-economic background, cultural origin and level of educational achievement or disability. With reference to the latter, Visser (2005:401) elucidates that it is clear that what is required is a single, non-discriminatory, high-quality education system (*cf.* 1.2, 3.3.3) with equal opportunities (*cf.* 3.6) and the recognition of all learners' fundamental rights.

Since there will be continuous pressure to resist the inclusion of all learners, despite the legal specifications Pottas (2005:34) cautions that an inclusive system must be vigilant in protecting and safeguarding the fundamental rights and interests of learners in order to remain fully participating members of the learning community by identifying and addressing barriers to learning (*cf.* 3.8 & 4.4), by being constantly aware that resistance should be expected, by developing a policy to educate the wider community about the needs of learners with special education needs and inclusive education, by working conscientiously to build even deeper and more

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[48] *Government of RSA and others v Grootboom and others* (note 24 above)

enduring relationships for learners, both with their peers and the community, and by realizing that the work concerning developing inclusive schools is never done.

Although the educational transformation process has been tackled with extreme urgency, the Department of Education (Department of Education, 2003c:3) realizes that the speed at which changes occur may at times seem to be painfully slow. Although it is time-consuming, the Department stays confident that inclusive education is the best path to be taken to give effect to the fundamental rights of all learners.

The Department of Education's confidence is not shared by DeafSA (2006:24), who report that policies have not been translated into reality yet. In this regard, Olivier (2003:36) postulates that, if a system fails to deal with social deprivation, exclusion or marginalization of its community, it is doomed to eventual failure.

In view of the above, attention is, forthwith, drawn to the actuality of an inclusive education system to give affect to the fundamental right to education in accordance with section 29 of the SA Constitution (1996a).

4.2.1 The fundamental right to education: an expectation of quality education

The SAHRC (2006:2) places emphasis on the right to education as a socio-economic right which imposes a positive duty on the State to provide education or access to education in order for the right to be enjoyed and fulfilled. The State has a duty to provide resources to take care of the basic needs of learners (Dlamini, 1994:574). The right obliges the State to afford sufficient schools, educators, support and other incidental services to ensure reasonable access to basic education for everyone (Malherbe, 2006). This is important, since the fundamental right to basic education extends to all learners and lays the responsibility on the education system to develop and sustain learning in a country (Peel, 2005; *cf.* 3.5).

Moreover, Du Plessis and Conley (2006), maintain that the right to education, like all other fundamental rights, imposes three levels of responsibilities on the State, namely obligations to respect, protect and fulfil. The duty to fulfil incorporates both an obligation to facilitate and to provide, while the duty to respect requires the State to avoid measures that hinder or prevent the enjoyment of the right to education. The responsibility to protect, on the other hand, imposes a positive duty on the State to

take measures that prevent third parties from interfering with the enjoyment of the right (Olivier, Khoza, Janse van Rensburg & Klinck, 2003:78).

With reference to the above, Yacoob (2003:v) cautions against the tendency that it is the duty of the State alone to give effect to the socio-economic rights of everybody. Civil society cannot just demand, criticize and instruct the State to adhere to their rights, since the SA Constitution (1996a) imposes a duty on everybody to contribute towards the broader process.

Pigozzi (1991:1&4) expands the duty of the State to give effect to learners' right to education by giving prominence to the right of learners to quality education that will serve them as a basis for lifelong learning (*cf.* 1.2). Accordingly, Niemann and Kotze (2006:610) call on education systems to be more sensitive to meeting learners' right to a *quality* basic education which, according to Grösser (2006:37), remains a demanding, complex and daunting task.

Since parents are paying more and the State less for education in South Africa, Steyn (2000) condones the parents' claims in demanding quality education for their children, but as the State nevertheless also spends large amounts on education, Beckmann and Prinsloo (2004:14) concede that the State may warrant some assurance regarding the maintenance of high quality.

Unfortunately, as Van Rooyen (2006) points out, there is no single or simple explanation of what quality education entails. Emphasizing this, the SAHRC (2006:7) comments that the right to basic education is not defined in any legislation and that there has, up to date, been no Constitutional Court decision that addresses the meaning of the right to basic education in South Africa (*cf.* 2.4.1.6.10).

Quality, according to Steyn (2002), implies continuous improvement which is essential against the background of daily changes around the globe, while Malherbe (2006) explains that quality education refers to education of a *standard* that would enable learners to enjoy the rights and fulfil the duties identified with citizenship (*cf.* 2.4.1.4). To the same extent, Steyn, Honiball and De Klerk (2006:1) assert that education should equip learners with skills, knowledge and values to enable them to take care of themselves by rising above the poverty cycle (SAHRC, 2006:16), and to contribute positively to the maintenance of a safe and supportive community, thus contributing to the country's prosperity.

Underscoring the above, Mhone (2003:4) indicates that a lack of education or low levels of education tends to go hand-in-hand with higher degrees of socio-economic vulnerability, while Olivier (1994:26) avows that the realization of learners' right to quality education would support and have a significant impact on the dignity (*cf.* 2.4.1.6.4) of learners and on their quality of life.

From the above it is apparent that the ideal of quality education is a very complex objective and that people may have different views on exactly what it entails and how it is to be achieved.

With specific reference to education, Steyn (2002) advocates that quality improvement involves discovering the root causes of barriers and applying remedies to remove such causes (*cf.* 3.7 & 4.4). Discovering the causes of barriers includes, according to Olivier (2003:44), identifying the processes which bring about exclusion, the affected categories of learners and the role of the actors involved in the process.

Van Rooyen (2006) posits that the quest for the improvement of quality education has been recognized as the most critical challenge facing most developed and developing nations. In line herewith, Pandor (2005:3), Minister of Education in South Africa, announced in her budget speech in Parliament that the improvement of the quality of education is a national priority that requires involvement and engagement throughout all levels of our society and that educators must be seen at the heart of quality education. Tyobeka, Deputy-Director-General of General Education, on the other hand, cautions that the achievement of quality education cannot be attained overnight (Rademeyer, 2006b:19). Moreover, the Institute for Justice and Reconciliation criticized the newly announced budget for the years 2008/2009 as not mirroring Pandor's commitment to future quality education (Rademeyer, 2006d:4; *cf.* 4.4.1).

With regard to the feasibility of quality education, Steyn (2002) avows that learners and educators can be much more responsive than they are at present – emotionally, intellectually, physically and mentally. By implementing total quality management aiming at continuous improvement, the headmaster of St Andrew's Preparatory School, Grahamstown, for instance, proposed that schools could be transformed into vibrant centres of learning and teaching, which could cater for the needs of all learners, parents and society in general (Rademeyer, 2006:4).

Although access to quality education should not be dependent on race, social class or geographic location (*cf.* 3.6.1), the SAHRC's investigation (2006:39) discovered that there are stark differences in the quality of education that are attributed to the race and social class of a learner. The researcher deplores such unfair discrimination, siding with numerous other educationalists who have voiced their disapproval concerning inferior education practices.

Among them is Visser (2005:414) who mentions his apprehension about the current general quality of education at many public schools. This concern is shared by Steyn (2002) who feels that many schools still provide education of a poor quality due to the legacy of apartheid, and by Mestry (2004:294) who asserts that the quality of education in South Africa has generally remained inferior, as indicated by weak academic performance and poor working conditions at many schools.

In addition, the SAHRC (2006:2) refers to recent research indicating that South Africa is not experiencing the outcomes in terms of quality education that were anticipated. The Commission (2006:18) concludes that, although the South African government is able to tackle the issues, the education system is somehow not finding the priorities and the means to start solving the crisis regarding quality education.

Affirming the above, Du Toit (2006:73) avers that the currently popular model of inclusion does not necessarily mean better educational opportunities. Although it may remove the stigma of segregated education, the same author claims that it fails to meet the individual needs of the exceptional learners. As reasons for the widespread evidence of unsatisfactory achievements of learners, Lewin, Samuel, Stuart and Sayed (2003:xxiii) point out that educator methods are slow to change in ways which reflect approaches deemed to be effective, while the quality of educator training remains poor (*cf.* 3.8.5.7 & 4.4.7). Ensuing from the latter, Mhone (2003:1) also indicates that social progress and economic resuscitation remain elusive.

Indicative of the absence of quality education, Peel (2005) divulged, at the International Special Education Conference 2005, the disconcerning information that many learners with a permanent hearing loss leave schools for the deaf with exit levels that are very low. Such learners cannot read or write a spoken language properly after twelve years of schooling, while only 54 of these learners wrote the National Grade Twelve exams at the end of 2003.

Mestry (2004:297) states that the need for quality education for their children drives parents to seek admission at schools outside their residential area. Minister Pandor (cited by Joubert, 2006) reports that ex-Model C schools have already been confronted by the challenge of integration, as black learners are increasingly looking for quality education. As a result, former *coloured* schools in Cape Town are absorbing an increasing number of black learners from the Eastern Cape for the same reason. Correspondingly, the SAHRC (2006:18) confirms that high levels of differentiation mirroring the economic disparities of society still exist within the education system and that the history of inequality continues to pervade both the physical provisioning at disadvantaged schools, as well as the quality of education delivered to marginalized groups of learners. The Commission (2006:18) has complained that education in South Africa persistently reinforces marginalization for sixty to eighty per cent of its learners, rather than establishing inclusiveness.

Ratifying the aforesaid, Rademeyer (2006e:15) reports that the Institute for Justice and Reconciliation found 80% of schools providing a poor quality of education and still being regarded as dysfunctional. Hefer identifies aspects that contribute to the latter, such as unqualified and incompetent educators, political and union interference, and exceedingly poor discipline among educators and learners (Rademeyer, 2006e:15).

In connection with the provision of quality education, Pelser (2006:10) reports that factors such as wealth, race and rusticity are still those that define quality education, since poverty impacts negatively on the accessibility of quality education. The SAHRC (2006:2) acknowledges that for many years there has been an inability among a large number of learners to afford quality education, due to school fees and other hidden costs such as school uniforms and transport costs (*cf.* 3.5.2 & 4.3.2).

It is therefore understandable that increasingly more South Africans will be demanding free primary education as a fundamental right.

4.2.1.1 Anticipating free education

Singh (2004:144) brings to the fore that free, compulsory and universal primary education for everyone is among the most defined of fundamental rights, which governments have a responsibility to convert into reality. As such, it was set as an

international millennium development goal for universalizing primary education in all countries by the year 2015.

One of the main considerations of the worldwide pressure for free primary education is the belief that free education will enhance enrolment at schools. Nonetheless, according to Fiske and Ladd (cited by Van Rooyen, 2006), recent studies indicate that South Africa has an average enrolment rate of 96%, which proves that the absence of free education has no negative effect on the enrolment of learners at public schools.

What must not be ignored, accordingly, is that the SA Constitution (1996a: section 29; *cf.* 2.3.1.6.10) frames the fundamental right to a basic education differently from many other constitutions in that the right is not subject to progressive realization of other economic and social rights. The South African government is, as a result, obliged to provide basic education to all its learners immediately.

The SAHRC (2006:12), in addition, illustrates that learners' fundamental right to basic education, *being accessible to all* (1996a: section 29), implies that education must be economically accessible and affordable to everybody. A vexing question in this regard is, as elucidated by Van der Vyver (1994:312), whether a constitutional right to education entails free education and subsequently requires the State to bear all costs of providing basic education.

Against this background, Van Rooyen (2006) points out that many South Africans hold the perception that basic education in the new democratic South Africa will be free. This can partly be attributed to the expectations created by international declarations and speculation in the media during the run-up to the 1994 elections. Conversely, as the same author accentuates, there is no factual basis for these expectations to be found. To the same extent, Bray (2000:281) avers that, although the ANC government is committed to free education for the first ten years of a learner's schooling, this could not be implemented immediately because of a lack of funding.

Supportive of the above, the SAHRC (2006:8) elucidates that it could be argued, that within the South African context since 1994, the State has had to deal with a unique situation of addressing gross and iniquitous past discriminatory distribution of educational resources on the basis of race. It is, therefore, given the size and

complexity of the education system, recommended that it would be unreasonable to expect the State to address all aspects of the right to basic education immediately (*cf.* 4.3.1) and to provide free education. In light of the latter, the legal test to determine whether South Africa is indeed complying with international standards in its constitutional obligations, would have to be different from the one set in the *Grootboom*[49]case (*cf.* 2.4.1.6.8 & 4.3).

Consequently, the SA Schools Act (84/1996c: section 40) empowers SGBs to charge school fees and enforce the payment thereof on parents who are liable for payment, by process of law. The same Act, conversely, also provides for the exemption of school fees under certain circumstances (84/1996c: section 5(3)), as well as for the fact that no learner may be denied access to schools due to an ability to pay school fees (84/1996c: section 5(1)). A parent is accordingly liable for paying school fees unless, or to the extent that, he has been exempted from payment in terms of this Act. Prinsloo and Beckmann (2004:324) point out that, (if a learner qualifies for exemption in accordance with the SA Schools Act) the education of such a learner could indeed be free.

Notwithstanding the above, the SAHRC (2006:20) found that there are still too many incidences of learners' being discriminated against due to their parents' inability to pay school fees, parents not being informed about fee exemption policies, school records being withheld due to non-payment, learners being sent home, services being withheld from learners at schools, legal processes to claim unpaid school fees being instituted against parents (including letters of demand being sent) summonses being issued and default judgments obtained, and school registration fees used as a means test to exclude poor learners.

Correspondingly, SABC 2 News (2007-01-12) confirmed that at the beginning of the 2007-school year many parents complained, as they had not yet received their children's progression reports for 2006, due to outstanding school fees. The latter was condemned by Patel, spokesman for the Department of Education, who showed that such actions by schools are against the SA Schools Act (84/1996c).

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[49] *Government of the RSA v Grootboom* (note 24 above)

In addition, Roithmayr (2003) affirms that, despite the availability of exemptions, the school fee regime of financing appears to bar access for some learners completely, and unconstitutionally burdens the right to access for others by requiring families to spend significant portions of their income on school fees.

Without the availability of free education for their learners, parents are placed in a situation where they feel obliged to pay school fees. Subsequently, the inability to pay school fees persistently leads to social exclusion and isolation, both within the family and between the family and the school (SAHRC, 2006:19). Additionally, Roithmayr (2003) points out that poor districts cannot adequately fund school needs, and government currently does not provide sufficient state funding to remedy the shortfall. Therefore, under the guarantee of equality in section 9 of the SA Constitution (1996a; *cf.* 2.4.1.6.3), the charging of school fees may violate the fundamental right to basic education of learners within these districts, since it may be regarded as discrimination on the basis of social class. The same author shows that a school's ability to charge fees and to provide a learner with greater funding and resources appears to correlate strongly with the class and race of the community in which the school is located (*cf.* 4.4.1).

Education in South Africa is, unfortunately, not at the point where primary school education can be offered free of charge. Nevertheless, Van Rooyen (2006) puts forward that a recent analysis of the macro-funding levels specifies that education has been allocated approximately twenty percent of the annual budget on a national level over the past twelve years, which is indicative of government's commitment to improve the quality of education and ensure equal opportunities for all learners, which will be scrutinized next.

4.2.2 The right to equality and equal educational opportunities

In South Africa, *de jure* segregation was effectively ruled out by the equality provision in the SA Constitution (1996a; *cf.* 2.4.1.6.3), the admission clause in the SA Schools Act (84/1996c; *cf.* 3.6.1) and law cases, such as *Matukane v Laerskool Potgietersrus* (*cf.* 3.6.1).

The quest for equal educational opportunities is as much a challenge to balance and harmonize the values of dignity, equality and freedom, and to respect and accommodate learners' differences, as illustrated by Malherbe (2004:12; De Vos,

2000:65), as it is to build the South African nation *on* and not separately from its diversity (*cf.* 3.6.2). Correspondingly, Nieuwenhuis (2005:187) points out that being human implies being equal and that one learner cannot be more or less human that another. In line herewith, Lazarus, Daniels and Engelbrecht (2004:46) assert that the acknowledgement of the right of learners to access equitable education opportunities is a moral prerequisite for a successful inclusion system in which self-reliance, independence and wants rather that needs are of importance (Pottas, 2005:22).

Since inclusion is part of a universal human rights movement, Swart and Pettipher (2005:4) emphasize that it has become an imperative for all countries to create equal opportunities for all learners to learn and succeed. Equally, the Court ruled in the matter of *Palm Pre-primary School*[50] that the inequalities in South African education have to be addressed and that a constitutional obligation rests on the State to pursue equal treatment of all learners. The implication of the latter is that, while racial inequality and segregation as past injustices of education provisions must be redressed, there also has to be accountability for redress (Beckmann & Prinsloo, 2004:136).

Equal educational opportunities imply, according to De Groof and Lauwers (as cited by Joubert, 2006) *availability* of educational institutions, the *accessibility* of education to everyone on the basis of non-discrimination, including physical and economic accessibility, *acceptability* of education being relevant, culturally appropriate and of quality, as well as the *adaptability* to the needs of learners within their diverse social and cultural settings.

Equality of opportunity, moreover, asserts that each learner should have equal rights and opportunities to develop his own talents and that there should be rewards for equal performances (Liebenberg, 2005). In support hereof, Kroes (2005:236) avows that the concept *equal educational opportunities* involves, *inter alia,* the opportunity to benefit from education in such a way that the learner will achieve a level of functional literacy to meet the demands of his chosen vocation, which is particularly true in South Africa.

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[50] *Federation of Governing Bodies of South African Schools (Gauteng) Palm Pre-primary School v Member of the Executive Council for Education, Province of Gauteng (case 29093/2000) (T)*

Equality of opportunity is seen by Fullan and Stiegelbauer (1982:14) to entail the opportunity to escape from the limitations of the social group in which one is born, while Thro (2004:9) draws attention to its importance for improving the quality of life of millions of people.

Equality does, however, not assume the empirical equality of learners, as it recognizes that inequalities in virtually every trait or characteristic are obvious and cannot be eliminated (Nieuwenhuis, 2005:192). Underscoring the latter, Bennet (cited by Joubert, 2006) cautions that equity should not be confused with sameness of result or identical treatment and experiences, since different treatment may rather be required in accordance with relevant differences. Supportive of the latter, Malherbe (2006) stresses that equal access does not imply total equality, but equal opportunities to education according to every learner's ability and potential. Reasonable and justifiable admission requirements based on performance, language proficiency and age may, in other words, be imposed. Similarly, Higgs (2002:13) argues that equality should be disassociated from sameness and the realization that it can legitimately be linked to differences.

Nieuwenhuis (2005:192) correctly points out that the notion of equality of opportunity is more complex, as it requires not merely that there should be no exclusion from access, other than those requirements appropriate or rational to the good in question, but that learners from all sections of the society have an equal chance of satisfying them.

In order to overcome previous inequalities, the same opportunities could be provided equally to all learners, leading to a so-called *one size fit all* model. Carrim (2003:312) points out that one size will definitely not fit all, because learners and/or schools are not located in homogeneous, stable socio-economic and political environments.

To the same extent, Joubert (2006) explicates that the focusing on mathematical ratios and race quotas in former white schools to erase the inequalities of the past does not show a commitment to providing equal educational opportunities for all learners in South Africa, since the challenge is not simply racial integration in a small percentage of schools. The challenge is embedded in the successful promotion of the values of dignity, equality and the advancement of human rights and freedoms for every learner, and in providing learners with equal chances to succeed. The latter

implies that instructional programmes, learning contact and styles, teaching strategies, assessment, as well as the school environment, need to be designed to promote the chances of all learners.

Indicative of the above, the Constitutional Court had to deal with a dispute on why black learners had to walk to school, while white learners were transported to school by buses, in the matter of *The Premium Province of Mpumalanga*[51]. The Court, *in casu*, had no difficulty, whatsoever, to find that separate access to schools was completely intolerable and incompatible with the Bill of Rights and had to be scrapped.

Despite the recognition of equal educational opportunities through the SA Constitution (1996a) and relevant Policies, there are unfortunately still serious shortcomings in the implementation thereof. Monyooe (2005:8) and the SAHRC (2006:24), for example, recognize that most learners with disabilities are still deliberately denied access to education, while Throw (2004:9) postulates that a superhuman effort is required to make meaningful progress towards adequate access to educational opportunities for millions of learners still hamstrung by the vicious circle of poverty, disease and hopelessness. It is therefore essential to investigate the potential of inclusion.

4.2.2.1 The potential of inclusion to accommodate diversity

In the sphere of education, where an inclusive education system is expected to be able to provide rich learning environments, taking into account the full diversity of its learner population (Pottas, 2005:36), South Africa is confronted with a particularly intricate challenge, since learners display a variety in their use of language, religion, learning style, type of intelligence, developmental potential, historical experience, social class and colour, as well as many other characteristics resulting from their vastly different economic and cultural backgrounds (Green, 2001:5, Prinsloo, 2007:158, & Sinclair, 1994:502; *cf.* 3.6.2).

What must, in addition, be taken into account, as highlighted by Du Toit (2006:18), is that, even though learners may show certain common characteristics, they are still

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[51] Province of Mapumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools Eastern Transvaal 1999 (2) BCLR 151 (CC).

unique regarding their personalities, possibilities and limitations. Although diversity implies differences, Banks (2004:48) conversely explicates that it must not emphasize differences or regard diversity as problems that need to be overcome, but that differences between learners must rather be viewed as a resource to support learning. In addition, Higgs (2002:13) cautions that the recognition of diversity does not open the door for dogmatism in terms of, *inter alia,* one specific religion, culture, language or group of learners. It simply proposes space for recognition and tolerance of differences.

The challenge at schools with diverse learners would, therefore, be to engender a common national identity that accommodates diversity and self-determination (Phatlane, 2006). In order to accommodate diversity, South Africa as a pluralist democratic State, must create a single education system with built-in levels of flexibility which will enable it to respond to a diverse range of learners (Dyson & Forlin, 2004:6).

According to Pottas (2005:35), an inclusive education system is an answer to the fundamental strains imposed on education systems, since it is able to deal effectively with issues regarding fundamental rights by celebrating similarities and dignifying differences (WCED, 2002). Engelbrecht and Green (2004:vi) predict that the latter requires an understanding of what the most apparently dissimilar learners may have in common and the recognition of the unique characteristics of every learner. Educators should not think of *normal* or *special* learners, but of one diverse and changeable population of learners who learn in a variety of ways and have the right to appropriate education.

Moreover, Pottas (2005:19) predicts that the increasing learner diversity as well as the ever-changing economic and social conditions are putting extra strain on the capacity of education systems to produce well-educated learners. In line herewith, Lazarus *et al.*, (2004:46) point out that the ultimate goal of inclusive schools is to contribute towards the development of an inclusive society where all members are able to fulfil their potential and participate optimally, and where respect for and valuing of diversity in the context of social integration is an active value. In practice, Prinsloo (2007:164) indicates that schools with cultural diversity in classes have expressed concern that educators experienced difficulties in creating relationships of trust and a climate of success.

Moreover, Yacoob (2003:vi) avows that the SA Bill of Rights aims towards a society in which the humanity of everybody will be recognized regardless of their circumstances, protect all vulnerable learners and achieve social justice, since the absence of adequate social security compromises democracy in a fundamental way and could result in its systematic erosion and eventual destruction.

Diversity among the learner population must be mutually reinforced and, if properly managed, should give rise to and sustain genuine respect for the variability of the community that constitutes an emerging nation (Van Tonder, 1999). Conversely, Visser (2004c:86) admits that this has not taken place in practice yet.

In this context, Green (2001:4) explicates that one of the cohesions (shared aims) on inclusive education is a conviction that the extension of mainstream schools to learner diversity (in particular to marginalized groups of learners) offers a means of turning commitments into reality. Accordingly, Tomko (1996:2) believes that inclusion is capable of teaching learners how to interrelate and function in a team together with others of different abilities, to value diversity and realize the ability of others, to make a contribution, and to provide learners with a sense of unity.

However, Blessing *et al.* (2003:2) elucidate that the placement of all learners in a general classroom is only a portion of the equation, since real inclusion focuses on celebrating diversity and dealing with differences which demand, among other things, according to Green (2001:5), the elimination of barriers to learning and development, inherent in the system itself. As a result, Blessing *et al.* (2003:2) puts forward that anything less leads to exclusion.

An important goal, according to Muthukrishna (2000), is to develop an ethos that all learners can value, and that ensures that the school is responsive to diversity. Similarly, Ayres and Meyer (1992:31) state that inclusion should have no conditions and should not make any differential value judgments. Everyone should be welcome and appreciated as each has a contribution to make. Education must accord dignity (*cf.* 2.4.1.6.4) to every learner for which respect as a value is critical (Pigozzi, 1999:1).

In *President South Africa v Hugo,*[52] the concept human dignity was provided with a broad and expansive definition. It stated that human dignity would be impaired whenever a legally relevant differentiation treats people as second-class citizens or demeans them or treats them as less capable for no good reason, or violates an individual's self-esteem and personal integrity.

However, Judge Sachs noted *In re: The School Education Bill of 1995*[53] that immense inequality continues to exist in relation to access to education in South Africa. It was also recognized that, although the imperatives of equalizing access to education are at present strong, and even though these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do present an important element of the equation.

Research conducted by Phatlane (2006) holds that the management of schools plays a central role in the social cohesion of learners. The findings of this research are positive as they indicate that learners feel that they have been taught at school to live together in harmony by respecting, loving, accepting, caring, and acknowledging each other despite differences.

In order for the education system to accommodate diversity among learners effectively, the identification of learners' diverse needs is needed as soon as possible.

4.2.2.2 The urgency of early identification

For inclusive education to be successful, Fullan and Stiegelbauer (1982:14) state that integrated diagnosis, preparation and follow-through with an individual education prescription for each learner with a disability is required. This not only requires time, but also harmonious relationships among all personnel. Knoetze and Vermoter (2007:1) add that the means through which the results of learner assessments are communicated to make them useful and constructive can, unfortunately, be debated. What is also important is, as pointed out by Rafalovich (2004:91), that educators must be sufficiently trained (*cf.* 3.8.5.7 & 4.4.7) in order to have extensive knowledge of the symptoms of various disorders and the methods of treating abnormalities

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[52] *President of South Africa v Hugo* (note 17 above)

Supportive of the above, Pottas (2005:54) explicates that the early identification of barriers to learning, which can be done with diagnostic procedures (Du Toit, 2006:4) and psychological methods (Knoetze & Vermoter, 2007:2), and subsequent effective and pragmatic intervention, influence the success of inclusive education, as well as the future lives of learners. Therefore the South African society expects legislation which will make early identification compulsory in order to promote the effectiveness of inclusive education. According to Rafalovich (2004:90), the school is often the place where the signs of special needs are most visible, as it places particular intellectual and social demands on learners. In this context, the same author believes that if schools fail to identify and address special needs in learners, they abandon them to a host of social ills, since schools are crucial in improving learners' future quality of life.

It is recognized by Rossi and Stuart (2007:140) that early identification and intervention can provide learners with the normal range of development during the early childhood period, giving them the means to be successfully included in classes with their peers. Kapp (2006:325) cautions that it may at times be difficult to identify barriers to learning, such as hearing impairments at an early stage.

Despite the academic significance of early identification, Booyse (2006:146) expounds that there are still numerous learners who complete their school career without ever being identified as experiencing barriers to learning and, thus, being denied the opportunity to fully actualize their potential. Possible reasons are, as held by Knoetze and Vermoter (2007:17), the lack of personnel, resources and cooperation between professionals and educators. Pottas (2005:54), also points out that the reality in South Africa is currently unresolved and incomplete and that early identification and intervention still need to be addressed to the full.

Within the framework of the SA Constitution (1996a), nothing may be done with regard to learners if it is not established that it is indeed in their best interests.

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[53] *In re: The School Education Bill of 1995 (Gauteng) 1996 (4) BCLR 536 (CC)*

4.2.3 The best interests of learners as a fundamental right

Davel (2006:1&5) posits that *the best interests of a child,* which has been termed the *golden thread* that runs through the law relating to children, is both a specific children's right and a standard against which all conduct of any person must be measured. This clearly implies that learners are afforded a specific fundamental right, akin to all the other human rights of children enshrined in the SA Constitution (1996a).

Of important significance to concede, is that the supremacy of learners' best interests is not regarded as an absolute right, similar to all other fundamental rights, seeing that the SA Constitution (1996a) itself allows for the limitation of fundamental rights (*cf.* 2.4.1.6.13). Hence, the best interests of learners will have to be demarcated in a process where it is balanced with the fundamental rights of other learners, educators and parents (Joubert & Prinsloo 2001:120).

In education and in society in general, section 28(2) of the SA Constitution (1996a; *cf.* 2.4.1.6.9) should, as indicated by Reyneke (2006:1), be the benchmark when the inclusion of learners is considered. In accordance, the State bears the obligation to adapt an inclusive education system to be in learners' best interests (SAHRC, 2006:16). Such an adaptation will, as maintained by Monyooe (2005:6), end the practice of forcing learners to adapt to whatever schools offer them (*cf.* 3.3).

Davel (2006:11) further explicates that the best interest standard necessitates full knowledge of all facts and circumstances of each individual case with due consideration to the right to education itself, as the main aims and objectives to be achieved at school are to respect the fundamental rights of all role players.

In addition, the SAHRC (2006:37) indicates that whenever there are competing claims on rights in the sphere of education, the best interests principle must be acknowledged and upheld and, where legislative and policy decisions are taken and result in unintended consequences that contravene the best interests of the learner, the right to a basic education will also be violated.

Regrettably, despite national and international guarantees, Reynecke (2006) illuminates the concept *best interests of the child* as still unclear and its implementation apparently an even bigger problem. Davel (2006) illustrates that it is

impossible to compile an exhaustive list of all the factors which must be considered when a court has to decide on a child's best interests under specific circumstances. In support, Van Rooyen (2006) stipulates that the determination of what constitutes the best interests of children can be considered to be a subjective doctrine as it lacks objective criteria.

The SAHRC (2006:24) reports that the implementation of an inclusive policy consistent with White Paper 6 (SA, 2001), as being interpreted and applied differently throughout the country, is not always in the best interests of the child. Reyneke (2006) also questions the effective implementation of *the best interests of the child* principle by stating that, if children's best interests were of paramount importance in South Africa, the education system would not be allowed to produce learners unable to read and write properly after twelve years of education. The same author propounds that someone should be held accountable for stealing twelve years from children's lives and for creating expectations that education will provide a better future, just to find that their education is practically worthless (*cf.* 3.5.1).

As education is compulsory until the age of 15 or the completion of Grade 9 (SA Schools Act, 84/1996c; *cf.* 3.5), learners are forced to attend schools which often provide education of a low quality. Reyneke (2006) therefore proclaims that learners should have a claim for damages if they do not receive a proper education. Against the background of the fact that the State should afford learners a duty of care, and that quality education is in the best interest of learners, the same author is of the opinion that the best interest principle should, or may very well tip the scale in learners' favour in such claims. In this context, Muthukrishna (2000) cautions that emphasis must not solely be placed on academic and social outcomes, but that the total development of learners must be borne in mind (*cf.* 2.4.1.6.9).

In view of the fact that parents have a right to choose education appropriate for their children (Paizes, 2006:25) within an inclusive education system, reference is, forthwith, made to the basic principles on the topic of parental choice.

4.2.4 The role of parental choice

In the past, parents had to send their very young children, who experienced barriers to learning, to special schools far from home (Van Eeden, 2006:23). It was either this, or learners, especially those with Down's syndrome, were kept out of school. Within

the framework of an inclusive education system, such learners may now be accommodated in regular schools with the help of assistants to attend to their special needs, expecting that it will be in their best interests (Paizes, 2006:25; Schouwstra, 2006; *cf.* 3.8.5.3).

Shirk (2005:3) asserts that, whether or not a learner is placed within an inclusive education class should always be the decision of the parents and educators: parents, since they are often the ones who know their children best, and educators, because they need to want and feel comfortable with all learners in their classes. To make the right choice regarding the placement of their children, may unfortunately not be an easy task, since educators and parents are still confused by the concept of inclusion itself. They are, for instance, not sure whether inclusion is legally required and if it is the best placement for their children (Shirk, 2005:3).

The latter will, as explicated by Meier (2005:2), depend on the individual circumstances of each learner, on the unique educational requirements he may need to have addressed in order to learn to his fullest potential, as well as on the education system's ability to meet such needs. Inclusion may, as Shirk (2005:2-3) indicates, work well with some, but not with others.

In choosing the correct placement for a learner, Du Toit (2006:75) suggests that the parents and educators should take various factors into account, of which the most important criterium should be the attainment of a placement where the learner can be assisted optimally to reach the goal of morally independent adulthood, together with all the value content it presupposes. In this regard, Van Rooyen *et al.* (2004:11) point out that some parents and/or learners may choose special education for the security and specialized attention they perceive as its advantages, while others may value the social participation in mainstream schools above basic education in a special setting.

The importance of the learner's right in choosing a suitable school environment is accentuated by the Deaf Community (2006:13) who argue that the rights of learners with a hearing impairment, for example, should be protected that their parents' rights and preferences should not be allowed to violate their basic fundamental rights by making choices on their behalf.

Parental choice will, however, be meaningless if chosen schools are not in a position to accommodate the individual needs of learners effectively.

4.3 SOCIETAL EXPECTANCIES THAT INCLUSIVE EDUCATION WILL MEET THE CHALLENGES

There is currently a move in South Africa towards adapting an inclusive approach to educating, *inter alia,* learners who experience barriers to learning at regular schools, in accordance with worldwide tendencies (Peel, 2005; *cf.* 2.3) although it is not specifically required by law (Cromwell, 2004:1). Such an inclusive philosophy is considered, at policy level (SA, 2001), to be the most effective means of combating discriminatory attitudes, creating welcoming communities, constructing an inclusive society and achieving education for all (*cf.* 3.4.1).

In order to attain this goal, the education system must be adapted, as set out by the SAHRC (2006:15), to the extent to which it includes rather than excludes minorities and vulnerable sectors of the community such as learner migrants, minority learners and learners with disabilities. Within the South African context, this also refers to learners living in households affected by HIV/AIDS, street children and children in prison.

4.3.1 High expectations of an inclusive education system

Emerging policies on inclusive education, as discussed in Chapter 3 hereof, call for the widest possible inclusion – the lame, the blind and the deaf, the HIV positive, the cognitively impaired, the rural poor, the orphaned and the homeless - to name but a few of the groups who may previously have been excluded (Pendlebury, 2002).

As a result, the education system needs to shift the focus from learners having to fit in (*cf.* 3.3.2), to the system reforming itself to be capable of accommodating and addressing the diverse needs (*cf.* 3.6.2 & 4.2.2.1) of all learners, so that each learner receives learning experiences that fit him individually (Lockwood, 2003:1; Swart & Pettipher, 2005:8). Consistently, Swart *et al.* (2002:176) point out that the focus must now be on the potential and responsibility of the circumstances in which the individual is placed.

Correspondingly, Dyson and Engelbrecht (2004:8) accentuate that inclusive education is not a mere response to the question on how to assimilate learners with identified special education needs into existing forms of schooling, but on how schools (*cf.* 3.3.2) can continually be restructured to respond positively to all learners

as unique individuals. This expectation has, regrettably, not been fulfilled up to date as the SAHRC (2006:24) highlights that policies and current provisioning of education do not adequately address the needs of, for example, learners with total or partial sightedness.

Tomko (1996:1) explains that inclusion is part of a much larger picture. Not only must it provide for equal access to regular schools, but also for the inclusion of all learners on all levels, *i.e.* social inclusion, curriculum accessibility and emotional inclusion. Therefore schools are expected to be not only a preparation for life, but also life itself (Vargo; quoted by Pottas, 2005:19). Inclusive education must not just be an ideal state or idea on paper, but rather an unending set of dynamic changes (Engelbrecht, 2004:8) or as Phatlane (2006) puts it, an ongoing and gradual process moving from comfort zones of a segregated nature through rough patches to what it *has to be*.

Illuminating the above, Alston (2006:1) accentuates that the best interests of learners cannot be judged on ideals and dreams, but must be judged on the real experiences of learners at the given time, since children are living now, not in an idyllic future. In order to achieve this goal, Tomko (1996:1) indicates that inclusion must be created with proper planning, preparation and support. Nevertheless, Landsberg (2005:v) cautions that the road to inclusion might be a long one, but that each step taken will bring the ideal closer.

The current predominant international discourse (*cf.* 2.3) on inclusion assumes, as pointed out by Pendlebury (2002), a nexus between inclusive education, fundamental human rights, democracy and social justice. Social justice is regarded as being a positive regard for group differences and for democratic processes based on group representations (Van Rooyen, Le Grange & Newmark, 2004:1). Contrary to social justice, for example, it has become widely accepted that there are exceptions to who can be included. Inclusion has, thus, come to imply everything but the elimination of exclusion.

Against the background of the apartheid era, characterized by a systematic abuse of fundamental rights where human beings were regarded as those who had to show obedience to power, rather than as bearers of rights, fundamental rights feature prominently in all anti-apartheid policies (Pendlebury, 2002:432).

As a result, the adoption of the term *inclusion* into a country's familiar education language can signify a genuine desire to improve the experiences of all learners. Yet, in many cases, the concept of inclusion is misunderstood or even deliberately distorted (CSIE). Joubert (2006) highlights that the termination of apartheid in South Africa, indicating a victory for democracy and fundamental rights, offers unique opportunities and responsibilities to reconstruct a fragmented and deeply discriminatory education system, and to ascertain a unified national system buttressed by democracy, equity, redress, transparency and participation.

Within the South African context, inclusive education must involve, as highlighted by Dugmore (2004:2), equality in education, appropriate support and an accessible curriculum which meet the learning and developmental needs of all learners in an equitable and flexible manner.

Enlisting the afore-mentioned, Swart and Pettipher (2005:4) align the concept of inclusion with broad principles such as a dedication to construct a more democratic society, providing a more equitable and equality system, and a belief that extends the responsibility of regular schools to include and accommodate the diverse learning needs of all learners, regardless of, *inter alia*, ability, gender, language or disability, so that all learners can attend schools and have access to the educational outcomes that schools offer.

Green (2001:5) points out that, since participatory democracy involves the rights of all previously marginalized communities and individuals to be recognized as full members of society, in accordance with the Salamanca Statement (UNESCO, 1994), it is the responsibility of society to create fully inclusive sites of learning (*cf.* 5.1). Therefore inclusion is about being part of what everyone else is, and being welcomed and embraced as a member who belongs (Vargo; quoted by Pottas, 2005:19). Amid all of this, inclusive schools must represent places where every learner can belong (Engelbrecht & Green, 2001:vi).

Learners' fundamental rights should enable learners to stand up, look others in the eye and, in a fundamental way, feel the equal of others (Pendlebury, 2002:434). The same author argues that rights also involve respect for people, seeing people as potential asserters of claims and recognizing their agency. In addition, Dyson and Engelbrecht (2004:8) constitute that inclusion concentrates on fundamental rights

and specifically on the transforming of human values into immediate rights for learners who were previously excluded.

On the other hand, since inclusion relates to educational and social values, as well as to a sense of individual worth, and since inclusion occurs at schools, in churches, on playgrounds, at work, and during recreation, it remains a controversial concept in the sphere of education (Tomko, 1996:1). Collaborating with the latter, Dyson (2004:6) refers to the description of inclusion as an example of the *dilemma of democracy* in the sense that inclusion is not the only educational value which has to be taken into account and that it may not always be mutually compatible with other educational values. Underscoring these statements, Joubert (2006) remarks that profound questions like learners' perceptions of the effect of the education to which they have been exposed, on the development of, among others, their sense of belonging to a nation, being treated as equal citizens, their hope for the future and a sense of commitment to the future of their countries and their inhabitants, remain largely unanswered.

Regarding the above, it is important to take cognizance of Joubert's (2006) opinion that the eradication of legally segregated schooling systems leads to the discovery of more fundamental questions. The first aspect, highlighted by this author, is the determination whether the elimination of forced racial segregation does not result in racially integrated schools, where school principals and public School Governing Bodies are forced to use racial or ethnic heritage information to diversify their schools (*cf.* 4.4.3). Other important aspects referred to, are the consideration whether racially homogenous schools are detrimental to learners and if race classification in multi-racial schools does not place unnecessary burdens on educators.

Those who support inclusion believe that all learners should always start their education in the regular environment and be removed *only* when appropriate services cannot be provided in the regular classroom. Bearing this in mind, Alston (2006) considers inclusion in other spheres of schooling, beyond the classroom by indicating that schools do not offer inclusive sport because the physically less coordinated (and this does not refer to the physically disabled) may get injured and probably won't perform as well. The same author (Alston, 2006) concludes that the physical differences in individuals on the sport field can be as marked as the intellectual differences in the classroom where some learners will also get hurt –

emotionally, socially and academically. In this regard, Alston (2006) draws attention to the fact that while physical injury is visible and can easily be avoided, emotional, social and academic injury is far less immediately obvious and is, thus, often brushed aside.

Following this, Farrell (cited by Van Rooyen *et al.*, 2004:6) highlights possible conflicts within the construction of inclusion as a fundamental right. There may be times when a learner's right to quality education and to have his individual educational needs met, are better met at special schools. It is, in addition, not always clear whose rights are being referred to – the learners', parents', schools', other learners' or those of educators – and whether the rights of groups are always compatible.

In this regard the researcher agrees with Sayed and Carrim (1997:98) who submit that the SA Schools Act (84/1996c), described by some as indicating a move to inclusion, may, to the contrary, exclude the historically marginalized rather than redressing past inequalities and may even perpetuate and further exacerbate them.

Moreover, Blind South Africa has reported to the SAHRC (2006:24) that they believe that the Department should legislate the manner in which education must be provided to learners with visual impairments, since White Paper 6 (SA, 2001), as it stands, violates the fundamental rights of learners, as it lays down philosophical principles of inclusion only. It does not commit the State in sufficient detail by way of legislation to provide the means required by learners with visual impairments to have equal access to the education system either, whether through special needs education or through public school education.

With regard to the feasibility of inclusion, Rademeyer (2006b:19) reports that plans were proposed to have 30 full-service schools in place by the year 2005. It was also proposed to transform special schools into resource centres. Up to date, little has come of this. Moreover, the same author reports that principals feel that the new policy on inclusive education is a failure. It is a policy that looks good on paper, but cannot be implemented under the unique South African conditions. In support, the SAHRC (2006:41) recommends that the policy of inclusive education needs to be further debated. The researcher concurs with the Commission which recognizes that the concept of inclusion is still in need of being transformed from written policy to real

experience that are beneficial to the individual learner and promote a culture of learning.

Against this background, attention is forthwith drawn to the possibility of inclusive education including all learners in regular classrooms, starting with learners with disabilities.

4.3.2 The prospect of including learners with disabilities: reality or myth?

Drawing on the Civil Rights movement, advocates of the inclusion of learners with disabilities (even severe disabilities such as profound mental retardation) in regular classrooms for the whole day affirm that inclusion is the ultimate goal for such learners, regardless of their disabilities or current placement (New York State Education Department, cited by Kearney, 1996:1). Concurring with this, adults with disabilities are demanding an end to segregated education (CSIE).

In contrast to mainstreaming, the goal of inclusion is to ensure that learners with disabilities are assigned equal membership in a community in accordance with section 9 of the SA Constitution (SA, 1996a, *cf.* 2.4.1.6.3). Accordingly, inclusion endeavours to maximize the social interactions between learners with and without disabilities. To the contrary, the SAHRC (2006:24) was informed by The Federation of Governing Bodies of South African Schools that the State's attempts have, hitherto, resulted in the social exclusion, rather than the inclusion of such learners.

The question of whether the inclusion of learners with disabilities is desirable remains, as pointed out by Shirk (2005:1), prominent in the education sphere. Du Toit (2006:73) points out that such learners do not receive the same quality of education in regular classes as at schools for special education, since ordinary class educators are not qualified to handle their needs and class sizes do not provide for individual attention.

Pavri and Luftig (2000:10) accentuate that the mere placing of learners with disabilities in an inclusive environment is not enough to support social inclusion. Other forms of support are needed to help guide their acceptance by and belonging to peer groups. In line herewith, Potter (2005:2) is of the opinion that mainstreaming learners with disabilities is a much better choice than switching over to inclusive classrooms, since mainstreaming allows learners to receive the benefits of being

included, while allowing them the extra attention and support they would not get from inclusion.

In keeping with the afore-mentioned, Schouwstra (2006) maintains that, for inclusive education to be in the best interests of both the learner (1996a: section 28; *cf.* 2.4.1.6.9 & 4.5) and the educator, it is important that sufficient support services be provided, though experience reflects the contrary. The SAHRC (2006:23), moreover, emphasizes that, where inclusive education is applied, educators often do not feel competent or confident to deal with the special needs of learners with disabilities (*cf.* 4.8.7). Schouwstra (2006) points out that research and practical experience have also shown that educators' perceptions of their role as caretakers and the higher demand of learners with disabilities have a negative influence on their ability to teach effectively. Consequently, the same author propounds that the effect of inclusive education may not be in the best interests of all learners.

To the same extent, Tomko (1996:1) sets out that the goal of inclusion is only achieved when all learners are actively participating in the activities of the class (in line with the right to education being a participating right; *cf.* 4.2.1) with the support and services they need as equal members who belong. Inclusion is not a trade-off of support and services for placement in regular classes or for the achievement of individual goals.

The term *inclusion* implies that learners with disabilities, whether physical, mental or both, would be included in a regular classroom all day, everyday (Heward, 2003). Although this seems quite evident and straightforward, it is more easily said than done. The placement of learners with disabilities in regular classrooms for the whole day may, as pointed out by Sullivan (2005:2), be too disruptive, affecting the other learners negatively. The same author acknowledges that it may not be correct to deny learners with disabilities the educational services they depend on, but that it is incorrect to expect regular education learners to learn in environments in which there are constantly distractions and outbursts from their peers (*cf.* 4.7.3). This statement is underscored by Reyneke (2006) who indicates that such circumstances may not be in the best interests (*cf.* 4.5) of other learners.

With reference to the above, Sullivan (2005:1) elucidates that, if parents can prove that their child's learning is being interrupted because of learners diabilities, they

should have the right to approach courts for relief. As a result, the USA Courts[54] hold that, when considering the placement of a learner with disabilities in a regular classroom, the effect that such a learner would have on the educator and other learners must always be taken into account.

Osborne and Russo (2003:26) set out that, although many older learners may be mature enough to be able to ignore learners with disabilities in their classes, younger learners may not be able to do so. Learners with Autism, for example, often flail their arms and stare off into space, while learners with Tourret's Syndrome also display odd tendencies which many other learners have never seen before. Even less severe disabilities as minimal as learning disabilities, as alluded to by Sullivan (2005:3), can disrupt an entire classroom's learning pace because of the extra effort and time it often takes them to understand a subject fully.

In addition, Schouwstra (2006) suggests that learners with disabilities are also exceptionally dependent on others, thus requiring continuous supervision. As a consequence, educators are expected to apply a higher degree of care against harm or damage to such learners, as would be the case with other learners.

Adding to the above, the increasing problems regarding discipline within South African schools raises another crucial issue. Alston (2006) refers to an example, currently common in South African schools, where a seventeen-year-old learner, who is physically large, beyond puberty, with a mental age of five years, is admitted to a Grade 5 class in a Remedial School alongside learners who are only ten and eleven-years-old, of normal intellect, but with learning difficulties. The same author draws attention to how an educator can exercise a range of disciplinary strategies appropriate to the ages of the various learners in the class and explains why some behaviour of the oldest member of the class passes without reaction while younger learners behaving in the same way are disciplined differently. Alston (2006) explicates that, when this range of differences is expanded to classes of fourty to sixty learners, the situation becomes intolerable for any educator to handle, even more so in regular classrooms where educators are expected to provide education for everybody.

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[54] *Sacramento City Unified School District v Holland (9th Circuit Court) 1994* and *Oberti v Board of Education of the Borough of*

From the responses of many of the educator respondents in the research conducted by Schouwstra (2006), it became apparent that the aggravating burden placed on the educator by a learner with an intellectual barrier to learning, as part of his duty to care, is deeply felt by all. The following remark made by one of the respondents provides an example: *You have to be very careful with a learner with an intellectual learning barrier. You must be aware of the limitations due to the intellectual and any other barrier of the learner and must reflect in the place and circumstances of the activity because it must be suitable and safe for the learner. This makes it very difficult because the learner does not always behave in the way you have anticipated.*

Correspondingly, Rafalovich (2004:90-91) asserts that learners with attention deficit disorders, for instance, are not easy to teach, due to their high rate of movement and talkativeness. Getting them to focus, pay attention and follow directions necessitate individual learner-educator interaction, the minimizing of distractions, rigid lessons and extra structure that may be time-consuming and very difficult.

Accentuating the problems regarding discipline, research done by Marais (quoted by Alston, 2006) in 2005 clearly indicates that normal discipline strategies are not appropriate for learners with, for example, limited mental capacity. Misbehaviour by such learners has to be dealt with very differently and therefore Alston (2006) suggests placing educators in impossible situations where they have to deal with all kinds of learners simultaneously. The latter is grossly unrealistic and unfair to everyone and a recipe for a potential breakdown.

Moreover, Schouwstra (2006) propounds that educators who were previously teaching in mainstream education experience a greater degree of stress due to the higher demands of learners with disabilities or other special educational needs, in view of their role as caretakers and the possibility of liability.

Some learners with disabilities such as Severe Emotional Disorder even present a danger to their classmates, as they cannot control their emotions and often express them by hitting, pushing, kicking or throwing objects. Moreover, Cromwell (2004:1) refers to the fact that it is well documented that medically fragile learners and learners with severe behavioural disorders are more likely to be harmed when placed

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Clementon School District (3rd Circuit Court) 1993

in regular classrooms where educators, for instance, do not have the highly specialized training to deal effectively with all learners' needs.

Although disruptions caused by learners with minor emotional impairments may not be so extreme, Osborne and Russo (2003:26) point out that it will still take valuable learning time away from other learners, depriving them of optimal learning opportunities.

On a more positive note, Wegerle (2002) puts forward that many undesired tendencies of some learners with disabilities such as tantrums, are caused by a lack of knowledge of how to control their emotions and that emotional intelligence is a teachable phenomenon. Rafalovich (2004:95) expounds that such behavioural difficulties are a result of frustration with the learners' inability to function adequately in the classroom environment due to their inability to make sense of a bombardment of information. Wegerle (2002) therefore believes that people are not born with such traits and, since they are acquired, learners must only be taught how to behave appropriately.

In addition, Pottas (2005:48) cautions that, apart from the direct effect of a disability on an individual, several other aspects must also be taken into consideration when placing a learner in any educational environment. In support of this, Rafalovich (2003:96) stresses that the learners with an attention deficiency, for example, experiences social problems due to the fact that they do not have the neurological ability to express themselves and be involved in reciprocated relationships, thus failing to recognize the effects that their actions may have on others and to take the interests of other learners into consideration.

Accordingly, Pottas (2005:48) expresses a list of reasons why some learners may require a more restrictive placement than in regular education classrooms. On this list are reasons such as the learner is not progressing in his current placement and that he requires resources which are not available in the regular classroom.

Correspondingly, Gallagher (1995:120) postulates that there is something amiss in the inclusion plan. Fairness does not consist of educating all learners in the same place at the same time and with the same curriculum, but rather in ensuring that all learners have their basic needs met and are travelling a well-thought-out road to a career and a satisfying life style. For learners with disabilities, these needs may

probably only be met in a resource room by an intervention specialist, or by a physical or occupational therapist. Inclusion would then imply that these learners would be denied these outlets, and without them, they may not be able to handle inclusion.

The following court cases provide examples of the afore-mentioned reasoning. In the *Hudson*[55] case the US Court, for instance, ruled that the learner's needs, *in casu,* were so great that a half-time special education and half-time regular education placement with substantially modified academic work was not enough. Similarly, the Court held in both the cases of *McWirt*[56] and *The Western School Corporation*[57] that an educators associate and a totally modified curriculum would not be sufficient for the inclusion of learners with moderate to severe mental disabilities.

Critics of inclusion feel that all learners will not benefit from placement at regular schools (Cromwell, 2004:1; *cf.* 3.3.2). One of these critics, Alston (2006) points out that the assumption that learners with disabilities will benefit more from inclusive education can be a case of ignoring their needs, and even more so where such inclusive classes lack the specialized day-to-day support of both learners and educators. The obvious difficulty posed in the case of learners with disabilities, as pointed out by Du Plessis and Conley (2006), is that they may be unable to exercise the fundamental rights they are claiming by the very fact of their disability and may indeed need to be treated differently to achieve true equality of opportunity (especially in the case of learners on whose behalf decisions need to be made).

In this regard, the SAHRC (2006:41) affirms that the placement of learners with disabilities within a system that does not, or cannot, cater for their special needs is a violation of their fundamental right to a basic education (1996a: section 29; *cf.* 2.4.1.6.10) and their right to equality (1996a: section 9; *cf.* 2.4.1.6.3).

In alliance herewith, the Association of the Blind in South Africa explicitly states that it will *only* accede to inclusion if provision is made for essential support services (Schoeman, 2002:5; *cf.* 3.8.1.2 & 4.4.5).

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[55] *Hudson v Bloomfield Hills Public Schools 1995 USA*

[56] *McWhirt v Williamson County School District 1994 USA*

[57] *D.F. v Western County School Corporation 1996 USA*

On the other hand, Tomko (1996:1) supports inclusion mainly on the social advantages it entails, believing that, through inclusive education, learners with disabilities can remain on a path that leads to an adult life as a participating member of society, since it provides them with a sense of belonging, being loved, having relationships and friendships with others which enriches their lives. Meeting all learners' needs together increases their ability to achieve academic and physical growth to their potential, while it enhances their potential and overall quality of life (Tomko, 1996:2).

Although reference was made to various critics and supporters of inclusion, it must be emphasized that White Paper 6 (SA, 2001) does not support the placement of all learners under all circumstances in regular classrooms, as it provides for alternative placements of learners with disabilities based on the severity of their needs (*cf.* 3.8.5.1).

Conversely, the SAHRC (2006:23) reports that there are still large numbers of learners with disabilities who do not attend school because of the difficulties in accessing schools or are mainstreamed by default without recognition of the attention that they may need, which constitutes a gross violation of their fundamental rights. As a consequence of such rampant and systematic disempowerment through discrimination, Monyooe (2005:8) maintains that learners with disabilities are continuously susceptible to poverty, public violence and early death.

The SAHRC (2006:24) investigated the inclusion of learners with disabilities and discovered that policies of inclusive education are yet to be realized through schools, demonstrating the necessary adaptability to include these learners. In addition, it was also found that current policies are not implemented satisfactorily or in a manner which is in these learners' best interests (*cf.* 2.4.1.6.9 & 4.5).

Consistent with the afore-mentioned discoveries, Pottas (2005:30) explicates that the fact that the particular needs of many learners with impairments are not met, results in the impairment becoming a handicap to such learners which, together, prevent effective learning from taking place. In view hereof, the SAHRC (2006:42) recommends that the Department of Education must adequately determine where the policy of inclusive education is failing learners with disabilities, what the reasons are and what can be done to remedy the situation urgently.

Since inclusion calls for adherence to the fundamental rights of all learners, the inclusion of another group of learners, namely the learners with gifted abilities, is discussed.

4.3.3 The inclusion of gifted learners

It is especially important for an inclusive educational system to ensure that all learners are provided with the opportunity and indispensable resources to build their individual strengths, wherever those strengths lie (Fuller & Richner, 2006:1) This is necessary, as highlighted by Steyn *et al.* (2006:1), since learners with giftedness can make an immense and exceptional contribution to South Africa's level of prosperity.

It is ironic that in an ideological environment which stresses inclusion in regular classrooms for learners with even severe disabilities (*cf.* 4.3.2), learners with highly gifted abilities – at the other end of the spectrum - are still being excluded in many ways (Kearney, 1996:1). In support hereof, Kokot (2005:469) points out that the needs of gifted learners are not taken into account by educational policies in spite of a worldwide consensus regarding the value of giftedness. These aspects are even more surprising if it is taken into account that learners with giftedness make up approximately 15% of learners in South Africa, according to statistics form the University of South Africa (cited by Benghiat, 2006:41). Amid the latter, Steyn *et al.* (2006:2) avows that too much emphasis is placed on including previous disadvantaged learners to the detriment of gifted learners, since the former group forms the majority.

The concluding result is, that learners with gifted abilities have fewer and fewer opportunities to interact with intellectual peers, regardless of clear research evidence of the academic and social gains in carefully designed groupings of learners with giftedness (Booyse, 2006:154; *cf.* 3.3.1.2). Following this, Fourie (2006a:22) reports that vast pressure is placed on the private sector to provide for learners with giftedness as public schools omit to house them adequately, while focusing mainly on the majority of learners with average abilities.

In order to educate learners with high gifted abilities successfully, Kearny (1996:4) suggests that the implementation thereof needs to be grounded in the research based on highly gifted learners and the development of extraordinary talent which differentiates them from other learners. In line herewith, Alston (2006) argues that

gifted learners are the ones who stand to suffer most in inclusive education where educators will be pushed to cope with the weak and have neither time nor strength to deal with learners who, apparently, *can cope on their own* (*cf.* 4.3.2). Unfortunately this is one of the greatest myths, according to Kokot (2005:473), which interfere with the provision for the special educational needs of gifted learners.

Accordingly, Kitching points out that highly gifted learners present challenges to educators. The same author believes that giftedness creates a barrier to learning since such learners often have to endure frustration if they are not stimulated enough in regular education classrooms (Van Eeden, 2006:23). Therefore Van Tassel-Baska and Stambaugh (2005:215) maintain that only educators trained in learner support will be able to address such learners' needs and, as set forth by Steyn *et al.* (2006:6), prevent them from becoming lost among the average masses (*cf.* 3.8.5.7 & 4.4.7).

Supporting the above, Tomlinson (2005:163) asserts that inclusion inadvertently harms gifted learners, given the fact that educators spend more time teaching learners who learn at a more leisurely pace (*cf.* 4.7.2). Instead of being provided with the support they so desperately need, many gifted learners encounter barriers to learning and suffer great injustices as they are ridiculed, bullied and ostracized by other learners, a state of affairs that frequently result in low-esteem, depression and other psychological trauma (Tomlinson, 2005:163). More importantly, it infringes on their rights to a quality education that will enable them to reach their full potential (Alston, 2006). Because of this, as affirmed by Benghiat (2006:41), such learners experience boredom, learning problems due to the barriers created by the system, (Engelbrecht & Green, 2001:vi; *cf.* 4.8) and frustration. Under such circumstances gifted learners are often looked upon as being incompetent, as they generally display no desire to learn in regular education classrooms (Fritz; cited by Benghiat, 2006:41; *cf.* 3.8.2 & 4.8.2).

Therefore, Fritz (cited by Benghiat, 2006:41) stresses that it is crucial to pay heed to the fact that gifted learners need special or additional teaching, given that they need to be provided with alternative stimulation on a continuous basis. In line herewith, Fuller and Richner (2006:1) propagates the provision of special programmes for academically gifted learners in order to guide them to grow to be the best and strongest future leaders, workers and citizens that they can be.

Special education for gifted learners is, as pointed out by Fuller and Richner (2006:2), not an extra, but an essentiality since academically gifted learners who receive only regular schooling are at risk, not only of failing to live up to their potential, but also of doing poorly at school. The minds of such gifted learners need particular kinds of stimulation in order to function effectively. They do not need more work, but rather different kinds of work and require more interdisciplinary learning methods, an accelerated pace, enriched and challenging material, and interactive experiences (Kokot, 2005:479; *cf.* 3.8.1.2 & 4.8.5).

In line with the argument of Fuller and Richner (2006:1), that gifted learners need an environment in which their giftedness is appreciated and developed, Steyn *et al.* (2006:1) remind everyone that educators are often not trained in gifted education and therefore mostly suffer from a lack of adequate information and knowledge on the needs of and educational provision for the gifted (*cf.* 3.8.5.7 & 4.3.3). Equally important, Alston (2006:8) points out that policies, such as White Paper 6 (SA, 2001), fail to provide for educator-aides which illustrates the view of those responsible for developing policy that educators can cope without such aides.

If inclusive classrooms are committed to serving all learners, they must choose to include, both physically and philosophically, even the most extremely gifted learner, as well as learners with the most severe disabilities. It implies educating learners to respect the unique developmental paths of each individual, no matter how unusual, providing access to a developmentally appropriate curriculum and providing related support services (Kearny, 1996:2; *cf.* 3.8.5 & 4.4.5).

If gifted learners, as a result of inadequate education, fail to live up to their potential, a country is losing a proportionally high percentage of future production and gain. But Fuller and Richner (2006:2) concede that, when academically gifted learners develop their full potential, they achieve extremely high success rates. Therefore spending time and resources to support such learners will result in economic, professional and technological rewards that are worth many times the original cost of the education.

Just as important as it may be to make provision for gifted learners with special needs, the needs of other learners who may, for many other reasons, experience barriers to learning must be addressed.

4.3.4 The ideal of including learners with special educational needs and/or barriers to learning and development

The inclusion of learners with special educational needs or learning barriers into mainstream classes is part of a universal human rights movement (Schouwstra, 2006), which accords them a fundamental right to equal access to education at all levels within a single inclusive education system (*cf.* 3.4).

In light hereof, Potter (2005:2) views inclusive education as providing learners with placement in regular classrooms for the entire day, regardless of how far behind they may be in any given subject. In addition, inclusive education constitutes that all learners will benefit from such placements and will not be required to keep up with other learners. All in all, the vision for learners with special education needs, as for other learners, includes, according to Pottas (2005:49), the appropriate acquisition of functional academic, social, vocational and recreational skills in order to prepare them to live and work in a variety of integrated settings throughout their lives.

Alston (2006), to the contrary, argues that the treatment of learners with equal ability, as though they are capable of benefiting from the same education or capable of producing the required level of performance, is an infringement on their dignity and on their right to be valued just for who they are, and that such treatment denies them the special education they need to achieve their potential, however limited that potential may be.

This implies that the inclusion of a learner who experiences barriers to learning must be accompanied with the provision of special education programmes (*cf.* 3.8.5.5 & 4.4.5.2) at the same time that his peers are learning about something else. Often this kind of special education carries with it the presence of a special education teaching assistant or aide (Blessing, Levitz & Levitz, 2003:2), although White Paper 6 (SA, 2001) does not provide for this.

Du Toit (2006a:16) also avows that specific education aimed at assisting learners not in general, but by concentrating on their specific needs along more systematic, better structured and often exceptional paths, is needed. To achieve the latter, the same author indicates that an in-depth understanding of the learner's needs in a more intense way and through the application of more refined methods of empathy is necessary. Swart and Pettipher (2005:7), moreover, explicate that relevant support

services within an inclusive framework must be taken to the learner, rather than moving the learner to the services as in the case of mainstreaming.

In its quest to accommodate learners who experience barriers to learning, the Department of Education aims at field-testing inclusive education in 30 districts in rural areas (SA, 2001). Some thirty selected ordinary primary schools were expected to be made more accessible and more assistive devices were to be made available for learners in need between the years of 2005 and 2006 (South African Yearbook, 2005/6:224).

The overall objective is to enable learners, the majority of whom could not access education in the past because of the unavailability of specialized services and support in rural and previously disadvantaged areas, to gain access to education. Meanwhile existing special schools have to be strengthened in order to become resource centres for full-service schools and ordinary schools in their area as part of the broader aim at taking support services to regular schools (South African Yearbook, 2005/6; *cf.* 3.8.5).

A commitment to inclusion does, conversely, not imply that all learners with special educational needs will necessarily be placed in regular classrooms since there will always be a few who are better catered for in separate environments (Engelbrecht *et al.*, 2004:viii). White Paper 6 (SA, 2001) acknowledges that learners with higher levels of need will be accommodated in full-service or special schools. Underscoring this argument, Bunch (cited by Pottas, 2005:55) submits that some learners with special educational needs will be good candidates for regular classroom placement, while others will not be, as the diversity of the population comprises a diversity of needs and, therefore, different support systems.

In this regard, Pottas (2005:55) offers that one of the most difficult problems encountered by the above is the determination of which learners are to be considered for regular classroom placements. According to Schouwstra (2006), it is essential to design screening procedures and define specific criteria for learners with special educational needs since no interim general assessment policy regarding the screening and placing of learners with barriers to learning into mainstream schools exists (*cf.* 3.7.3 & 4.4.2). The defining of specific criteria for placements are important in order to maximize the opportunity for learners who can benefit from inclusive

education to be selected and to minimize the possibility of accepting learners for whom inclusion would be a negative experience (Bunch, cited by Pottas, 2005:55; *cf.* 4.3.2 & 4.3.3).

In spite of the fact that education is being emphasized as one of the most important factors in facilitating the transformation process in South Africa, inclusion as an option for learners with special educational needs appears not to have materialized (Du Plessis and Conley (2006).

In addition, Alston (2006) voices his concern about the inclusion of learners with limited mental or academic ability (learners who would have been in special classes) since they will not be able to cope with regular classroom education. They need specialized attention in smaller classes where their deficiencies can receive specialized attention. The same author views the aim of White Paper 6 (SA, 2001) as no more than an idealistic dream. To the same extent, Schouwstra (2006) illustrates that, although inclusive education may seem suitable for learners with intellectual barriers to learning, it is not always in the best interests of such learners (*cf.* 4.5).

Alston (2006) adds that, intended or not, inclusive education in the present situation, denies the intellectually impaired the education that fits their abilities and needs. It serves to bring potentially enormous frustration to persons at both ends of the spectrum. In order to substantiate his argument, Alston (2006) refers to evidence of frustration present among learners who were attending special classes in regular public schools. Such learners are now crying out to go back to special classes where they were recognized for whom they are, for their ability and performance and their level of competence, instead of being constantly aware of their inadequacies and not able to perform in the mainstream situation (*cf.* 3.8.5.1 & 4.4.5.1).

A case study at a school for learners with severely intellectual barriers and multi-disabled learners was recently conducted by Schouwstra (2006) in order to determine the influence of mainstreaming on the learner with intellectual barriers. The researcher (Schouwstra, 2006) found that practice has proven that, in many cases where learners with special educational needs were placed in mainstream education, it had a rather negative influence on them (*cf.* 4.5). This presumption is based on research results indicating remarkable positive change in learners' self-esteem and confidence after a six months period at a special school. The same

researcher submits that, if these learners stayed at mainstream schools, the difference between their intellectual abilities and those of their peers would have increased dramatically. In conclusion, Schouwstra (2006) advocates that the admittance to a special school is definitely in the best interests of learners with special educational needs (*cf.* 3.8.5.1 & 4.4.5.1).

From own experience working with learners from mainstream schools being referred to special schools, the researcher agrees with Alston and Schouwstra on the academic, social and emotional advantages of special school placement.

As inclusive education also implies extending educational opportunities to a wide range of marginalized groups who may historically have had little or no access to schooling (Dyson & Forlin, 2004:32), attention is drawn to the expectation of including such learners.

4.3.5 Inclusion of other marginalized learners: theory or practice?

Due to the overt ignorance of fundamental rights in the history of South Africa, constitutionalism (*cf.* 2.4) has become the feature of the new dispensation. In line herewith, Olivier *et al.* (2003:121) urge that decisive approaches should be adapted to extend significant protection to, in particular, the vulnerable groups in South Africa.

Equally, Muthukrishna (2000) reflects that, although there tends to be a rather narrow, conservative focus on learners identified in terms of their deficiencies and establishing alternative provision to meet their diverse needs, there should also be a focus on a wider group of vulnerable, marginalized or disadvantaged learners and the need of the system to change in order to accommodate their needs. This is extremely important, as Rossi and Stuart (2007:139), as well as Theron and Dunn (2006:492) show that the combined effects of malnutrition, poverty, teenage pregnancies and diseases such as Aids, have created a much higher proportion of learners who experience barriers to learning in South Africa than in many other countries.

Schouwstra (2006:1) supports the above by stating that the aim of inclusive education is to addresses the educational needs of all learners in a non-threatening, supportive learning environment, which especially includes learners who were formally disadvantaged and excluded from education because of barriers to learning,

in line with the overall aim of the SA Constitution (SA, 1996a: Preamble) to heal the division of the past. Correspondingly, the Constitutional Court emphasized, in *S v Mhlungu*[58], that the meaning of the fundamental rights contained in the SA Bill of Rights must be determined and understood against the background of past human right abuses which brought along intense suffering and injustice and that the SA Constitution endeavours to bring about reconciliation and reconstruction in this regard.

The SAHRC (2006:3) calls attention to the fact that those learners who are most disadvantaged in enjoying their fundamental right to basic education (*cf.* 2.4.1.6.10), frequently lack the means and the social power to speak out and claim their rights. In support hereof, Judge Chaskalson stated in *S v Makwanyane*[59] that the very reason for establishing a new legal order was to protect the rights of minorities (*cf.* 4.4.3) and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and those who have hitherto been marginalized. The Court also accentuated that everyone can be assured that their fundamental rights will be protected only if there is a willingness to protect the worst and the weakest.

Nevertheless, Olivier (2003:26) expounds that millions of learners living in South Africa are still exposed to poverty and deprivation which excludes them from the reach of the social security system, while the SAHRC (2006:37) concludes that poor, rural township and farm schools are still marginalized within the dominant discourse on education. In addition, Prinsloo (2007:158) explicates that rural and urban poverty is a problem which must be considered in the quest for meaningful change and social cohesion.

Within the scope of providing education for all, the fundamental right to a basic education of non-citizens also merits attention. This is of particular importance in the South African context, as numerous refugees from neighbouring countries, such as Zimbabwe and Mozambique, seek better life opportunities in South Africa. Olivier *et al.* (2003:98&123) concede that there is no constitutional indication why all non-

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[58] *S v Mhlungu 1995 (3) SA 867 (CC)*
[59] *S v Makwanyane 1995 (3) SA 391 (CC)*

citizens - legal or illegal - should not, in principle, be equally entitled to all constitutionally entrenched rights other than those reserved for citizens (*cf.* 2.4.1.6).

On the contrary, many refugee learners are in practice destitute and are denied fulfilment of their basic needs, for instance by being excluded from education because they cannot gain access to schooling. Sookrajh *et al.* (2005:2) point out that the notion of exclusion and inclusion is multilayered since different constructs of inclusion are developed around the thought, practice and experience of refugee learners within the hosting school community. It is argued that what is offered by schools is a strikingly conservative discourse of perceived inclusion in the ways in which refugee learner practices get constructed (Sookrajh *et al.*, 2005:2).

In considering legislation, it is interesting to note that the SA Schools Act (84/1996c) does not allow for the admission of refugee learners even with proper documentation, while the Draft White Paper (Department of Education, 1999a) is fairly silent about the education of refugee learners and does not respond to the responsibility of the State to accommodate such learners at local South African schools.

Pieterse (2000:53&61) expounds the idea that it will be extremely difficult to fulfil the needs of foreign learners (non-citizens) within South Africa where the realization of the socio-economical needs of many citizens is still little more than aspiration. The same author acknowledges that millions of South African citizens suffer great socio-economic hardship, which creates uneasiness when one suggests that foreigners should also be entitled to some of the fundamental rights guaranteed by the SA Constitution (1996a). But aliens are human too. They also have ties with the community in which they live, they also have needs and they also experience suffering.

Within these parameters, the State will have to justify the non-existence of socio-economic rights to aliens under the limitation clause (1996a: section 36; *cf.* 2.4.1.6.13). Unfortunately, the possibility exists that the limitation clause may be used vigorously against non-citizens such as immigrants, as the Courts and the State may favour the socio-economic needs of citizens when deciding on policy in this regard (Pieterse, 2000:53).

As a consequence, while the attending of schools with peers in neighbourhood schools, learning the core curriculum that a school community deems essential,

participating in all facets of school life and having relationships with learners of own choosing are a reality for many learners, others are still being excluded (Pottas, 2005:19).

The exclusivity of the current education system, or rather the lack thereof, came under the spotlight during the Public Hearing of the SAHRC (2006:3). It was found that the education system still struggles to be available and accessible for all learners. The Committee also criticized the inclusive education system of not being implemented sufficiently to address the needs of various learners. Following this, the SAHRC (2006:37) reports that social cohesion through education is not promoted or nurtured within the current system.

Against this background, it has to be established whether an inclusive education system is preventing or causing barriers to learning.

4.4 THEORETICAL EXPECTANCIES: PREVENTING OR CAUSING BARRIERS TO LEARNING AND DEVELOPMENT?

Barriers to learning and development are created, as explained by Engelbrecht and Green (2001:vi), when an education system offers education inconsistent with what a particular learner requires (*cf.* 4.3.3).

The term *barriers to learning and development* is, according to Peel (2005; *cf.* 1.1), an overarching concept used to refer to all those aspects that result in a breakdown in the learning process with the consequence that a learner is prevented from reaching his full potential. In accordance, Swart and Pettipher (2005:17) enlighten us that there is a range of internal and/or external factors which contribute to the establishment of barriers to learning and development.

These authors (2005:17) recognize those factors situated within the individual learner which may be organic in nature, such as a visual or hearing impairment (which could be permanent, recently acquired, fluctuating or circumstantial), as internal factors that may lead to barriers in learning and development if the consequent diverse needs are not met (*cf.* 3.6.2).

In contrast to internal factors, external factors are identified as those aspects intrinsic to the system or the environment and thus outside the learner. It is on these factors that emphasis is particularly placed by White Paper 6 (SA, 2001:17; *cf.* 3.8), while

regarding inclusion as being concerned with respecting the fact that all learners are different in some way, and as such require educators to change their attitude, behaviour, teaching methods, assessment strategies, curriculum and class environments (*cf.* 3.7 & 4.4). By referring to these external factors, Alston (2006:8) expresses concern whether inclusive education will be able to assist in solving them or will rather exacerbate them.

Whether barriers to learning are created by internal or external factors, Rossi and Stuart (2007:139) express their opinion that learners who experience barriers to learning and development, are at risk from formal education and that stimulation can deter these barriers, ensuring that learners are able to actualize their potential. As a result, Monyooe (2005:17) elucidates that attempts to redress barriers to learning and exclusivism are consistent with the principles that underpin the achievement of an inclusive education system since such a system recognizes the need to empower all learners equally by providing them appropriate skills to explore the frontiers of knowledge.

The most critical external factors which may result in barriers to learning and development (*cf.* 3.8), as identified by White Paper 6 (SA, 2001), are addressed in more practical terms.

4.4.1 Socio-economic barriers

Funding plays a critical role in the provisioning and serving of an effective education system, since schools need financial resources to repair their infrastructure, including teaching and learning materials (Monyoee, 2005:15). In a developing country such as South Africa, which is encumbered by a high backlog of social needs and demands (Mhone, 2003:13), Mestry (2004:290) and Visser (2005:412) enlighten us that economic factors can complicate the full implementation of an inclusive education system.

Those in favour of inclusive education believe that it is the most cost-effective way of educating learners. In contrast, the SAHRC Report (2006:24) maintains that inclusive education, if implemented properly, as an expensive route to follow. In support of this, Alston (2006) submits that the cost of providing specialized services in every school is totally prohibitive. Kauffman (1989:3), similarly, views inclusion as a policy driven by an unrealistic expectation that money will be saved. Pottas (2005:55)

avows that the estimated cost of providing educational support services for a learner with specific educational needs could be two to three times more than the cost of educating other learners.

Whichever route is followed, Steyn *et al.* (2006:1) underline the necessity of a well-structured funding arrangement to be in place, especially in a country such as South Africa where financial resources are limited, before the needs of learners who experience barriers to learning can be met in the inclusive classroom, as special devices such as hearing aids are quite expensive. The provision of special devices is essential, as Monyooe (2005:15) upholds that poor facilities adversely contribute to low standards in education which culminate in high learner drop-out and failure. When educators and learners find themselves in under-resourced environments, they easily lose confidence in the system and schools become dysfunctional at the cost of the nation (Department of Education, 2003c:7; *cf.* 3.8.1.3 & 4.8.2).

As a result, Pottas (2005:29) explicates that aspects such as poverty, underdevelopment and lack of basic services are continuously creating barriers to learning. Access to basic services is a huge problem, as these services are sparse or non-existent or because learners, especially those with disabilities, are unable to reach learning centres due to lack of, *inter alia,* transport and/or inferior or even absent roads. During the Public Hearing held by the SAHRC (2006:19), it was, for instance, consistently pointed out that the greater the poverty in a province, the greater the inequality in terms of quality education being experienced (*cf.* 3.5.1 & 4.3.1).

If the State provides insufficient funds to schools, the burden is placed on the parents, educators, learners and the community to supplement funds (Mestry, 2004:197&296), which is a problem in itself, considering the high unemployment rate in South Africa. Subsequently, Muthukrishna (2000) submits that, in the majority of South African schools, low achievement, exclusion and school dropout arise from social and economic disparities (*cf.* 3.8.1 & 4.8.1), inappropriate curricula (*cf.* 3.8.5.5 & 4.4.5.3) and inflexible organizational strategies which generally place learners at risk.

Underscoring the above, Eme-Uchne (2006) explains that learners' fundamental educational rights cannot be guaranteed amid high levels of poverty. The result is

that poverty continues to reinforce exclusion within education (SAHRC, 2006:37). In light hereof, Eme-Uchne (2006) stresses the need for government to adopt strategies for poverty reduction and eventual eradication, as well as for the vigorous implemention of the government's economic reform policy aimed at poverty alleviation.

Mestry (2004:290), moreover, argues that the criteria determination by provincial government to fund schools is not equitable and therefore infringes on the right of learners to receive quality education. Since it is the State's responsibility to balance the rights of learners to quality education by providing adequate funding to schools, the same author suggests a revisal of current criteria used to allocate funds to schools.

Davies (2005:132) avers that most provincial educational departments are unable to fund programmes for, among others, learners from disadvantaged groups to acquire skills of a kind that will enable them to benefit from the educational programmes they receive at schools optimally.

Accordingly, Hermsen (vice-chairman of the School Governing Body at a school for cerebral palsy in Pretoria) states that the State is deceiving parents, since despite legislation being aimed at the protection of learners, it is not being realized in practice (Rademeyer, 2006b:19). Indicative hereof, special school services (*cf.* 4.8.5.1) are deteriorating due to the State's inability to meet its promises. Learners are negatively influenced every time a therapist has to leave the school due to personnel reductions, despite the fact that the School Governing Body is already spending R 1 million *per anum* on salaries. A further disadvantage is that it contributes to the deterioration of the general quality of education (*cf.* 3.5.1 & 4.3.1) which learners who experience barriers to learning and development receive.

On the other hand, Davies (2005:134) elucidates that there is evidence of the real commitment of the State to do as much as possible to ensure that the needs of all learners are, within financial constraints, addressed on an ongoing basis. Supporting this, the South African Yearbook (2005/6:208) reports that South Africa has, at almost 5,4% of gross domestic product, one of the highest rates of government investment in education in the world. Government has, for example, allocated R12 397 billion to the Department of Education for the years 2005 and 2006. In the same

period, a conditional grant mounting to R912 151 was allocated to the National School Nutrition Program. By November 2005, the Department of Education was providing meals to approximately 5,3 million learners.

The announcement of the new budget for the years 2008/2009, which does not allocate more funds to education, is severely criticized by the Institute for Democracy in South Africa, as not being evident of Pandor's (Minister of Education) commitment to quality education (Rademeyer, 2006c:4; *cf.* 3.5.1 & 4.3.1). The only positive aspect in the new budget is the amount allocated to early childhood education in order to reach the goal of making Grade 0 accessible to everybody by the year 2010.

Reasons for the above, as pointed out by Mestry (2004:297), may be that government realizes that it cannot carry the burden of providing education to meet the educational needs of everyone who must be addressed from public funds alone. Correspondingly, Monyooe (2005:15) avers that the financial constraints for public quality education cannot and will never be matched by any State budget alone. Accordingly, partnerships with the private sector and parents, who will in turn have some say in the running of public schools, were identified to leverage the necessary financial muscle schools need so desperately (Davies, 2005:131).

Verbeek (2006:152), however, convince us that economic factors such as unemployment make it difficult or even impossible for parents to comply with the payment of school fees. Because of these economic factors, public School Governing Bodies, especially those in poorer areas, are hindered from supplementing the resources received from government (SAHRC, 2006:19). Another contributor to parents not paying school fees is the presence of social factors such as the culture of non-payment among certain groups of society, which enhances parental abdication of this responsibility. This creates, as underlined by Verbeek (2006:152), a rolling-over effect of responsibilities to others within the society.

A second problem, as enlightened by Van Rooyen (2006), is the inexperience or incapacity of schools' Finance Committees. The election of parents and/or legal guardians from the parent community to serve on public School Governing Bodies and the responsibilities of said members in accordance with the SA Schools Act (84/1996c: sections 16-32 & 36) put all public schools on the road to becoming self-managing schools. In many parts of South Africa (especially the deep rural parts)

many of the parents elected to serve on public School Governing Bodies are, unfortunately, illiterate or lack the knowledge and skills required to perform their duties effectively.

Despite the fact that the devolution of discretionary powers for the financial management at school level is in line with international trends and is also part of the process of democratization in education, Van Rooyen (2006) affirms that the spending of funds at school level is not structured in a way in which the objective of providing quality education to everyone, drives the decision-making as a first priority.

In addition, Rademeyer (2006b:19) reports that many schools struggle to survive since they cannot deny learners, who cannot afford to pay school fees or are exempted thereof, access to schools (*cf.* 3.6.1).

Providing another example of SGBs struggling to make ends meet, Hoff indicates that there are schools, especially in rural areas, where food even has to be gathered for poor learners to ensure that they at least have something to eat (Rademeyer, 2006b:19). Needless to say, there is also a great lack of resources and support material (*cf.* 3.8.3.1 & 4.8.2) at some special schools, such as wheelchairs, hearing aids and nappies for learners with cerebral palsy, the latter resulting in the death of approximately ten learners due to extreme infections.

Reference must also be made to statements by the Department of Education (Department of Education, 2003c:4-5) that there has been a wealth of major achievements in the sphere of education since 1994, that they currently have a record that is impressive by international standards and that they are well on their way to attaining targets set for education transformation. In contradiction hereof, the SAHRC (2006:10) reports that, notwithstanding the R90 milliard that was allocated to education, the education system is in a crisis, since it fails to provide learners with quality education (*cf.* 3.5.1 & 4.3.1).

4.4.1.1 Availability of sufficient resources

According to Human (2000b:155), the fundamental rights of learners without sufficient resources are meaningless, since without resources, services cannot be provided. Accordingly, the same author explicates that there is little point in creating

an improved legal framework for learners unless, in addition, resource allocation is addressed and redressed.

In order to satisfy learners' right to basic education in public educational institutions, Dyson and Forlin (2004:3) and Visser (2005:404) clarify the situation that the provision of especially human (*cf.* 3.8.5.7 & 4.8.7) and financial resources of ample quantity and quality is a key fundamental right and related issue at schools that is presently being increased. The SAHRC (2006:1) concedes that the current stark imbalances of access to resources, services and opportunities undoubtedly impact on the fragility of the county's democracy.

South Africa has an obligation to mobilize sufficient resources in order to combat poverty and extreme inequalities and to alleviate social exclusion (Olivier *et al.*, 2003:23; Malherbe, 2006). Expanding on the latter, Van Rooyen *et al.* (2004:7) explicate that the provision of resources must be done according to the ideology of distributive justice, *i.e.* justice focusing on equal allotment of material and social goods, except where unequal distribution would benefit those who had adverse starting positions. The latter is referred to by Monyooe (2005:4) as the social side of justice which entails the redistribution of resources. This, as illuminated by Mestry (2004:297) and Visser (2004c:88), involves a redress of all existing inequalities in the education system, to close the gap between well resourced and poorly resourced public schools.

To the contrary, Dyson and Forlin (2004:34) opine that the notion of high-quality resources provided by the State to all learners and meeting a wide variety of apparent needs has, under the impact of economic shortages in developing countries such as South Africa, come to seem increasingly problematic. As effective learning is fundamentally influenced by the availability of educational resources to meet the needs of society, Pottas (2005:28) indicates that socio-economic disadvantages are having a negative effect on education.

Slabbert and Swanepoel (2002:4) highlight the issue that, due to insufficient resources, schools are under immense pressure to *do more with less.* In addition, Dyson and Forlin (2004:34) advise that the question of making the best of limited funds inevitably gives rise to the notion of inclusion as a cost-effective form of education provision in a highly resource-intensive venture.

Along with this, Kearney (1996:5) says that enrichment materials are not currently available for the highly gifted in regular classrooms (*cf.* 3.3.1.2 & 4.7.3), while Du Plessis and Conley (2006) concede that there is still a lack of resources in terms of school staff, flexible curriculum and suitable physical setting in classrooms. Concurring with the latter, Prinsloo (2007:165) indicates that rural schools, in particular, are still ill-equipped to cope with new demands.

Moreover, the SAHRC (2006:25) refers to the School Register of Needs Survey done in 1996 and 2000 which revealed that there is still a need for radical improvement with regard to the provision of resources. The survey found 27% of schools without water, 43% without electricity, 80% with no libraries and 78% without computers. The survey also suggests that, due to overcrowded conditions, over 10 700 additional classrooms are needed. As a result, Zille questions the availability of sufficient resources to meet the increasing demands of learners in future (Van Eeden, 2006:23), while Van Rooyen *et* al. (2004:6) communicate the fact that it must be apprehended that resources are incredibly scarce.

Consistent with the afore-mentioned, White Paper 6 (SA, 2001:15) indicates that the distribution of learner expenditure regarding the use of resources is inefficient, while an absence of a uniform resourcing strategy and national provision norms for all learners is also evident.

However, the Department of Education (Department of Education, 2003c:7) maintains that schools are managed effectively to ensure that resources are translated into quality education, and into the meaningful economic, political and cultural empowerment of all learners. Proper management is, as a result, imperative, as the improved resourcing must lead to improved learner performance. Anything short of this will represent a waste of public resources and a betrayal of learners. In support hereof, Beckmann and Prinsloo (2004:14) insist that the large amounts spent on education warrant some assurance regarding the maintenance of standards.

Unfortunately, the latter does not seem to be the case in practice, as Rademeyer (2006e:15) reports that despite the provision of more resources to the previous disadvantaged schools, the Institute for Justice and Reconciliation complain that unequal outcomes are still evident. The latter is confirmed by the SAHRC (2006:19)

and Reddy (2003:97) who point out that, for what has been put in, the results are tremendously disappointing to everyone.

In order to leverage the shortage of resources on hand, Asmal (SA, 1997b:3) asserts that the resources of special schools will be made available to neighbourhood schools, by making special schools part of district support services (*cf.* 3.8.5).

It is important to remember, as clarified by the SAHRC (2006:19), that the mere reallocation of resources is not, on its own, sufficient to produce quality education. There are also other factors such as negative attitudes that contribute.

4.4.2 Attitude barriers

External aspects such as policies and systems can be dramatically changed, as set out in Chapter 2, but if people do not change their attetudes, changes for the better will not be sustained. Indicative of this, Wegerle (2002) cautions that, although many things are being changed daily, at the end nothing may seem to have changed at all.

Swart and Pettipher (2005:8), similarly, expound that, despite fundamental school reform and restructuring being essential for the successful realization of inclusion, such transformation is not possible without a radical shift from one set of assumptions, beliefs, values, norms, relationships, behaviours and practices to another, based on values of mutual acceptance, respect for diversity, a sense of belonging and social justice. The latter entails, among others, the uncovering of negative stereotypes, advocating unconditional acceptance and combating prejudice and discriminatory practices (Lazarus, *et al.*, 2004:46).

The above changes are important. Du Plessis and Conley (2006) recognize the fact that discrimination arises when differential treatment based on disabilities, for example, results from unjustified stereotypical assumptions about learners' abilities or worth, and does not afford every learner the dignity, equal concern and respect he deserves. Lesole (2006:6), moreover, airs his opinion that South Africans should wake up, as, although South Africa has been a democracy for twelve years, people have not yet changed their mindset about making the country a better place to live in. Correspondingly, Pottas (2005:29) explicates that negative and discriminatory attitudes in society towards differences in terms of, *inter alia,* race, class, gender,

culture, disability and religion result in barriers when directed towards learners in the education system as they often lead to pedagogical neglect and even rejection.

Kapp (2006:459) offers the opinion that attitudes frequently lack vision and perspective due to the view that, although an attempt is made to educate some learners, all effort will be in vain. The same author cautions that educators who set preconditions or make certain demands before accepting a learner, are alienating themselves from the learner. Effective inclusive education, to the contrary, is embedded in unconditional acceptance, leading to a willingness to be available to provide support.

Accordingly, the social model of disability, which underlies inclusion, emphasizes that the circumstances of learners with disabilities and the discrimination that they face are socially created phenomena, and that this has little to do with their impairments. Consequently, the *cure* of these *problems* lies in the restructuring of society (SA, 1995:11). Hence, Monyooe (2005:13) calls for the identification and execution of drastic steps to stop the blatant violations of the fundamental rights of learners with disabilities.

Lemmer (2002:58) asserts that educators' expectations play an important role in determining learner achievement. Unfortunately, educators frequently hold less positive expectations with reference to the behaviour and abilities of, for example, language minority learners, or too high expectations of the learners with giftedness (Van Tassel-Baska & Stambaugh, 2005:214). In addition, Benghiat (2006:41) discloses that learners with dyslexia are often regarded as lazy, problematic, naughty, aggressive and forgetful, while learners diagnosed with an Attention and Hyperactive Disorder are perceived as underachievers. Correspondingly, Rafalovich (2004:66) explicates that educators must be trained to identify special needs in learners as they continue to punish learners who act out of the ordinary, instead of identifying the problem. Confirming the latter, Kitching maintains that wrong perceptions are often the biggest barrier to the successful inclusion of learners with special education needs (Van Eeden, 2006:22).

On a positive note, Monyooe (2005:8) admits that a disability culture, with images of strength, beauty and pride, is emerging in South Africa. This could be strengthened, as set out by Peel (2005) through partnership between schools and the community

which will educate and guide everyone to understand those learners who are different better.

However, Monyooe (2005:13) however cautions that believing and supporting inclusive education does not guarantee that the system will function effectively. Other organic variables also need to be addressed to minimize failure.

4.4.3 Language and communication barriers

Despite the fact that the constitutional framework concerning the protection and accommodation of South Africa's linguistic diversity is rather promising, Henrard (2001:78) shows that practice reveals a *de facto* denial thereof. In support, Kamwangalu (2003:175) maintains that language-in-education policies have failed to promote the status of indigenous languages as media of learning and teaching (*cf.* 3.8.3).

As that an inclusive education language policy must comply with the requirements of equality (1996a: section 9; *cf.* 2.4.1.6.3), as well as with the requirements of a feeling of belonging and the fundamental right to education through the medium of a learner's choice, Combrinck and Verhoef (2006:19) assert that more than mere language policies on paper will be needed.

Webb, for example, argues that the current educational language practice of mother-tongue education in the first three years of schooling and afterwards through the medium of English, is unacceptable since it is not pedagogically accountable and not in line with the constitutional norms or the current Language-in-Education Policy (Department of Education, 1997a, Rademeyer, 2006c:4; *cf.* 3.8.3).

Combrinck and Verhoef (2006:19) emphasize that the debate regarding languages is by no means simple, especially in respect of the socio-economic (*cf.* 3.8.1) imperatives which play a role in the choice of parents and learners regarding the medium of instruction. In addition, Phatlane (2006) reminds everyone that, although mother-tongue education is theoretically possible at schools in the form of unilingual and multilingual education, (Rademeyer, 2006c:4), the same cannot be said of the practical possibility (*cf.* 2.4.1.6.10.2) thereof.

Although the fundamental right to choose the language of instruction is vested in the individual, Van Tonder (1999) affirms that it has to be exercised within the overall

framework of the obligation on the education system to promote multilingualism and inclusiveness. Similarly, Tulasiewicz and Adams (2005:9) caution that the opportunity for using the choice of language in education is largely dictated by societal considerations which can result in language conflict.

In practice, Peel (2005) explains, the choice of learners with hearing impairments, for instance, is restricted to schools that offer sign language as a medium of instruction, thus denying them equal access to all schools (*cf.* 3.6).

In making choices concerning the medium of instruction on behalf of their children, D'Oliveira (2003:133) avows, parents are inclined to choose a particular school first as language is regarded as part of the fixed package offered by schools and since parents seem reluctant to disturb the *status quo*. The SAHRC (2006:28) therefore argues that there are no guarantees that parents would opt for language policies that are supportive of cognitive growth and the broad transformation goals of the country in general.

Moreover, Henrard (2003:14) avers that the aspect of choice fits into a particular political frame and should be interpreted against the background of the apartheid legacy during which indigenous languages were perceived in a very negative light and the strategy of mother-tongue education was abused. In support hereof, Tulasiewicz and Adams (2005:41) explicate that there will always be political agendas, closely linked with attitudes towards authority, to be addressed when planning language in education. In this regard, Grove (2006:19) cautions that, if political happenings continue to influence language policies, English will most probably be the only medium of instruction in future.

Van Tonder (1999) explicates that, although African communities wish to hold on to their languages, they are under the incorrect impression that they can only be successful in their future careers if they have been taught in English. Consequently, the ability to speak English, the aspirational and empowering language, has become a major object of desire as well as a marker of social status, resulting in socio-economic pressure to adapt to receiving education through the medium of English only (Rizvi, 2007:viii).

Due to the afore-mentioned myth, Martin (2004) avows that many learners undervalue their home languages. Indicative hereof, Gilomee affirms that quite a

large number of Afrikaans-speaking learners are enrolled at English schools believing that it will provide them with an advantage in life (Rademeyer, 2005:23). Similarly, Colditz explains that parents of rural learners often assent to English schooling, believing that it will lift their children from poverty (Fourie, 2006:10). Therefore PRAESA (1991:1) wisely points out that, parents erroneously believe that their children will gain proficiency in English by being educated in this language from as early as possible.

In this regard, Smit (2006) maintains that English, or any other second language, has nowhere been shown to be the most successful language of learning for most learners who speak other languages at home (Smit, 2006). Prinsloo (2007:164) actually indicates that, where black learners were enrolled at former Model C schools while not being proficient in English or Afrikaans, education proved to be ineffective. Similarly, Kamwangamalu (2003:182) avows that the demand for English will alienate, rather that emancipate African learners, most of whom have no access to education.

Ity is therefore clear that the main problem, in this regard, as enlightened by D'Oliveira (2003:133), is that parents repeatedly allow their children to be taught in English before they are ready for it, and before any real grounding in their mother tongue has taken place.

Another reason for the undervaluation of home languages, as expounded by Rademeyer (2005:23), is the fact that mother tongue education is frequently considered as being inferior and an attempt to produce a confined and isolated semi-literate labour force. In order to alleviate these false perceptions regarding English as the best medium of instruction, Webb propounds that the term *mother-tongue* should rather be replaced by the concept *language of academic proficiency* (Rademeyer, 2006c:14).

Moreover, Tulasiewicz and Adams (2005:12) submit that the preference of using other languages must be seen as a loss of identity and as a betrayal of linguistic loyalty, resulting in low morale among both educator and learner, while forcing educators to concentrate more on the training of second languages.

In this regard, Van Tonder (1999) reports that, during the Conference on Language Policies in Africa held at Harare in 1997, the under-evaluation and marginalization of

certain languages were identified as main obstacles in the way of striving to acknowledge all languages equally.

With reference to the above, Guillomee, Heese and Schlemmer avow that the lack of mother tongue education is contributing to the current crisis in education and to the overall poor performances by learners (Rademeyer, 2005:23). The consequence hereof, as held by Rademeyer (2006c:4), is that such learners are incapable of meeting the demands made by the modern labour market. Underscoring the latter, Martin (2004) accentuates that literacy is the *catalyst for inclusion* and without it learners will be excluded from life in general.

To aid parents in refraining from incorrect choices, Fourie (2006b:10) stipulates that the State has a duty to empower parents with regard to methods on how to develop their children optimally and on the advantages of mother-tongue education. This is essential as the increasing rate of illiteracy in South Africa must be dealt with urgently.

4.4.3.1 The fundamental rights of minority groups to this language in education

Lemmer (2002:38) informs us that language-minority learners comprise of a very diverse group. They frequently differ, not only in externally evident characteristics, but also, *inter alia,* in their communication needs, their level of proficiency, their attitude towards the language of instruction and their cognitive styles.

When language minority learners therefore enter schools, they bring along a wealth of cognitive, social and linguistic skills which have been developed in their first language (Lemmer, 2002:39). Unfortunately many educators incorrectly perceive these learners as having no language at all and of suffering from impoverished thinking skills (*cf.* 3.8.2). Based on these perceptions schools fail to address the needs of language-minority learners, leading to their access to academic knowledge being delayed and withholding them from full participation, which contributes to a sense of social alienation (Desai, 2003:143).

Supporting the above, Pottas (2005:29) indicates that if teaching and learning do not take place through a learner's first language, communication breakdowns occur, resulting in learning breakdown, as communication is a crucial means of gaining

access to important knowledge and skills and thus determines academic achievement. This is especially relevant to South Africa, as Webb asserts that the majority of learners' proficiency in English is not good enough for academic purposes (Rademeyer, 2006c:4).

Although fundamental rights principles generally do not provide standards for the use of language in education, Henrard (2003:16) stresses the importance of education's socialization function in addition to its qualification function, *i.e.* education plays a central role in passing on values, culture and language to the next generation. Underscoring this, Strydom (2003:23) adds that the deep-seated role education plays in the linguistic and cultural survival of communities hardly warrants contesting. Consequently, it is crucial that the nature of education provided to learners should not alienate them from the culture and language of the national community or from their family unit.

Similar to other learners, those with hearing impairments, for example, have the right to be educated in their language of choice (*cf.* 2.4.1.6.11). Whenever such learners are denied the right to be educated in their language of choice, which is Sign Language, it may be argued that they are being indirectly discriminated against by the education authority on the basis of their impairment.

In light hereof, the accommodation and understanding of language-minority learners and their special needs are continuously regarded as an enormous challenge to schools (Lemmer, 2002:40) and subsequently to SGBs who determine the language policies at schools.

4.4.3.2 The determination of schools' language policies: a function of public School Governing Bodies

The SAHRC (2006:28) alludes to the power granted to public School Governing Bodies by the SA Schools Act (84/1996c: section 6(2)) to determine schools' language policies, while stressing the fact that this power is increasingly being questioned, since it is felt that many public School governing Bodies are not fully functional or sufficiently representative of the broader community (*cf.* 4.2). Concerns are therefore being raised about whether public School Governing Bodies act in the best interests of learners (*cf.* 4.5), have sufficient knowledge and are sufficiently informed about the consequences of their language decisions (Fourie, 2006b:10).

Against the belief that mother-tongue education needs to be provided in order to secure education of a high quality, the SAHRC (2006:28), propounds that South Africa neglects its responsibility to give attention to the important bond between language and quality education by providing public School Governing Bodies with the power to decide on schools' language policies.

With regard to this function of public School Governing Bodies, D'Oliveira (2003:133) debates on the use of language policies as a possible measure to exclude black learners from schools, as well as on the lack of recognition of African languages (*cf.* 4.8.3.6). Indirectly, this impacts on accessibility to a school and retards the Department's broader transformation goals of ensuring that education is available to all (*cf.* 3.6 & 4.4) To the same extent, the Northern Cape High Court decided in the case of the *Seodin Primary School*[60] that the language policies, set by public School Governing Bodies of four schools in their district, were used as methods to discriminate between certain learners on the basis of race, by ensuring that the schools remain racial enclaves to perpetuate the advantages of minority communities.

To the contrary, Smit (2006) points out that the purpose of the decision of a SGB to set a language policy as, for instance, Afrikaans single medium instruction, could be to preserve the original ethos at the school, to provide home-language education to the majority of learners of the school in order to support the general conceptual growth of learners to achieve optimal academic results (*cf.* 3.5.1 & 4.3.1), to enhance the self-esteem of average learners by enabling them to cope with the academic material, to protect language rights of an endangered language and to promote the diversity of education languages against possible monolingual English education.

In this regard, Visser (2005:414) argues that it would seem that, especially in regard to admission requirements and language policy, the powers of parents through SGBs have been limited unnecessarily. The reason for this is obvious, namely internationally acceptable minority and collective or group rights which are currently discredited in the public education system on account of the history of racial

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[60] *Seodin Primary School and others v Northern Cape Department of Education and others Case no. 117/2004 (NC)*

segregation in education which fostered somewhat exaggerated fears about a recurrence of racial discrimination.

Correspondingly, the rise of African languages to a level capable of being used as language of instruction at schools will forthwith be discussed.

4.4.3.3 Expectations regarding the elevation of African languages

Learners who have an African language as their mother-tongue, as pointed out by Desai (2003:143), unfortunately come from language backgrounds which do not enjoy much status in the greater society (*cf.* 4.8.3).

As a result, Kamwangamalu (2003:178) avows that governments do not have the political courage and will to promote indigenous languages. Instead countries such as Lesotho, Botswana, Swaziland, and South Africa chose rather to promote the assumed neutrality of English in the name of national unity and global usage. Consequently, parents are critical of the Department of Education's commitment to encourage the use of African languages as medium of instruction, arguing that the Department does not engage sufficiently with language issues, that they are not monitoring what is happening in practice, and that there is no sense of urgency to deal with such issues (SAHRC, 2006:28).

Accordingly, Desai (2003:141) maintains that promoting linguistic diversity (*cf.* 3.6.2 & 4.4.1) too often denotes a mere recognition of existing languages other than English, and to a lesser extent, Afrikaans, and some superficial use of these languages, such as in greeting and opening remarks at events. Supporting this, Strydom (2003:29) postulates that the majority of indigenous languages will enjoy official status in name only, while their use will be constricted to communal or local enclaves.

Reasons for not providing education through the medium of African languages are not hard to find. Smit (2006), for instance, concedes that the complexities of most multicultural schools are such that it is not reasonably possible to offer a single indigenous African language as the medium of instruction since learners at one school usually have different home languages. Kamwangamalu (2003:182) avers that education in the African languages will continue to be denied until educational resources (*cf.* 3.8.1.3) in the African languages are developed to a higher conceptual

level and until these languages are perceived to facilitate access to the wider societal and economic advancement.

The work of Ntake and Pare in 2001 (cited by Heugh, 2003:123) has, however, shown that a significant contribution has already been made in this field with the translation of senior certificate examination papers for science into Pedi with the assistance of the Pan South African Language Board. The process took a year and was accomplished with a meagre budget. The same author argues that it should be possible to replicate this process with very little effort and expense for the other eight African languages.

Accordingly, D'Oliveira (2003:136) demonstrates that new language documents, as well as Curriculum 2005, have already been translated into the eleven official languages despite difficulties experienced with terminology, such as *learning outcomes* that is new to many languages.

Conversely, Mgqwashu (cited by Smit, 2006) posits that the underdeveloped nature of African languages, as well as the absence of the will to strive for the *de facto* equality of African languages, continues to be an insurmountable burden. Phatlane's (2006) research, for instance, posits evidence that, where African languages were indeed offered at schools, they were phased out due to learners' lack of interest in taking them. Similarly, research done by Muthukrisna (2000) in the Eersterust schools in Gauteng, where Afrikaans is the predominant language of instruction, showed that learners from the Mamelodi district coming to these schools prefer being taught in English, even though their home language is SeSotho, Zulu or Tswana.

In this regard, Grove (2006:19), postulates that, although it is common to refer to language change, it is the language users who determine the character and the extent of change. However, Heugh (2003:128) points out that, to date, only Afrikaans-speaking learners have demanded the implementation of an equitable language policy.

Nevertheless, Kamwangamalu (2003:182) warns that the continuous neglecting of African languages will lead to further marginalization and alienation of the majority of Africa's population, as well as to the demise of their languages. In addition, a report by the United Nations shows that the continuous neglecting of Africa's indigenous

languages, is one of the important reasons why Africa is still struggling with poverty, violence and a lack of self respect (Rademeyer, 2005:23).

There has, conversely, been some progress in the language sphere, as Heugh (2003:127) reports that, for the first time in South Africa, a school close to the Namibian border is now teaching Nama. In addition, Free State has formulated a provincial language-in-education policy, stipulating that in the Foundation Phase (Grade R to 3) tuition shall take place in the mother tongue and that an additional language shall be introduced from Grade 1 onwards (D'Oliveira, 2003:138).

To the contrary, Smit (2006) maintains that, as much as one would like to see African languages revalued in Africa, current trends in language used in the higher domains such as education suggest that the opposite is occurring in practice. The relationship between the former colonial languages and African languages is asymmetrical and is likely to remain so for years to come. In addition, Mgqwashu (cited by Smit, 2006) cautions that it is unrealistic to expect that indigenous languages can be introduced as medium of instruction at all levels of education in South Africa and that it is overly simplistic to expect that home language instruction would automatically result in improved educational successes or economic development.

Supporting this, Desai (2003:142) warns that a multilingual learner, who speaks three or more African languages but not English, cannot currently be socially integrated in South Africa since he lacks sufficient proficiency in the language used in the economy. Accordingly, Sema poses that the equality of all eleven official languages will only be encouraged if all languages are also recognized in the working community (Rademeyer, 2005:24). In line herewith, Henrard (2003:12) explicates that unequal access to education (*cf.* 3.6 & 4.4) seems to have repercussions in terms of access to jobs and/or political power, which implies that educators should aim to attribute status to all languages so that no individuals are forced to reject their identity in order to rize in a perceived hierarchy.

4.4.3.4 Language in education versus equal access to schools

The language of learning was raised as a sensitive issue during the Public Hearing of the SAHRC (2006:3), due to South Africa's history. It was underlined that language is an important issue that needs attention as it impacts on the availability, accessibility and adaptability of the education system delivering quality education (*cf.* 3.5.1 &

4.3.1). In accordance, Grove (2006:19) explicates that language may not be used as a barrier to make education inaccessible for certain learners and, therefore urges the State to obtain answers to many language questions. The same author highlights the fact that it has become imperative that the State should start to put its words and promises into action.

With reference to quality education in this context, Heugh (2002:192) remarks that it is understandable that access to quality education might be a short-term solution for the education authorities, but such a practice does not offer any long-term solution to the vast majority of learners who do not have equal access to quality education.

Van Tonder (1999) points out that South Africa now has eleven official languages, which implies equal rights and equal opportunities for the development of all official languages. Within this framework, Strydom (2003:29) propounds that if the State favours only certain languages, feelings of marginalization and alienation will be created among those whose languages are neglected, resulting in national unity becoming a mere rhetoric concept. Van Tonder (1999) is, conversely, of the opinion that a Language-in-Education Policy in itself will not guarantee further developmental opportunities for any language. A strategy, comprising definite steps, will have to be implemented. Accordingly, the following examples of national actions are recommended:

- Language awareness campaigns to promote language equity, impressing upon parents their responsibility to balance their concerns for social and economic empowerment with what is in the best interests of their children and learning.
- Investigating new avenues of developmental opportunities for languages.
- Exploring means for exercising learners' language rights.

Relevant to the above, Heugh (2002:192) postulates that the obvious answer to the language predicament is not to pit equal access to education against minority languages, but to improve the quality of education on the whole. In the view of the same author, quality education for everybody will only be achieved if the commitment, training and levels of competence of educators are improved and if home-language instruction is given its rightful place in South African Education.

The purpose of a decision by the education authority to enforce and change a language policy should, therefore be to promote equal access of disadvantaged learners to quality education and to enhance bilingualism by promoting English (Smit, 2006).

As it appears, inclusion that promotes non-discriminatory practices with regard to language and culture is a contested area when it comes to deafness (Peel, 2005). If education managers and educators view deafness from a social-cultural paradigm, they not only prevent the barrier *negative attitudes and stereotyping of differences* (*cf.* 3.8.2 & 4.8.2), but will automatically understand the need for being fluent in Sign Language in order to prevent the barrier of inappropriate language provision and communication (SA, 2001:7&18; *cf.* 3.8.3). Accordingly, if schools provide learners with hearing impairments access to education in the language of their choice, such learners will have access to education which is inclusive and equitable in the more complex use of the terms (UNESCO, 1999:8).

In line herewith, the possibility of providing education for all learners in their mother tongue, will now be addressed.

4.4.3.5 The eminence of mother-tongue education

Mother tongue is being defined by Kamwangamalu (2003:177) as the language which a person has acquired in early years and which normally has become his natural instrument of thought and communication.

In addition, Tulasiewicz and Adams (2005:3,4&5) advise that mother-tongue education means different things to different people, although it is mainly referred to as the language in which one is born, being the prime stimulus of human activity, or the language which influences the way in which its users actually perceive the world, therefore determining their cognitive functioning. In South Africa, Desai (2003:142) explicates, that mother-tongue education is considered to be a given for English-speaking, and to a lesser extent, Afrikaans-speaking learners only. However, when it comes to speakers of African languages, the debate continues to be waged furiously.

Education Bill of 1995. 1996 (3) SA 165 (CC)

Regrettably, Guillomee points out that, to date, government has failed to accept the eminence of mother-tongue education (Rademeyer, 2005:23). In support hereof, Heugh (2003:124) elucidates that structural support of multilingual education initiatives has, thus far, been minimal while Judge Sachs has remarked in the course of the *Dispute concerning the Constitutionality of certain provisions of the School Education Bill*[61] that immense inequalities continue to exist in relation to access to education in South Africa.

In the latter case, the Court also emphasized that no language group has a claim on the State to establish schools exclusive to their particular language, as it would serve to constitute barriers to learning for learners from other language groups. The Court further viewed the achievement of equality as the dominant theme of the SA Constitution (1996a), although considerable importance must also be given to cultural diversity and language rights. This statement is criticized by Strydom (2003:29) as implying that markedly less constitutional pungency is allocated to language and cultural rights, thus, subsuming language and cultural diversity under the dominant theme of equalizing access to education.

Congruently, Henrard (2003:12) alludes that, in a multilingual State with only one language being used as the medium of instruction, a seemingly equal *common* base line entails serious substantive inequalities for those who are not taught in their mother tongue. Along with this, Heugh (2002:192) elucidates that, as long as learners are expected to receive tuition in English from an early age, without a solid foundation of academic learning in a language that they are comfortable with, the success in achieving the required education outcomes will remain dismally low for the vast majority of learners.

In accordance with this argument, Henrard (2003:12) suggests that any educational policy deviating from mother-tongue education simply fails to lead to equal access to education for members of marginalized and disadvantaged communities. The same author is also adamant that the goals of substantive equality and equality of opportunity cannot be reached unless all individuals receive the same quality of education.

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[61] *Ex Parte Gauteng Provincial Legislature in re: Dispute concerning the constitutionality of certai provisions of the School*

Whatever the definition allocated to mother-tongue, Uys et al. (2007:70) acknowledge that the alliance between mother-tongue education and good performance cannot be ignored. In support of the latter, Hindle, Director-General of Education, refers to a study done among 35 000 Grade 6 learners which recognized that learners educated in their mother-tongue, performed much better (Rademeyer, 2005:23).

Those in support of mother-tongue education sustain their position that effective literacy acquisition and second language proficiency depend on well-developed first language proficiency. Kamwangamalu (2003:181), for example, maintains that a learner learns better in his own language, since there is incontrovertible agreement between the genius of the language and the mentality of its speakers. Additionally, the same author illuminates the point of view that learning in the mother-tongue saves many years that would otherwise have been wasted in knowledge acquisition owing to the fact that learners should firstly have to learn the other language.

The eminence of mother-tongue education as a medium of instruction was consistently raised during the Public Hearing of the SAHRC (2006:28) as a necessity for effective learning to take place since the strong educational, political and cultural rationale for home-language instruction was recognized by all. In this regard, Henrard (2003:12) indicates that there are several arguments in favour of mother-tongue education based on the impact that it is believed to have on the emotional and cognitive development of learners and their future (professional) lives. In support, Maree explicates that intellectual development depends on mother-tongue education, since a learner's language ability determines the quality of his learning experiences and the accuracy of his knowledge (Rademeyer, 2005:24).

Desai (2003:143) emphasizes that reasons for not implementing the mother tongue in education are often not educational, but rather political, social and economic. This is important to take cognizance of, since what is best for the child psychologically and pedagogically may not be what is best for the adult socially, economically or politically and, what is even more significant, what is best for the child and the adult may not be best or even possible for society. The same author points out that the debate for or against the use of mother tongue in formal education is often polarized as either promoting a case for the importance of the mother tongue or promoting a case for a language of wider communication. In South Africa, this polarization

manifests itself as tension between the promotion of English on the one hand and the promotion of African languages on the other. Quite often the result is that many learners do not acquire English effectively, nor do they develop proficiency in the mother tongue (Desai, 2003:143).

Conversely, Heugh (2002) asserts that, against the background that the vast majority (86%) of learners in schools will not have any use of a global language of education at tertiary level, improvement of the quality of home language education will be in the best interests of such learners. Nevertheless, mother-tongue education still seems to be the most appropriate policy choice regarding the medium of instruction, according to Henrard (2003:13), although the road towards implementing such a policy will, regrettably, not be without potholes.

4.4.3.6 Availability of educators to teach in the eleven official languages

The implementation of a language-in-education policy is currently according to PRAESA (1992:2), the most critical issue in South Africa's education system which is exacerbated by a shortage of suitable trained educators (*cf.* 3.8.5 & 4.8.7) and adequate materials (*cf.* 3.8.1.3 & 4.8.1.1) for multilingual classrooms.

Accordingly, concern is raised by Prinsloo (2007164) over the issue that many educators are not able to speak the language or dialect of the learners in their classes, resulting in ineffective education taking place (Kgosana, 2006:19). Statistics, referred to by Heugh (2002:193), show that 83% of the learners, who mainly come from poor socio-economic backgrounds, are currently taught by educators who themselves are not proficient in English. This is regarded as shocking by the SAHRC (2006:28) which stresses that such circumstances cannot longer be ignored as they amount to the violation of learners' fundamental right to a basic education (*cf.* 2.4.1.6.10).

In order to provide language support to learners, Heugh (2002:121) draws attention to the reality that educators will have to be trained to conduct education in more of the eleven official languages as well as, according to Uys, Van der Walt, Van den Berg and Botha (2007:70), to facilitate language learning in their classrooms, irrespective of the subject or learning programme they teach. This is necessary, as pointed out by D'Oliveira (2003:135), since educators are, within an inclusive education system, expected to deal with the different levels of language development

in one heterogeneous class of learners by using cooperative learning techniques and general differentiation.

4.4.4 School environments as a continuous barrier to learning and development

Schools as teaching and learning environments can either support or hinder the inclusion of all learners. Supporting this, Lazarus *et al.* (2004:45) affirm that strategies must be explored to create school environments that support the learning and development of all learners. Such environments, in which all learners are welcome to participate, will, as set out by Blessing *et al.* (2003:2), entail respect for and the valuing of diversity (*cf.* 3.6.2).

Expanding on the above, Du Toit (2006a:18) avows that special programmes alone are insufficient to resolve a learner's educational needs. A very important component should be added, namely a supportive educational climate in which aid can be rendered. Correspondingly, Dyson and Forlin (2004:24) explicate that inclusion is taken to indicate a more thorough commitment to create regular schools, which are *inherently* capable of educating *all* learners. This implies that inclusive learning environments must foster the personal, academic and professional development of all its learners (Lazarus *et al.*, 2004:48).

Moreover, Pottas (2005:49) emphasizes that all learners deserve to be in an environment where they can participate and communicate with peers, educators and staff who challenge them academically while meeting their social, emotional and cultural needs, and where they are truly included in every aspect of school life. In addition, Xaba (2006:565) points out that school environments should also be safe havens for all learners, which does not refer only to the absence of violence and crime, but also to the elimination of psychological injuries, although not as regularly reported as physical injuries.

In order to achieve this goal, Lazarus *et al.* (2004:53) claim that both the aspects of school life that are acting as barriers to enhance inclusion and those that facilitate a welcoming and supportive environment must be identified. This will, however, not be an easy task, as Du Toit (2006a:19) points out that a supportive educational environment for a learner with blindness, *inter alia,* is completely different from that of a pedagogically neglected or environmentally deprived learner.

Concerns about the general decline of a culture of teaching and learning mainly due to the poor management of schools, uncommitted educators and the lack of parental support, are put forward by Ngidi and Qwabe (2006:529).

In order to improve schools' accessibility to all learners, Peel (2005) suggests simple structural changes such as accessible toilets for physically impaired learners, electricity and running water, indicator lights for break times and emergencies, and adequate ramps. Moreover, the Integrated National Disability Strategy (cited by Lazarus *et al.*, 2004:50) identifies a number of barriers withholding learners with disability from equal opportunities. This includes structural barriers in the built environment, such as flights of stairs, inaccessible service points (telephones) inaccessible entrances and problematic interior design (fixed seats or inadequate floor space). Accordingly, the SAHRC (2006:41) avows that it is totally unacceptable that the Department of Education is aware of learners who are totally excluded from receiving education due to disability, but that immediate steps are not taken to rectify the situation.

Illuminating the above, Alston (2006:6) asserts that learners who are physically handicapped cannot be housed in regular classes if the essential facilities are unavailable. However, White Paper 6 (SA, 2001) is silent on such key issues as the number of learners per class and the fact that learners who experience permanent physically barriers in a mainstream class may require greater aisle space, different and more appropriate or even larger furniture, and probably other safety equipment which will require additional space. Furthermore, some costly building alterations may be essential including, *inter alia,* the provision of lifts in double- or multi-storied buildings.

Conversely, Rademeyer (2006f:6) reports on a shocking school environment established at the Silverton High School in Pretoria where there are only prefabricated classrooms and chemical toilets for use by learners, while parents are requested to pay R440 per month in school fees. According to the same reporter, the Department of Education reacted to complaints in this regard by stating that parents, who do not like the school, are welcome to take their children to any other school. The Department, however, also indicated that this school was established as an emergency outcome to accommodate learners from the Mamelodi district to be

educated in English to which they grew accustomed during their primary education years (*cf.* 4.8.3).

Consistent with the aforesaid, the SAHRC (2006:25) reports that the Department is still in the process of addressing inherent stark inequalities and redressing them in a context of major demographic shifts taking place in some provinces.

4.4.5 Inaccessible support services as barriers

Inclusive education represents a system where *all* learners learn together at regular schools with appropriate networks of support (CSIE:1).

However, Schoeman (2002:5-6) points out that the adequate provision of support services (non-educational services required to ensure the provision of quality education according to the needs of learners (Steyn *et al.*, 2000:10) is of vital importance, since it is recognized that learners who experience barriers to learning and development can only be sufficiently accommodated if the necessary support is provided. As an example, Benghiat (2006:41) explicates that learners with Attention and Hyperactive Deficiency can have a great future if they receive the correct support. It is also recognized by Schoeman (2002:6) that, without the basic support systems and aids available, learners with, *inter alia,* visual impairments (blind or partially sighted) would actually be further disadvantaged in an inclusive education environment.

In light hereof, the Department of Education (Department of Education, 2003a:12) recognizes that the greatest challenge for the newly proposed District Support Teams (*cf.* 3.8.5.3) is to change existing support services, which are fragmented, uncoordinated, not developed in an integrated way, do not work within teams and overwhelm, over-load and do not connect trainees with their core purposes.

The immense extent to which support services are needed within an inclusive education system is illustrated by Schoeman (2002:6) who explicates that the following will be needed at every site of learning where learners with visual impairments, for example, are enrolled:

- Qualified Braille instructors without whom such learners will remain illiterate.

- Access to material for Braille teaching and learning at different levels of development and for different age groups.

- Instructors with thorough knowledge of orientation and mobility techniques without which such learners will be deprived of the opportunity to achieve physical independence and lead a physically active life.

- Programmes containing individual instruction in daily life skills to strengthen their self-confidence and individual capacities.

- Educators with expertise in teaching learners with visual impairments at all regional resource centres (*cf.* 3.8.5.7 & 4.8.7).

- Equal access and quality services irrespective of the severity of, *inter alia,* their visual impairment, gender and age (*cf.* 3.6 & 4.4).

- Parental involvement, as far as possible, granting parents the opportunity to exercise their right to make choices regarding the setting where their children's requirements will be addressed most appropriately (*cf.* 3.8.5.6 & 4.8.6).

In keeping with the afore-mentioned, Alston (2006) conveys that White Paper 6 (SA, 2001) is silent on the matter of aids for educators, despite reference being made to district support teams and other expertise being available to assist and/or support educators in inclusive classrooms. The same author criticizes *district support teams* as being distant support teams (*cf.* 3.8.5.3), while accentuating that educators need personal aids in the classroom in order to cope with the demands of a variety of learners due to their individual range of differing needs.

Pottas (2005:31) points out that the education system unfortunately is still far from providing sufficient support services to all learners, while existing support services are still functioning as highly specialized, high-cost models available to only a small minority of learners.

4.4.5.1 The future of special schools

Schoeman (2002:3) cautions that the changing of an education system and the approach to special needs education from a segregated and centralized system to an

inclusive system is a long and difficult process, even a costly process (*cf.* 3.8.1 & 4.8.1) in terms of money and human resources.

It is, as emphasized by Dugmore (2004:2), important to bear in mind that inclusive education in South Africa does not imply mainstream dumping or the closure of existing special schools. Van Eeden (2006:22) admits that the closure of all special schools will be unfair, since it will lead to the violation of the fundamental rights of certain learners. This is said in the context that a learner with, for instance, Down's Syndrome has equal rights to education and a balanced social life as any other learner.

Surprisingly enough, Cromwell (2004:2) submits that it is not only educators who battle over inclusion, but also parents of learners with disabilities who do not support this approach. Consequently, some parents dread losing special educational services they have fought for and fear that their children will be thrown into regular classrooms without appropriate support (Rademeyer, 2006b:19).

Originally, the term *special education* was used to describe a specific set of services and support which a learner could receive to assist him in participating in classroom activities embedded within the curriculum of general education. Somewhere along the line, the term has, as explained by Blessing *et al.* (2003:2), evolved to that of a description of some place learners with unique approaches to learning spend their time or some programme that is undertaken outside the general learning community. Rather than being a *process* or a means to an end (a way in which to insure that all learners have maximum opportunity to learn from and grow with one another at school), special education has become an end or outcome in and of itself.

According to Lockwood (2003:1), apartheid special education schools and services were organized according to two segregating criteria, namely race and disability. Decades of segregation and lack of resources were apparent in the imbalance between special schools that catered exclusively for white and black learners with disabilities. Accordingly, the aim of new policies is to create special education on a non-racial basis.

Despite the fact that an inclusive education system believes that all learners should in future, rather be accommodated in regular classrooms under the umbrella of inclusion, there are a number of authors who, for various reasons, encourage the

continuation and strengthening of special schools. Such schools are essential to accommodate learners with, *inter alia*, disabilities so severe that they cannot interact with other individuals at all, and consequently would not gain socially by being included in regular classrooms (*cf.* 3.3.1.3 & 4.7.2).

Inclusive education for blind and partially sighted learners is currently being implemented on a limited scale in South Africa, as described by Pauw (2006:365). The greatest advantage thereof is the opportunity these learners are offered to attend school from their parents' homes and to remain in the seeing community. Social integration is thus a decisive consideration.

As apposed to set advantages of inclusion leading to, *inter alia*, better self-concept, higher aspirational levels and social participation, Du Toit (2006c:72-73) found, through research, that learners attending special schools had improved self-images and when such learners were transferred back to regular schools, their self-image deteriorated. In addition, Pauw (2006:365) draws attention to the fact that special schools represent a concentration of special knowledge and experience, with trained personnel, teaching aids, equipment, and a teaching programme which is specifically developed and implemented to nurture the individual learner with special educational needs.

In support, Alston (2006) claims that, although no one can deny that all learners have a fundamental right to education (*cf.* 2.4.1.6.10), the failure to provide the specialized teaching needed, in the mistaken confidence that educators can cope with a range of learners who experience barriers to learning in their overcrowded classrooms, is to deny learners meaningful education and therefore a breach of their fundamental rights. This is particularly noticeable in regard to learners in need of specialized remedial education at remedial schools. These learners have normal intelligence, but have special learning difficulties requiring specialized attention by trained educators (*cf.* 4.8.7). To return these children to mainstream classes or to deny others the opportunity of such teaching, is to fail to provide an education which is specifically in their best interests (*cf.* 4.5). Accordingly, Fuchs (2004), with whom the researcher occurs, expounds that the closure of special schools which deliver essential services will only undo good work already done and destroy the lives of many learners. Accentuating this, Benghiat (2006:41) avows that dyslexia among learners, *inter alia*,

can only be countered by remedial education and persistence in special school settings.

Rimland (1995:288), a special education specialist, provides another example of the importance of special schools when asserting that, as much as he wanted his autistic son to cope successfully at a regular school, it was apparent that he could not. Emanating from this, the same author is convinced that special classes with experienced and skilled educators, who had gone to lengths to train themselves in teaching methods, helped his son to come along much further than ever expected and to reach his full potential.

Consistent with the above, Rimland (1995:289) explicates that a team of individuals is needed to work together for months, learning about an individual learner figuring out where the learner should be placed and what services he will require for inclusion to be successful. To make the switch to inclusion, many learners would be cheated out of much of this preplanning and may consequently end up in regrettable situations.

On the other hand, there are also authors who concede that special schools should not have a future within an inclusive education system. Dyson and Forlin (2004:34), for instance, argue that special schools are too costly, as they demand a low learner-educator ratio, highly trained staff, specialized teaching material and equipment, the transportation of learners, as well as separate school buildings. Accordingly, numerous developing countries have, after examining their viability, come to view special schools as a financially unrealistic option (*cf.* 3.8.1).

Maddin and Slavin (1983:520) also maintain that there are a number of reviews and meta-analysis that consistently report little or no benefit for learners when placed in special educational settings. Rustemier (2002), moreover, asserts that the segregation of learners in separate special schools is internationally recognized as discriminatory, damaging to individuals and society, and violating learners' fundamental rights to inclusive education. Accordingly, special schools are viewed by the same author as a fundamental obstacle to inclusion which should be closed, while all their resources should be transferred to a mainstream setting which should be restructured to increase their capacity to respond to learners' diversity.

Another negative aspect is enlightened by Van Eeden (2006:22) who submits that the artificial segregation of learners with, *inter alia*, disabilities encourages people to be uncomfortable in the presence of people with disabilities, while it alienates excluded learners, as they do not learn how to cope with others. As a result, inclusion is more positively a reflection of true life.

It is of extreme importance to realize that, since educators at special schools already possess an understanding of the needs of learners with special educational needs, they have a tremendous contribution to make to inclusive education (Schoeman, 2002:4). In order to make use of their expertise, such educators have to be taken along in the transformation process and, if necessary, be assisted and trained to widen their scope of understanding inclusive education. Regrettably, this is not taking place and, consequently, educators with relevant training and years of experience were, and still are, forced out of the system at departmental and school level. The unfortunate result of such action is clearly visible today. On observing certain schools, Schoeman (2002:4) expounds that shallowness in the understanding of the real needs of learners with special educational needs and a lack of knowledge in crucial areas of teaching and learning are very much alive.

On the other hand, the idea is that all educators must be empowered to be able to support learners experiencing barriers to learning (Kitching, cited Van Eeden, 2006:22). In accordance, the priority of general education training is currently to develop a truly inclusive system of education, ensuring that there are no underqualified educators (South African Yearbook 2005:210; *cf.* 3.8.5.7 & 4.8.7).

Within an inclusive education system, all learners must start their schooling in regular classes. As a result, learners with disabilities will attend the school closest to home which must be equipped to accommodate them. Subsequently, placing learners in special schools or special classes should be the exception, rather than the rule (Pottas, 2005:21).

In reaction to the above, Hoff (Chief Executive of the Parents Association for Children with Special Education Needs, representing more than 12 000 parents) comments that parents feel that the State is not fulfilling its duty towards learners who experience barriers to learning and that such learners' constitutional rights are being infringed upon (Rademeyer, 2006b:19). The basic complaints against inclusion

are the shortage of educators and support personnel, small subsidies from the State, growing quantities and increasing numbers of learners who are relieved from paying school fees due to poverty (*cf.* 3.8.1 & 4.8.1), outdated resources (*cf.* 3.8.1.3 & 4.8.2) and buildings which are maintained with great effort (Rademeyer, 2006b:19; *cf.* 3.8.4 & 4.8.4).

As a result of the emphasis placed on inclusion, special schools are currently in a survival mode. The number of learners at Sonitus, a school for the hearing-impaired, for instance, has increased from 246 learners in 1999 to 350 learners in 2006, while the school has lost eighteen posts for educators in the corresponding time-frame. Reasons for the increasing numbers are the access of many previously disadvantaged learners and the increasing reference of so-called slow learners who do not perform well at regular schools (Rademeyer, 2006b:19).

Obviously this calls for a special type of curriculum.

4.4.5.2 The dream of a flexible curriculum

The SA Constitution (1996a; *cf.* 2.4) has brought the fundamental rights of learners to the fore, resulting in the fact that learners must now be recognized as having the right to assess school curricula and the right to a curriculum which is appropriate to their learning needs. These rights have, as explicated by Engelbrecht *et al.* (2004:viii), profound implications for the nature of the curriculum and the learners. Such a curriculum should, as pointed out by Joubert (2006), assist all learners to acquire the knowledge, values and attitudes for negotiating the challenges presented by South Africa's rich and varied multicultural society, and thus to free the potential of each learner (*cf.* 2.4.1.1).

Accordingly, Schoeman (2003:36) points out that schools are needed, as much for political as for educational reasons, since the quality and nature of the citizenship of the future depends more on schools than on any other institution. Schools therefore bear a special and historic responsibility for the development of civic competency and responsibility among all learners.

To achieve this goal, Muthukrishna (2000) and Du Toit (2006b:25) propose that attention must be given to changes in curricula and overall teaching methods, teaching media, expected rate of progress, possible additional aid and parental

guidance, in order to minimize barriers to learning and maximize optimal participation for all. To the contrary, Vandeyar and Killen (2007:101) maintain that major changes have not yet materialized, as educators, in many instances, still apply the same pedagogical practices they used decades ago, while Carl (2000:171) expounds that many curriculum initiatives have miscarried, as their developers have underestimated the importance of their implementation.

Correspondingly, Lewin *et al.* (2003:xxv) explain that the development of a new curriculum needs a more enlightened approach to learning. It is therefore time to convert ideas into workable structures and learning opportunities which correspond to the demand for educators who are competent to promote the ambitious agendas of the new education system. Derbyshire (2006:413) cautions that the pro-inclusion argument referred to as the *adaptation of the curriculum to suit all learners in an inclusive classroom* should not constitute watering it down to the lowest common denominator.

Consequently, all decisions regarding an inclusive education system must be made on the basis of learners' assessed needs and in their best interests. Therefore, Alston (2006) accentuates that the needs of each learner must be fully assessed, using several assessment processes to facilitate valid, reliable measures of the learner's performance and identifying the effects of the teacher's instruction on the learner (Pottas, 2005:37).

Bearing this in mind, the new OBE framework was implemented to facilitate the transformation of the education system in general, to emphasize the educators' role in curriculum development, highlighting the need for educators to develop their competence to identify and respond to local needs, thus providing flexible programmes (Lazarus *et al.*, 2005:51). The latter is very valuable as it will assist educators to refine their teaching activities to optimize learning for all learners (Sands, Pottas, 2005:37; *cf.* 3.8.5.7 & 4.8.7).

Accommodating all learners on an equal basis (*cf.* 3.6 & 4.4) and enabling everyone to reach their full potential (*cf.* 1.1) may, according to Bray (2000:45), imply implementing differentiated school programmes. Under ideal inclusive conditions, all learners must work towards the same overall educational outcomes, *i.e.* actions and performances that embody and reflect learner competence in using content,

information, ideas and tools successfully (Schoeman, 2003:36). What differs, is the level at which these outcomes are achieved, the additional support that is needed and the degree of emphasis placed on various outcomes.

OBE is built around three premises, namely that all learners can perform successfully, although not at the same pace, that each successful learning experience is a stepping stone to more success and that schools are pivotal in creating the conditions for success at schools (Schoeman, 2003:39).

Maree points out that the ideals set for OBE have not materialized, due to overhasty implementation thereof (Rademeyer, 2007a:5). A reason for the latter is that, although educators received OBE training, they find it difficult to implement it at their schools (Reddy, 2003b:192). In support of this statement, Peel (2005) states that principals in schools for the Deaf feel that the overall relevance and quality of training in OBE received by educators were inadequate, especially with regard to learners with a hearing impairment, since 84% of schools for the Deaf experience gross difficulty in implementing Curriculum 2005 (*cf.* 3.8.5.7 & 4.8.7). It is, in addition, emphasized by the same author that the new curriculum needs to be adapted for learners with a hearing impairment by making the outcomes more practical and to accommodate such learners in the assessment criteria in a better way.

The SAHRC (2006:24) also reports on the fact that the curriculum is not adequate for learners with a hearing impairment, in that it does not address their specific learning needs such as using Braille and acquiring social skills or mobility training. It is also recognized by the Commission that the education of these learners is still centred on the medical approach which focuses on speech training at the expense of education, which results in the lack of a regular curriculum and such learners being functionally illiterate.

In order to overcome some of these identified barriers created by OBE in equipping the Deaf, Peel (2005:35) recommends that OBE training should be done by educators with a clear understanding of the Deaf and that educators for the Deaf should be involved in all training and decision-making regarding OBE.

Pottas (2005:27) adds that the current curriculum and inclusive education system as a whole, fail to respond to the diverse needs of the learner population in South Africa, resulting in massive numbers of drop-outs, push-outs and failures. In support of this

statement, Lewin *et al.* (2003:xxv) assert that the development and practical implementation of a new curriculum is still far from complete and that there are many issues which are still being contested.

4.4.6 Mounting lack of parental involvement as barrier

Kamper (1998:81) explicates that the effectiveness of the provision of educatio under unfavourable circumstances is determined by two factors, namely the political will to make a success (*cf.* 4.1) and the nature and extent of parental and community involvement. Although parents' support cannot guarantee educational success, Rambiyana and Kok (2002:10) indicate that their lack of support can indeed sabotage even the best intentioned reforms. In accordance, the new democratic dispensation in South Africa is seeking to ensure the participation of parents and communities in the governance of schools (SAHRC, 2006:29; *cf.* 4.1).

The practicality of a decentralized system that bestows a great deal of power on local communities or schools may, as explicated by Visser (2003:143), promote democratic participation at a number of schools, but simultaneously undermine the overall majority by allowing minority groups to maintain privileges at the expense of greater equity. At a local level, the same author explains that school communities may be given this power, but could have that power rendered useless by a lack of skills necessary for exercising it. This is a real danger in South Africa where public School Governing Bodies have been given considerable powers, but lack the skills necessary to exercise them effectively at many schools (Visser, 2003:143; *cf.* 4.8.1).

Illuminating the afore-mentioned, Pottas (2005:30) explains that negative attitudes towards parental involvement, obstruct the recognition of the vital function of parents (*cf.* 3.8.2 & 4.8.2). Parents are usually regarded as important merely for the purpose of financial resources or similar assistance they can provide (Visser, 2003:143). Although the SA Schools Act (84/1996c: section 19) obliges provincial education departments to provide capacity training in order to facilitate cooperation between educators and parents, Fredman (2005:144) submits that its practical implementation is threatened by an insufficient budgetary allocation (*cf.* 3.8.1). In addition, Carl (2000:6) indicates that democracy is hard work, people must learn to work together, respect differences, take responsibility for decisions and make positive contributions.

Democracy cannot quickly be learnt through a lecture, it can only be learnt by living it.

In addition, Muthukrishna (2000) indicates that a lack of involvement on the part of the parents is a pivotal social factor which impacts negatively on the success of an inclusive education system. Notwithstanding the latter, Schoeman (2006:23) points out that many parents are still not actively involved in the education of their children. Indicative hereof, various responses received from principals indicate an overwhelming lack of parental involvement at their schools (Prinsloo, 2007:162).

Noninvolvement of parents should, according to Lemmer (2002:56), not be interpreted as that parents do not want to become involved. Correspondingly, Peel (2005:35) provides the following two possible reasons for the non-involvement of parents: distance from schools and socio-economic factors. The latter is underscored by Prinsloo (2007:162) who explicates that many low-income families do not have the resources or confidence to participate, or to the ablility to make a contribution to many educational aspects. The same author concedes that many parents may even be too busy trying to cope with their own immediate problems even to become involved in school activities. Moreover, many parents are unfamiliar with the schooling system while their lack of proficiency in English, which is largely used as medium of instruction (*cf.* 4.8.3), leaves them feeling anxious, disempowered or even alienated in the school environment (Lemmer, 2002:56).

Cooperation between parents and schools is complicated by various other factors. In this regard the SAHRC (2006:29) reports on underlying simmering resentments and sometimes anger between parents and educators as a result of unmet needs and unrealized capabilities. In addition, Lemmer (2002:56) explains that barriers and misunderstandings, *inter alia*, arise from existing differences in ethnicity, as well as educational and social class between educators and parents. Visser (2004c:93) concedes that educators are often skeptical about the involvement of parents through democratically elected public School Governing Bodies, especially in historically black schools where there is little or no experience of appropriate parental involvement.

Moreover, many educators are not familiar with the background and communities of the learners they teach. As a result, educators often regard learners' home

environments as inferior and inadequate to prepare them for academic success. Educators are often disinterested in issues relating to local culture (Prinsloo, 2007:156) and/or even tend to look upon parents of linguistic-minority learners as apathetic and indifferent to their children's education or feel that parents who, for example, do not speak English are illiterate and incapable of helping their children with school work (Lemmer, 2002:56).

The persistence of such misconceptions must be eliminated, since failure to recognize parents as equal partners is detrimental to the inclusive process (Pottas, 2005:54). This stems from the fact that parents must serve important roles as supporters co-educators and valuable instructional stakeholders, providing indispensable information concerning learners, especially for learners who may not be able to fight for themselves as a result of diverse problems (Du Toit, 2006c:63). Moreover, Theron and Dunn (2006:493) explicate that the absence of parental support has a detrimental effect on learners since it gives rise to feelings among learners that their parents' apathy is proof of their lack of worth and/or scholastic ability.

Pottas (2005:36) underscores the above, asserting that mutual efforts by professionals and parents, working together as a team with different but equal status, engaging in interactive processes and using specialized content to achieve shared goals, are required to meet the needs of all learners.

The recognition of parental involvement in education for all learners regardless of cultural background is well documented as it gives rise to higher scholastic achievements, reduced dropout rates and reduced absenteeism (Lemmer, 2002:56).

Subsequently, Monyooe (2005:12) illuminates the necessity to increase the active involvement of parents in the education of their children. It is also important that schools should increasingly make an effort to gain intimate knowledge of learners and their parents which will, according to Lemmer (2002:57), enable schools to incorporate their diversity into their curricula, to use some of their expertise, to involve parents and even to start education programmes for adults in order to assist them to help their own children with school-related activities. Parents must not only be empowered to participate, but must become actively involved in the planning, development, implementation and monitoring of education and support. They need,

as elucidated by Schoeman (2002:5), also to be empowered to take up the responsibility with regard to their own children.

The latter is eminent as parents are to play an ever increasing key role in education against the background of the new inclusive curriculum which is learner-centred, requiring learners to discover more knowledge and skills by themselves, aiming at making learners more responsible for their own learning (Van Eeden, 2006:23).

In spite of considerable efforts and achievements since the democratic transition to improve the participation of parents in education, the SAHRC (2006:29) reports that it is evident that some communities remained marginalized. The experiences and voices of the working class, the poor and vulnerable learners and parents, are still not heard clearly or loudly in the education system.

Similarly, Visser (2005:414) acknowledges that much is still to be done to achieve adequate parental involvement, crucial for the successful functioning of an inclusive education system.

4.4.7 Human resource development as barrier

The link between quality education (*cf.* 3.5.1 & 4.3.1) and the professional ability of educators is endorsed by a number of sources. Bray (2000:45), for instance, places emphasis on the fact that educators play a key role in fostering fundamental rights and that educators' personal conduct and example play as an important role as their teaching. In addition, recent research provides convincing evidence that educator quality plays a critical role (Grösser, 2007:37; Ngidi & Qwabe, 2006:537) in whether and how much learners are learning (Van Rooyen, 2006). Underscoring this, the SAHRC (2006:25) explicates that educators are the ones who spend large amounts of time with the countries' learners and are responsible for ensuring that quality learning takes place successfully in classrooms.

Despite the pivotal role educators have to play, an education audit done in 1999 in the North-West Province (referred to by Oosthuizen *et al.*, 2005:25) revealed that many educators were unqualified for their jobs. Reasons for the high rate of unqualified educators within the system, as highlighted by Mattson and Harley (2003:286) are, *inter alia,* the fact that many educators were trained at impoverished teachers' training colleges in the former homelands, the right-sizing of the

Department of Education in 1996 resulting in many qualified educators leaving the profession and, according to Reddy (2003a:91), because of high failure rates among education students from poorly resourced and managed high school systems, being unprepared for effective training.

Within the above context, DeafSA (2006:21) reveals that the majority of educators in schools for the Deaf are themselves, *inter alia*, not fluent in South African Sign Language, even though legislation specifies that Sign Language should be used for the teaching and learning of such learners. Results revealed that 76% of schools for the Deaf accommodate learners with special needs and only 52% of educators at schools for the Deaf are trained and equipped to educate these learners.

During the SAHRC's investigation (2006:24), the Federation of Governing Bodies of South Africa (FEDSAS) also reported that educators do not always have the necessary knowledge to teach learners with disabilities effectively in a way that caters for their special needs.

The new inclusive education system is placing yet another set of responsibilities on educators since inclusion does not entail simply adding to existing school programmes, but requires significant changes to the ways educators conduct their work – changes that have not always been welcomed (Lessing & De Witt, 2007:53). At the end of the spectrum, inclusion proposes that all learners belong in regular classrooms and that good educators are those who can meet the needs of all learners, regardless of what those needs may be.

As a consequence of their underqualification, educators struggle to create environments conducive to learning, are incapable of using appropriate resources, teaching and assessment strategies and lack basic classroom management and facilitation skills that would enable them to monitor learners' progress and intervene when appropriate (Monyooe, 2005:10; SAHRC, 2006:27), with serious implications for the intellectual development of all learners.

In meeting diverse needs, emphasis is placed on the ongoing professional development of every educator as a key element in ensuring quality throughout an inclusive educational system (Coetzer, 2001:89; Engelbrecht & Green, 2001:v; Blessing *et al.,* 2003:3; Hindle, 2003:327; Parker, 2003:40, and, Lessing & De Witt, 2007:53).

In addition, educators themselves need to possess a clear understanding of the SA Constitution (1996a; *cf.* 2.4) and the fundamental rights enshrined within, since educators who do not understand the nation-building task at hand cannot effectively provide quality education (*cf.* 1.2). Disregarding the fundamental rights of learners, such as educators discriminating, both overtly and covertly, against learners, is unfortunately still a reality in the schooling system (Department of Education, 2003c:11). To eliminate the latter and assist principals and educators in coping with the plethora of policies and the high expectations implied by them, Pendlebury (2002) urges that educators must be well trained in Education Law. This is necessary since knowledge of Education Law will assist them in respecting the fundamental rights of all participants and facilitating the creation of secure learning environments (Oosthuizen *et al.*, 2005:10).

During the training and re-training of educators, Van Rooyen (2006) submits that urgent attention must also be given to educator-related issues such as, among others, motivation, good conditions of service and enhanced opportunities, as they will lead to commitment to duty, improvement in educator quality and service. The main aim of such intervention should, according to Lazarus *et al.* (2004:311), be to minimize, remove and prevent barriers to learning and development, and thereby assist the education system in becoming more responsive to the diverse needs of the learner population.

Carl (2000:5) warns that the training process must be conducted with the democratic participation of educators, otherwise alienated educators are created, which will definitely affect productivity adversely. To the contrary, academics (Carrim, 2003:306; Rafalovich, 2004:105; Smit & Greyling, 2006:598; and Van Rooyen (2006) avow that educators are unfortunately seldom treated as important resources of schools, let alone appreciated as the most precious source. In this context, Parker (2003:41) affirms that the misrecognition of educators results in inadequate on-going educator development and training which continue to cause barriers to learning in general.

In support of this argument, Meier (2003:289) maintains that education training policies and practices are still in bad shape, lacking coherence. Lewin *et al.* (2003:xxiv) also explain that many educator teaching programmes have remained substantially unchanged despite radically changed demands from education systems

on educators and reformed curricula. As an example, Lessing and De Witt (2007:53) confirm that educators often experience in-service training as worthless, while Meier (2003:293) asserts that students and new educators frequently complain that they have not been taught to cope with the variety and range of individual learners in a classroom setting (*cf.* 3.6.2). Prinsloo (2007:164), moreover, concedes that trainers who present in-service training lack the necessary skills and knowledge of didactics and of current school conditions, thus not comprehending the problems in contemporary classrooms.

Grösser (2007:51) points out that new ways of teaching, *per se*, will not automatically improve the quality of learning, as educators will need ongoing sustained support, encouragement and recognition to succeed. The latter is underscored by Jansen (2003a:118) who asserts that there is a disjuncture between what policy aspires to promote and the realities of educators' experience and actions.

The above disjunction in practice leads, as pointed out by Mattson and Harley (2003:284), to educators trying to engage in a policy system that is not aligned with their personal and professional identities. In such an attempt, they merely follow the State policy while trying to appear competent, superficially upholding a policy which they do not want to put into practice. According to the same authors, the latter could lead to policy falling into the trap of social amelioration, where commitment to a vision clouds the ability to consider exactly what is the good intentions of social reconstruction.

Likewise, Visser (2005:415) insists that much more must be done to ensure that all educators are properly qualified and act professionally and diligently, hence leaving less room for unacceptable educational practices, as well as for corrupt and quasi-corrupt practices that falsify real education achievements or cause additional problems.

In an attempt to achieve long-lasting solutions, Meier (2003:289) argues that all stakeholders (universities, schools, unions, State bodies) must engage in collaborative efforts in support of the generation and use of the best practices as part of a *whole*. According to Muthukrishna (2000), the empowerment of educators to become problem-solvers and to explore creative ways to respond to everyday

teaching and learning problems and to translate theory to practice, must be a priority in any such engagements.

Conversely, Schoeman (2003:51) cautions that education is a profession where autonomy is still extremely significant and, to use the cliché, once the classroom door shuts, the individual can operate in a variety of ways. In support hereof, Jansen (2003a:123) and Prinsloo (2007:163) submit that what educators claim to do and what they are actually observed to do in practice, are quite different. The latter is underlined by the SAHRC (2006:25) who reports that, during their investigation, a picture was created of many educators not playing the role they ought to be playing.

To the contrary, Wegerle (2002), as well as Mattson and Harley (2003:287), illuminates that educators feel that they are overworked, underappreciated and underpaid, which are contributing to burnout (Pienaar & Van Wyk, 2007:542) as well as to a lack of motivation, enthusiasm and confidence (Prinsloo, 2007:165).

However, Jansen (2003a:128) and Carrim (2003:306) show that policies often referred to a so-called ideal educator, do not correspond with realism since they are unable to analytically address the specific realities experienced by educators or the complexities of their identities analytically, thus marginalizing, disempowering, framing and demoralizing educators

Meier (2003:222), correspondingly, concludes that inclusion is still more rhetoric than reality in South Africa because of additional constraints faced by education, such as class size and inadequate educator training, labelling education as child-conscious rather than child-centred. The latter requires the facilitating of the learning process in which young minds take charge of their own learning, design their own material, invent their own learning opportunities and occupy the centre of the classroom (Jansen, 2003a:12). Education which is child-centred demands complete individualization of the learning process. (which is unfeasible when educators are confronted by classes of thirty or more learners) since it recommends that class sizes do not exceed a maximum of 20 learners participating (Feldhusen, 1985:237; Rafalovich, 2004:115).

Unfortunately, education authorities expect schools to accommodate 40 plus learners per class (Schoeman (2004). Overcrowded classrooms, filled with learners with wide levels of academic ability and learners with physical, mental, medical and/or

psychological problems, as stressed by Alston (2006), are a nightmare for educators and a place where learners get *lost*. Consequently, classrooms are transformed into places where learners receive poor attention, poor assistance and make poor progress, not because educators want this to happen, but because they just cannot cope. Underscoring the latter, Mestry (2004:294) explicates that insufficient and overcrowded classrooms (one of the main determinants of quality education) have militated against effective teaching and learning by creating impossible working conditions.

As a result, Rafalovich (2004:178) submits that the current state of public education, on which bloated classrooms and stressed-out educators foster intolerance towards learners with special education needs, fosters barriers to learning and development rather than eliminating them. To lessen the pressure on educators, some provinces are providing additional educators. This could permit somewhat smaller class sizes, with ensuing additional attention to learners who are greatly in need thereof. Provinces such as North West have also contracted with international advisors to train curriculum support specialists and key educators in some subjects. These initiatives are, however, patchy and are not characteristic of all provinces (Davies, 2005:131).

In the broader sense, Lewin *et al.* (2003:xxiv) affirm that much has, unfortunately, remained at the level of rhetoric, rather than being practically implemented. As a consequence, Jansen (2003:121) submits that the patterns of teaching, learning, managing and assessing remain intact.

4.5 SUMMARY

Legislation, as discussed in Chapters 2 and 3 hereof, has painted an inspiring picture of the prospective successes of an innovative inclusive education system for all South African learners, which has given rise to high educational aspirations among all stakeholders in the education sphere.

Against this background, Chapter 4 placed a magnifying glass over the implementation of such a system in practice and over the day-to-day experiences of various groups of learners.

Although some positive features, progress and accomplishments were found and enlightened, the broader picture is clouded by still too much evidence that such a system has, after six years from its inception, failed to make a change for the better in many learners' lives. Widespread evidence was found to indicate that the system, now more that ever, excludes a vast majority of learners instead of including them, due to persistent socio-economic constraints, negative attitudes, everlasting language difficulties, deficient school environments, inaccessible support services, the mounting lack of parental recognition and involvement, as well as the absence of motivated, well-trained educators.

All the above factors placed emphasis on the complexity and immense challenges South Africa has to face in order to institute a successful inclusive education system. On the other hand, questions regarding the capacity of the government to implement its reform policies are an abiding concern of policy commentators today (Motala & Singh, 2001:6).

In view hereof, Chapter 5 endeavours to portray the fundamental rights of learners in the United States of America and the United Kingdom, and to gain some expertise from their inclusive educational systems, focusing on to these rights in an attempt to see South Africa's current state of education in perspective.

CHAPTER FIVE

FUNDAMENTAL RIGHTS OF AMERICAN AND BRITISH LEARNERS WITHIN AN INCLUSIVE EDUCATIONAL SYSTEM

5.1 INTRODUCTION

The previous chapters focused on the fundamental rights of learners within inclusive education in the South African context as guaranteed by legislation, while attention was also paid to the prospects which such guarantees convey. During deliberations in these chapters it became evident that there are discrepancies between legislative ideals, and their practical realization.

Since countries can learn from one another's successes and, indeed, from their mistakes (Dyson & Millward, 2000:8), this chapter aspires to cast light on the rights of learners in the United States of America (hereafter referred to as the USA), and the United Kingdom (hereafter referred to as the UK) within an inclusive educational framework in order to render some prospect which could present guiding principles for the successful achievement of inclusion in South Africa.

As a short introduction, the relevant legislative principles and concepts are discussed, after which the historical background to inclusion and the education system in each country are dealt with followed by an overview of the implementation of inclusion in practice.

5.2 LEGISLATIVE FRAMEWORK

State and federal constitutional and statutory provisions are the basic source of law in the USA (Cambron-McCabe, McCarthy & Thomas, 2004:1). As such, constitutions specify the structure of government and outline the powers and duties of its principal officers and subdivisions (Dunklee & Shoop, 2002:20). Because of the supremacy[62] of the Federal Constitution of the United States of America (1787; hereafter referred to as the USA Constitution), State constitutions and authority over education must be

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[62] The supremacy of the Federal Constitution was confirmed by the Supreme Court in the matter of *Cooper v Aaron 358 U.S. 1 19 (1985)* which declared that, albeit responsibility for education being primarily the concern of States, such responsibilities must be exercised within the parameters of the USA Constitution, as it applies to state action.

exercised consistently with its provisions (Levin, 1990:73). To ensure that the intent of the USA Constitution (1787) is respected, a separation of powers among executive, judicial, and legislative branches of government is established (Cambron-McCabe *et al.*, 2004:9).

In addition, Dunlee and Shoop (2002:20) avow that the USA government is based on democracy, and that the USA Bill of Rights (1787) denies those in power, any legal opportunity to coerce the consent provided by those who are governed. Consequently, law is not a static set of printed documents but, rather, a living and changing set of precepts that depend on the courts for interpretation.

The overlapping jurisdictions of USA and State constitutions and courts, Congress and State legislatures, and various governmental agencies (including local school boards and school-based councils), as enlightened by Cambron-McCabe *et al.* (2004:1), present a complex environment for educators attempting to comply with legal requirements.

Courts, under the USA system of government, are the final interpreters of legislative provisions (Dunklee & Shoop, 2002:21) and are more prepared to enforce fundamental rights, according to Levin (1990:1), than courts in other countries. These courts, as indicated by Cambron-McCabe *et al.* (2004:6), conversely, generally uphold decisions made by school boards of education, unless such boards have violated legislative or constitutional mandates.

Partington (1990:85) explains that Parliament Statute, with supreme authority, forms the basis of education law in the UK. Through statutory instruments, Parliament often delegates power to the Secretary of State for Education and Science to make binding regulations for education. It is the function of the UK Courts to regulate the execution of power by the Secretary of State, which usually involves the doctrine of *ultra vires* (acting beyond authority). Democratic rights within British society depend on decisions taken within courts which have to remain independent of outside pressure and interference from government (Robertson, 1986). UK Courts also interpret the law when called upon, and their interpretation becomes law until modified by statute.

5.2.1 Historical background

The Salamanca Statement (UNESCO, 1994) was formulated by 92 governments (coming from relatively poorer countries) and 25 international organizations and committed the international educational community to the development of inclusive schools. It illustrated the extent to which inclusion – described as a re-conceptualization of values and beliefs that welcomes and celebrates diversity, and not only a set of practices - had become an international goal (Swart & Pettipher, 2005:8).

Although it is possible to agree across international boundaries what inclusion means, Dyson and Millward (2000:4) caution that the reality in each education system will be determined by the history, culture and politics of each system. It is, therefore, dangerous to regard the adoption of inclusion in different countries as a straightforward alignment with a policy direction that is globally understood. Instead, it is essential to establish what the current perception of each country towards education is, and what the structure of the educational system in each country entails (Futjita, 2000:1).

The USA notion of inclusion grew out of a social policy history which is significantly different from that of the UK. The issue of race in the USA has generated a notion of civil rights which is not shared by the UK (Partington, 1990:87).

Although the UK has long maintained a substantial infrastructure of segregated special education, it also has a *liberal* tradition of expecting mainstream school to make some form of provision that was recognizably *special.* Against this background inclusion is not experienced as a shock by the UK education system, no new forms of provision is needed, rather just an extension of existing provision to accommodate learners with somewhat more pronounced difficulties (Dyson & Millward, 2000:4-5).

Dyson and Millward (2000:142-143) point out that what happens in schools cannot be divorced from the policy context within which they are located, since policy creates constraints within which schools must operate, therefore a view of the respective legislative measures in each county merits special attention.

5.2.2 Legislation that governs inclusive education in the USA

The USA system of government provides a structure of laws that protects individual rights, guarantees individual freedoms, while providing the right of each individual to call on the courts or government to correct injustices (Dunklee & Shoop, 2002:19).

5.2.2.1 USA Bill of Rights

Because the USA Constitution (1787) does not authorize Congress to provide a system for education (all social and economic rights are omitted), the legal control of public education resides with the respective States as one of their sovereign powers (Levin, 1990:4). As illuminated by Cambron-McCabe (2004:2), a State's authority is comparable to its power to tax and to provide for the general welfare of its citizens. In this regard, Thro (2004:99-100) explicates that, although education is not a fundamental right under the USA Constitution (1787), free public education is indeed a constitutional value.

The Bill of Rights, comprising the first 10 Amendments to the USA Constitution (1787) safeguards individual liberties against governmental violation (Cambron-McCabe, 2004:11). As part of the USA Bill of Rights, the 4th Amendment warrants the right of citizens to be secure in their persons, houses, and effects against unfair searches and seizures. This amendment has recurrently appeared in educational cases concerning drug-testing and searches of learners' lockers and person (Levin, 1990:3).

The 5th Amendment provides that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. Many cases in the Columbia District (involving topics such as desegregation and the rights of learners with disabilities) have relied on due process guarantees of the 5th Amendment, since the 14th Amendment does not apply in this jurisdiction.

The infliction of cruel and unusual punishment is proscribed by the 8th Amendment. This has often been invoked in legal disputes to corporal punishment (Levin, 1990:3). As a result, the majority of States ban corporal punishment in schools. To the

contrary, USA Courts[63] still view corporal punishment as a tolerable form of discipline when administered in a reasonable manner (Dunklee & Shoop, 2002:1).

Levin (1990:3) draws attention to the 14th Amendment (1787) as the most extensively involved constitutional provision in school litigation as it specifically addresses State action. This Amendment maintains that no State may deprive any person of life, liberty, or property, without due process of law, which ensures fundamental fairness while shielding the individual against arbitrary governmental action. The right to due process of law is the cornerstone of civil liberty as it ensures fairness to all citizens. In part, this Act provides that no State shall deny to any person, the equal protection of law. In the context of education, it forms the basis of equal educational opportunities (Levin, 1990:3). This clause has been momentous in school cases involving alleged discrimination based on race, gender, ethnic background, and disabilities (Cambron-McCabe *et al.*, 2004:13-14).

5.2.2.2 Equal Educational Opportunity Act, Act 60 of 1997

In addition the Equal Educational Opportunity Act (60/1997: section 1703) offers that no State shall deny equal educational opportunity to an individual in relation to his race, colour, sex, or national origin. While earlier USA laws relied on a concept of equality which implied equal access to different resources, new laws assume that equality refer to the full access to regular resources such as regular schools and broad educational programmes (Nelson *et al.*, 2000:417).

5.2.2.3 Americans With Disabilities Act, Public Law 101-336 of 1990

The Americans With Disabilities Act, (101-336/1990a: section 2) acknowledges that society has historically tended to isolate and segregate learners with disabilities which continue to be a serious social problem in the USA as such learners are faced with restrictions, limitations, and unequal treatment.

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[63] The constitutionality of corporal punishment was confirmed in the USA Supreme Court case of *Ingraham v Wright 430 U.S. 651 (1977)*. It was, conversely, noted that, since the use of corporal punishment deprives a learner of liberty interests protected by the Constitution, rudimentary due process must precede its use.

As a result this Act, for example, legally outlaws discrimination against learners with disabilities. It requires educational institutions (public and private schools) to ensure equal access to all facilities, and full participation of programmes and activities by learners and employees, without regard to disability (Dunklee & Shoop, 2002:36). Cohen (1996:2) enlightens that this Act provides the basis of an argument by many that learners with disabilities have a civil right to attend school in the general education setting which would provide them with equal educational opportunities in order to be able to live independently and economically self sufficiently.

This Act provides that auxiliary aids and services must be offered to learners with vision or hearing impairments or other disabilities in order to ensure that such learners have equal opportunities to participate or benefit from education. In addition, this Act states that physical barriers in existing facilities must be removed if removal is readily achievable. If not, alternative methods of providing services must be offered.

5.2.2.4 Individuals With Disabilities Act, Public Law 105-117 of 1990

In addition, the Individuals With Disabilities Education Act (105-117/1990b; hereafter referred to as the IDE Act) guarantees learners with disabilities free and appropriate public education in the Least Restrictive Environment consisting of special education and related services designed to meet their individual needs through Individual Education Plans (hereafter referred to as IEPs). Moreover, the IDE Act increases parental participation as it requires schools to report learner performance to parents (Dunklee & Shoop, 2002:36).

To qualify for protection under the IDE Act (105-117/1990b), learners must meet three requirements: they must be between the ages of 3 and 21, must have a specifically identified disability, and must be in need of special education. The main aim of this Act is to improve the educational results of learners with disabilities, by identifying the barriers that prevent such learners from receiving the maximum benefit from education (Wood, 2002:23). The IDE Act (105-117/1990b), in addition, sets high standards for school to meet. Schools are expected to provide supplementary aids and services for learners with disabilities when needed, while separation may only occur when a learner cannot learn in regular classes even with supplementary aids and services (Nelson *et al.*, 2000:418).

Moreover, programmes for learners with special educational needs should not be separated from those available to other learners unless such segregation is necessary for the program to be effective, and then, too, separate programmes must be compatible (Russo & Perkins, 2004:34). Special education is defined by the IDE Act (105-117/1990b) as *specially designed instruction to meet the unique needs of learners with disabilities, including instruction conducted in the classroom and in other settings, as well as instruction in physical education* (Shirk *et al.*, 2005:1). Special education is thus reinstated as a service rather than a place were learners are sent too.

The IDE Act (105-117/1990b: Preface) stresses the need to prevent the mislabeling and dropping out of school, and thus unemployment of minority learners as well as the need to provide incentives for *whole school approaches*. Interim Alternative Educational Settings, in which learners will have access to the general curriculum, special educational services, and behavioural support services, are also established for the temporary placement of learners with behavioural problems (Wood, 2002:24).

5.2.2.5 No Child Left Behind Act, Public Law 107-110 of 2001

Another important Act to take notice of is the No Child Left Behind Act (107-110/2001) which promises to close the educational achievement gap between disadvantaged or minority learners and their peers by aiming at fostering educational environments in which all learners can learn and succeed. This Act contains four basic principles, namely stronger accountability for results, intellectual flexibility and local control, expanded school choice options for parents, and an emphasis on scientifically supported teaching methods. Mc Whirter *et al.* (2004:62) indicate that there are certain concerns about the implications of this Act as funding is likely to flow away from schools in desperate need thereof, as accountability is questioned, as it is unlikely to raise the academic scores of learners, and as schools are less likely to receive support or services so desperately needed.

The No Child Left Behind Act (107-110/2001) provides financial aides to meet the special needs of various groups of learners, by in return sets standards for learner achievement and holding learners and educators responsible for educational results. Financial provision for education is also made for state-funded charter schools that operate outside many regulations on the basis of a charter granted by the State or

local board of education or (Cambron-McCabe *et al.*, 2004:3). Moreover, most states, which recognizes the basic inequalities in the capacity of different school districts to raise revenues and the difficulty that some school districts have in raising sufficient funds for even the minimum programmes, have provided funds to school districts to supplement the locally raised revenues (Levin, 1990:13).

5.2.3 Legislation that governs inclusive education in the UK

In contrary to South Africa and the USA, the UK has no written constitution. As such, reference is made to an *un-codified* constitution that can be found in a variety of statutory documents (Robertson, 1986).

5.2.3.1 Education Act, Public Act 31 of 1944

The central concept of the Education Act of 1944 (31/1944) is the establishment of a partnership between parents, local and national government. This Act makes provision for the establishment of Local Education Authorities (hereafter referred to as LEAs), as elected regional bodies, which membership is based on the major political parties. The main statutory function of LEAs is to provide *efficient* schools which must be *sufficient in number and character for their respective areas* (Partington, 1990:87).

5.2.3.2 Education Act, Act 60 of 1981

The Education Act of 1981 (60/1981) made provision of a *liberal* special education system which made it possible for additional resources and specialist services to be provided for meeting learner's special educational needs without recourse to special school placement.

This Act (60/1981) introduced the term *special educational needs* generally defined as a *learning difficulty* which may be behavioural, mental or emotional. A learner has a learning difficulty if:

- he has a significantly greater difficulty in learning in comparison to the majority of other learners of his age, or
- he has a disability which either prevents or hinders him from making use of educational facilities of a kind provided at schools.

According to section 1(4) of the same Act, the fact that a learner's mother tongue may not be English is not to be regarded as creating a special educational need. This Act places a statutory duty on LEAs to make provision in regular schools for learners with special educational needs (Partington, 1990:101). It (60/1981: section 5(1)) specifies steps to be taken in identifying special educational needs and make appropriate placements against which parents cannot appeal. As a result of this Act, training in special education needs has become a key component of educators' courses both pre- and in-service.

Although this Act made way for the integration of learners with special educational needs to be easily integrated in mainstream schools, it was not followed by a dramatically shift towards a more fully integrated system, seeing that most LEAs chose to retain substantial infrastructures of segregation provision (Partington, 1990:86).

5.2.3.3 Education Act, Act 40 of 1986 and the Education Reform Act, Act 40 of 1988

Corporal punishment was abolished by the Education Act of 1986 (40/1986) while the Education Reform Act of 1988 (40/1988) have transformed numerous powers from LEAs to parents and SGBs. The latter Act also provided for parental choice to specify a preferred school in which they want their children to be educated.

The Education Reform Act (40/1988: section 1) introduced Parliamentary legislation for the first time in the field of establishing a National Curriculum for UK schools. This Act provides for national bodies to provide guidelines for the teaching of subjects in the curriculum and offers LEAs the function of monitoring it at local level (Partington, 1990:93). This Act has a strong decentralizing tendency, particularly with regard to shifting decision-making about schools from LEAs to schools themselves. The motivation on the part of government, as pointed out by Partington (1990:93), appears to be twofold. Firstly, there is concern that, under financial pressure, some LEAs are cutting curricular provisions to below accepted levels, and secondly, that some LEAs of a left-wing political persuasion was introducing subjects such as Peace Studies, which were not to the government's taste.

Although the Education Reform Act of 1988 (40/1988) aspired to further reduce segregation and categorization of learners with special educational needs in the UK,

Bowe *et al.* (1992:122-123) inform that there remained a wide variation in practice and levels of provision since LEAs, and even more, individual schools, continued to give their own interpretation to the provision of learners with special educational needs. Not only through their own ideological positions about social justice and their definitions of appropriate provision for special needs, but also in terms of their particular institutional priorities.

5.2.3.4 Green Paper on Special Needs Education (Excellence for All Children: Meeting Special Educational Needs) 1997

The Green Paper on Special Needs Education (UK, 1997:44) calls for the inclusion of learners with special educational needs in mainstream schools. This was the first time that any UK government had committed itself to creating an avowedly inclusive education system and marked, as enlightened by Dyson and Millward (2000:1), the extent to which inclusion had become the dominant issue in special needs education in this country.

This Paper (UK, 1997) places emphasis on inclusion as a process rather than about different placements.

5.3 FACTORS THAT AFFECT THE FUNDAMENTAL RIGHTS OF AMERICAN AND BRITISH LEARNERS IN INCLUSIVE EDUCATION

According to Potts (2002:2) the current legislative framework of the UK promotes exclusive values above inclusive values. If inclusion is thus to be implemented successfully, legislative reform is urgently needed.

5.3.1 The education system

Since the 1980s a new tide of privatization and *marketization* in education has emerged in many countries, making *choice* one of the major issues of educational policy and raising questions about the *one best system* of public education (Fujita, 2000:1).

In general, inclusion – as the one best system - is understood as a continuing dynamic process of structural change from a traditional out-of-class approach to a radical in-class form of provision (Dyson & Millward, 2000:135). Since the traditional models of teaching impose, according to Simpson (2004:72), restriction on changes,

reform of education systems is needed. Resulting from the latter, global reform movements have attempted to create decentralized and diversified educational systems. Fujita (2000:1) shows that *excellence* and *choice* have been two major diverse themes in the USA while the UK focused on *excellence* and *control.*

The education systems of the two countries differ from each other in ways which are directly relevant to the meaning of inclusion. Dyson and Millward (2000:3-4) enlighten that the proportion of learners identified as in need of special education, the formal assessment procedure, the reliance on categorical forms of provision, the grade system, the regular education testing and assessment systems, the relationship between the individual school on the one end and local, state and federal government on the other in the USA, are all different in significant ways from their equivalents in the UK.

All State constitutions in the USA address the legislative responsibility for establishing public schools. Usually the legislature is charged with providing for a uniform, thorough and efficient, or adequate system of public education. The State legislature has plenary, or absolute, power to make laws governing education. Presently all 50 states require that learners between specific ages (usually 6-16) attend a public or private school or receive equivalent instruction (Cambron-McCabe *et al*, 2004:2). Provision is also made for state-funded charter schools that operate outside many regulations on the basis of a charter granted by the state or local board of education or other entities. Although less that 1% of learners are currently enrolled in such schools, the number continues to increase as states approve new legislation and expand the provision of existing laws (Simpson, 2004:75).

Within legislative parameters, the state board of education can issue directives governing school operations, while the administration of schools are locally done by school boards who are also responsible for taking operational decisions about schools. Cambron-McCabe *et al.* (2004:9) also puts forward that, although it might appear that educators retain little decision-making authority, administrators as well as classroom educators can enact rules and regulations, consistent with policies and laws from higher authorities, to ensure the efficient operation of the school or class under their supervision.

In the UK, the LEAs have often been condemned for the perceived failure and unresponsiveness nature of their public education, which led to the breaking down of the harmonious partnership among central government, the LEAs and schools. Partington (1990:84) elucidates that the role and power of the LEAs has been reduced through various reform measures such as the *opting out* policy to introduce grant-maintained schools. On the other hand, the role of central government has been expanded through measures such as the introduction of National Curriculum and its associated system of testing. Other measures of open enrollment, per capita funding, and the local management of school policy have promoted market competition among schools as well as the expansion of the power of the SGBs.

In general, the mainstream education system in the UK is regarded by Thomas *et al.* (2000:42) as not yet ready or even prepared to adjust its practice efficiently to meet the need of those learners who experience complex and challenging difficulties. The same authors explicate that, albeit the fact that all learners may be physically present in classrooms, they will only be truly included if they are able to participate and take actively part in all activities.

5.3.2 Compulsory schooling

In both countries, under discussion, compulsory education is legally provided for, which in the USA confers on learners a legitimate property right to attend school (Cambron-McCabe *et al.*, 2004:13).

All 50 States in the USA compel learners between specified ages, usually 6 to 16, to be educated (Levin, 1990:4&15), while the Education Act (31/1944: sections 7 & 8) lays down that the statutory period of full-time education in the UK is from age 5 to 16.

Cambron-McCabe *et al.* (2004:67) point out that the legal basis for education in the USA is grounded in the common law doctrine of *parens patriae*, which means that the State, in its guardian role, has the authority to enact reasonable laws for the welfare of its citizens. Resulting from the latter, parents do not have the choice whether their children are educated, although they do have some control over where such education takes place.

In the UK compulsory education stems from the fact that a parent of a child between the ages of 5 and 16 has a legal duty to ensure that his child receive efficient full-time education suitable to his age, ability and aptitude and to any special educational needs he may have either by regular attendance at school or otherwise (31/1944: section 36).

The reasons for compulsory schooling in the USA are, among others, preparing learners for citizenship and economic independence, inculcating certain societal values, and preserving the security of the State. In order to secure the democratic system of government, Levin (1990:22) enlightens that it is essential to educate each new generation in those values and attitudes deemed essential to the operation of a democracy.

Since education is compulsory, both the USA and the UK presents measures to be taken against parents if their children are not provided with education. The Education Act (31/ 1944: section 36) does not make schooling *per se* obligatory. Parents may make other arrangements for carrying out their statutory duty to ensure that their children are educated efficiently and full-time through, for example home schooling (Partington, 1990:88).

Sanctions against parents, who neglect their duty to educate their children[64], include fines and imprisonment for up to one month on conviction (31/1944: section 40). As a last resort the learner may also be removed from the family into the care of a LEA as being in need of *care and protection*. Parents in the USA can similarly face criminal prosecution or civil suits for failing to meet their legal obligations under compulsory school attendance laws. Furthermore, their children can be expelled for excessive truancy or judicially ordered to return to school (Collins, 2003:203).

In line with international instruments (*cf.* 2.3), each State Constitution in the USA places a duty on its legislature to provide for free public schooling, thus creating a state entitlement (property right) for all learners to be educated at public expense (Cambron-McCabe *et al.*, 2004:24). Alike the USA, LEAs in the UK may not impose tuition fees in schools since the Education Act (31/1944) makes provision for free

education. In addition, LEAs must either provide free transport to school or the means to it (Partington, 1990:87).

Government-funded schools impose no admission criteria on learners. Non-governmental schools, in contrast, which enroll less that ten percent of the school population, range from academically highly selective schools to others much less so. This sector of schools also contains many schools set up for a specific purpose, be it for dyslexic or autistic learners or for those with a special aptitude for music, ballet, drama or sport. Such schools are also selective by virtue of educational need or special aptitude (Partington, 1990:89).

5.3.3 Equality of educational opportunities

For rights to be regarded as fundamental and have higher protection (strict scrutiny), it must be either explicitly or implicitly guaranteed by the constitution of a country (Levin, 1990:61; Cambron-McCabe *et al.*, 2004:144).

In addition, the legal tradition in the USA is based on the requirement that a person be vested with legal capacities in order to be able to exercise his fundamental rights. Consequently, although a learner of minority age may be vested with the same fundamental rights as a person of majority age, the minor in the USA may not be bequeathed with the full capacity to exercise these rights (De Waal, 2000:52). As a result, parents have to act on behalf of their minor children (Cambron-McCabe *et al.*, 2004:xiv).

Running throughout the history of the USA, there has always been concern over any abusive governmental power. Coupled with this, the USA Constitution guarantees individual liberties and rights within its Bill of Right to regulate interactions among all State and local institutions of government and its people (Wood, 2002:29).

Moreover, the adoption of the 14th Amendment (US Constitution) led to the extension of most of the rights embedded in the US Bill of Rights to individuals against State governments and subdivision, which includes state and local school boards (Levin,

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64 In the matter of *Crump v Gilmore Crump v Gilmore 68 U.S. (1969) 68 Local Government Reports 66* the Court stressed the fact that the duty of parents is absolute and that LEAs need not show that the parents knew of a learner's absence from school or show any neglect on the part of the parents.

1990:1). In order to protect the rights of learners in the USA, section 1983 of the Civil Rights Act (102-166/1966; as amended in 1991) made it possible for individuals to file suit in federal courts against schools and school officials to seek damages when their fundamental rights have been violated (Dunklee & Shoop, 2002:132).

5.3.3.1 The right to equality

In the USA, *equality has been a* basic tenet of almost all educational reforms since the late 1950s, since the American society is a *discrimination-conscious society* and an *equality-conscious society* as well as a multi-racial, multi-ethnic country where discrimination and differences have been highly problematic (Fujita, 2000:4).

Nelson *et al.* (2000:418-419) *affirm that equality and fairness* are in line with the principles of democracy which requires that all citizens have the opportunity to be fully educated. As such, education cannot be reserved to a favoured few or to a favoured minority.

Following the above, equal educational opportunities are guaranteed through various federal and state laws (Cambron-McCabe *et al.*, 2004:145). Nelson *et al.* (2000:99), assert that equalizing educational opportunities across school districts is the responsibility of each State. Levin (1990:43) upholds that it is not easy to determine what the nature of the entitlements to equal educational opportunities, as embedded in the Federal Constitution, is. Demands upon public schools can be affirmative, asserting and an entitlement to a minimum educational opportunity, to equal access, or to a specified educational outcome. Or they may be framed negatively asserting as a right to be free of discrimination on the basis of race, gender, or disability in the operation of public schools (Levin, 1990:43).

In order to give effect to the fundamental rights of learners to equality, the concept *inclusion* is used as it stresses equal opportunities, fairness, and shared responsibilities. It involves all learners on an equal basis, with no exceptions and irrespective of their intellectual, physical, or other differences (Nelson *et al.*, 2000:434). Inclusion, however, means that all learners must receive instruction unique to their needs (Wood, 2002:165).

To the contrary, some regard inclusion as merely the *latest egalitarian fad* in the USA (Alston, 2006). Nelson *et al.* (2000:434), for instance, reveal that free and equal

education, equal support, or equal results for the wide variety of learners who attend regular public schools, are not a reality in the USA and that it is unrealistic to believe that learners, shifted to meet inclusive goals, will actually obtain equal access, support and results. Cohen (1996:2), moreover, informs that full inclusion is denying the right of certain learners to attend special schools since treating all learners as though they are the same is not democracy but is injustice.

In response to the above, Nelson *et al.* (2000:434) caution that equality does not require exact equality of condition as differentiating between learners are permissible as long as it is necessary to protect and nurture them. Fairness may mean providing different educational opportunities for learners if the reason therefore is sensible and consistent. Keeping disruptive learners in regular classes, for instance, does not make sense.

Accordingly Levin (1990:44) informs that a democratic society permits and encourages many practices of inequality. Sometimes these practices are designed to compensate for previous inequalities, such as racism (affirmative actions) through which programmes are developed especially for those who were previously denied equal treatment.

It might appear from a literal translation of *equality* that once a State establishes an inclusive educational system, all learners must be treated in the *same manner.* Courts, however, have recognized that learners are different and that *equal treatment or support* of *un-equals* can have negative consequences. Accordingly, valid classification practices, designed to enhance the educational experiences of learners by recognizing their unique needs, generally have been accepted as a legitimate prerogative of educators, Indeed all schools classify learners in some fashion, and State laws often specifically authorize or even require school boards to group learners by academic levels, gender, age, and other distinguishing traits (Cambron-McCabe *et al.*, 2004:143).

In the USA courts were often asked to decide whether differentiation between learners resulted to discrimination or were permissible. The Court decided in the case of *Swann*[65] that the school board had to show a legitimate reason for the

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[65] *Swann v Charlotte-Mecklenburg County School District 402 U.S. 1 (1971)*

segregating learners. Moreover, in the matter of *Brown*[66] the Supreme Court viewed racially segregated educational facilities as being inherently unequal, and that separate schooling was unconstitutional as it violates the Equal Protection Clause (US Constitution: 14th Amendment). The Supreme Court recognized education as perhaps the most important function of State and local governments and affirmed that all learners have a fundamental right to equal educational opportunities. The verdict in this case, as pointed out by Hay (2003:135), implies that the placement of learners in separate settings could *generate a feeling of inferiority* to learners' status in the community that may *affect the motivation of the learner to learn and has the tendency to retard educational and mental development.*

Cambron-McCabe *et al.* (2004:146) informs that when practices of differentiation were challenged by courts in the USA, it was generally mandated only that learners be provided access to public education, equal access to integrated schools or to equal school facilities, the provision of equal curricular opportunities, instruction by equal trained professionals, or instruction of equal duration was not required.

The unpleasant reality is, as emphasized by McWhirter *et al.* (2004:61), that the USA still runs separate and unequal schools. The conditions of schools for poor, African American learners are, for instance, not designed for high levels of literacy. Poverty, violence, drugs, unequal school funding, uncertified educators, and institutionalized racism in schools that serve these learners, are still being accepted.

The abovementioned unequal conditions appear to be the major reason why learner performances in the USA falls short when compared with other countries' learners. To substantiate the latter, McWhirter *et al.* (2004:61) refer to statistics from the Children's Defense Fund which indicate that one out of every two USA learners will never complete a single year at college, that one out of eight will never graduate from high school, and that one out of three learners is found to be behind a year or more in school.

While *de iure* inequality of learners is ruled out by legislative measures in the USA, Joubert (2006) elucidates that it is still unclear of how *de facto* segregation will be solved in future.

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[66] *Brown v. Board of Education of Topeka and others. 347 U.S. 483 (1954) & 349 U.S. 294 (1955)*

Contrary to education system in the USA, the educational system of the UK has all along, under *liberal principles*, been informed by notions of equity, the value of the individual and the right of all individuals to participate in shared communities, curricula and learning experiences (Dyson & Millward, 2000:5). In the UK, unlike the USA, equality has thus not been a critical issue in the current inclusive reform movement (Fujita, 2000:4).

The Warnick Report of 1978 enlightened that the purpose of education for all learners are the same (Dyson & Millward, 2000:6). Although learners were separated from classmates for limited amounts of time in the past, educational provision was, nevertheless, subjected to criticism on the grounds of segregation, stigmatilization and, ultimately, limiting the educational- and life-opportunities to which learners with special education needs had access. Subsequently, remedial work across the curriculum was done which developed into a *whole school approach* (Dyson & Millward, 2000:6).

With time it became apparent that inclusion within a largely unchanged mainstream cannot secure an appropriate education or guarantee equality of value for all learners (Potts, 2002:2). Moreover, it became clear that social justice does not come simply through removing inequality (Thomas *et al.*, 2000:10). A more fundamental transformation is required including an active commitment to reducing segregation. It also entails, according to Potts (2002:2), resisting exclusionary pressures, which remain strong. In addition Clifton (2004:89) advises that solutions which work towards removing inequalities need to be addressed, not only on the macro-level through legislation, policy and guidance, but also on the micro-level, as individuals, both educators and learners, can make significant differences to young people's lives. It is necessary to thus also be concerned about the reality of what actually happens in classes and how the interactions and values of learners impact upon their day-to-day activities and relationships (Clifton, 2004:89).

Inclusion in the UK is an essential step towards ending discrimination in education according to Rustemier (2002:3). Although the concept that some learners are disabled more by their environment and experience of society's attitude towards them, than by their actual medical condition was a crucial concept to get across the UK, Sorsby (2004:55) experienced that people are beginning to alter their attitudes

towards disability, and towards inclusive education as a new way of teaching all learners equally.

As a result, the term *equality of educational opportunity* is central to the Education Reform Act passed in 1988 (40/1988) and is central to the various documents emerging from it. It is also reflected in the National Curriculum Council's initial promise (40/1988:4) to take account of ethnic and cultural diversity and ensuring that the curriculum provides equal opportunities for all learners, regardless of ethnic origin or gender. (Gregory, 2003:275).

In order to adhere to legislation and give effect to the fundamental right of every learner to equality, an inclusive educational system was accepted since inclusion is based on the principles of equality, human rights, and social justice. Equal opportunities are at the heart of inclusion (McConkey, 2003:19; Phillips & Jenner, 2003:62) Within this framework a commitment is made to the development of regular schools as *the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all* (Sheehy & Simmons, 2003:1-2).

Within the parameters of inclusion, schools need to develop a sense of equity in promoting every learner's rights and responsibilities in all aspects of school life (Visser, Cole & Daniels, 2003:45), while educationalists must be committed to equality, to widening participation and to encourage the development of an inclusive ethos and curriculum within schools. Educators should see each learner as having an equal right to education (Clifton, 2004:75&90).

Similarly to the USA, equal opportunities in the UK are not regarded as being about treating everyone the same but rather about meeting individual needs and celebrating individual strengths. Underscoring the latter, Phillps and Jenner (2003:62) enlighten that equality does not mean uniformity. Clifton (2004:90), likewise, notifies that an educationally inclusive school is one in which teaching and learning, achievements, attitudes and well-being of every learner matter and in which account is taken of learners' varied life experiences, backgrounds, and needs.

On the contrary, obsessive insistence on sameness is a densely formulated concept which suggests several factors at once, such as repetitiveness, rigidity, single-mindedness, pedantry, and inability to judge the significance of subtle differences

(Alderson & Goodey, 2003:73). The same authors demonstrate that the overlooking of individual differences among learners and treating all exactly the same make seem to imply equality it certainly is not in the best interest of learners.

5.3.4 The right to education

The right to education is provided for in a variety of international instruments (*cf.* 2.3) in which education is considered to be a human right in itself as it is a indispensable means of realizing other human rights. The ideal of education of humanity for justice, and liberty, is thus of perennial importance (Singh, 2004:138).

Governments, international organizations, and agencies at the World Education Forum (UNESCO, 2000) reaffirmed education as a fundamental right while underlining the role of education in empowering individuals and transforming societies. Among the most clearly defined of these rights, which governments have duty to make a reality, is the right to free, compulsory and universal primary education for all (Singh, 2004:143-144).

Under the Constitutions of the USA and the UK, learners have no substantive right to education and are dependent on the goodwill and efficiency of their parents and educators (Parrington, 1990:106; Throw, 2004:99-100). Consequently, learners also have no right to be consulted over their own education.

Although it is well settled that learners in the USA do not have a fundamental right to receive an education, Russo (2001:732) avows that free public education is, nonetheless, a constitutional value as it specifically provided for by State constitution. In the matter of *Rodriquez*[67] the Court confirmed that education is not among the rights afforded explicit protection under the US Constitution. In 1971, a Pennsylvania court in the case of *Pennsylvania Association for Retarded Citizens*[68], however, ruled that all learners, regardless of disability, have a basic right to an education under the 14th Amendment. The Court further stated that no law could postpone, terminate, or deny learners access to a publicly supported education and described a basic order of preference for placement starting with the regular public school class, if possible.

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[67] *San Antionio Independent School District v Rodriquez 411 U.S. 1 (1973)*

[68] *Pennsylvania Association for Retarded Citizens v Commonwealth,334 F.Supp. 1257 (E.D.Pa. 197). 343 F.Supp. 279 (E.D.Pa. 1972)*

Similarly, the Court declared in the matter of *Mills*[69] that learners with physical or mental disabilities have a right to a suitable and free education.

Albeit the right to education not being a fundamental right in the USA, Congress has taken a leadership role in safeguarding the educational rights of minorities, women, and learners with disabilities (Dunklee & Shoop, 2002:139), and, on a sporadic basis, the rights of gifted learners (Russo, 2001:733).

Seeing that all learners, in principle, have a equal right to education in the UK, Clifton (2004:78) show that school districts have a positive duty to make education as equally accessible for all learners as possible. Accordingly, the lack of recognition in the UK Education Law of all learners' human rights to inclusive education is regarded by Shaw (2002:1) as a major issue of concern. By continuing to enforce segregation in separate special schools for some learners, Shaw (2002:1) argues that UK legislation contravenes the principles set by the CRC (UN, 1989; *cf.* 2.3.3) to which the UK is a party.

Underscoring the latter, the Centre for Studies on Inclusive Education (CSIE) in the UK focuses on the development of inclusive education as a human right. This Centre argues that inclusion within regular schools is a right for all learners and that neither parents nor professionals should have the right to choose for learners (Potts, 2002:1). In accordance, Vaughan (2002a:5) postulates that central and local governments will come to see inclusion as a learners' right issue and keep it high on political and economy agendas. Moreover, Clifton (2004:77) enlightens that inclusion must not only support learners' basic human rights to education but also ensure that each learner feels that education is accessible, relevant, and value them as individuals with diverse needs.

According to Gwynn (2004:119) communities are divided, with one group enjoying a feeling of *oneness* and others separated through a sense of *otherness*. Divisions are created by superstitions and damaging beliefs about learners' needs, abilities and entitlement. Seeing that the segregation of learners into separate schools breaches the underlying principles of the fundamental rights of learners, inclusive education is globally regarded as a solution.

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[69] Mills v Board of Education of the District of Columbia 348 F.Supp. 866 (DDC 1972)

5.3.4.1 Right to quality education

Within The USA context reference is made of *appropriate, meaningful,* and *basic* education to which all learners are entitled to, while the UK strive towards *efficient* education for their learners. Appropriate, meaningful education is defined as education that *commensurate with learners' needs* (Levin, 1990:56) and *efficient* education as educating learners those things necessary for minimal effective functioning in a democracy (Nelson *et al.*, 2000:103).

According to McWhirter *et al.* (2004:72) the outcome of any quality educational programme is the ability of the graduate to move to the next level of opportunity, be it further training or employment. To achieve this, Nelson *et al.* (2000:214) postulate that the purpose of schools is to teach fundamental knowledge and skills, including a body of important information and values. Fundamental skills such as mature reading, writing, and computation must form part of a basic education as they are necessary to survive and be productive in a contemporoy society (Nelson *et al.*, 2000:214).

The No Child Left Behind Act (107-110/2001) aims at improving the performance of schools, while pledging that no child will be left in failing schools. This Act requires higher performance standards in Reading and Mathematics along with annual testing of all learners in Grades 3 through to Grade 8. Furthermore, assessment data must be categorized by poverty, ethnicity, race, disability, and limited English proficiency to ensure that no group of learners are left behind (Cambron-McCabe *et al.*, 2004:15).

Albeit education being an implicit right of all Americans, since it is essential to the progress of the nation, only for a minimally learners adequate education is assured. No agreement exists on what a learner should learn while it is acknowledged that the higher the expectation is, the more it will cost taxpayers to bring every learner to that level (Nelson *et al.*, 2000:200).

As a result, learning in USA schools is consistently found not to be on par if learners' scores are compared with scores obtained by learners in other countries (McWhirter *et al.*, 2004:58). Similarly, Nelson *et al.* (2000:213) reports that declining test scores and the painfully obvious evidence of basically illiterate citizens demonstrate the serious deficiencies in USA schooling despite the enormous expenditures.

School choice has been offered in the USA as a solution to poor-quality schools, based on the belief that choice inspires competition and therefore higher quality (McWhirter *et al.*, 2004:72). The importance of high quality is emphasized by Nelson *et al.* (2000:275) by stating that a nation's international economic competitiveness depend on how well educated its people are. Therefore, no country can afford to be slack on the quality of education. It is important that all citizens can maintain decent standards of living.

To achieve the above, LEAs in the UK are obliged to provide *efficient* schools although no definition is provided for the concept *efficient* in legislation (Partington, 1990:87). To establish whether quality education is provided, Simpson (2004:74) explains that quality assurance is all about assessing the quality of learners' experiences and how schools respond to their individual needs. In assessing the quality of education, Ensing (1996:11) cautions that too low assessing standards may lead to minimal quality provision which would reduce learners' rights. In this regard, Rustemier (2002:1) enlightens that inclusive education – to which all learners are entitled to (Dyson & Millward, 2000:178) - implies more enriching and rewarding educational experiences for all learners and thus high-quality education.

Within an inclusive framework, educational disadvantages are to be attacked vigorously. Since *success for a few* is no longer an option, low attainment and education failure can no longer be tolerated. In practical terms, this entails that learners in the UK whose attainments are low, for whatever reason, can expect to be subjects of vigorous intervention, to be moved from their cozy spots in special schools into a standards-orientated mainstream, and be pushed towards individual targets and towards helping the school to meet its own institutional targets (Dyson & Millward, 2000:179).

Despite the aforesaid and significant advances, Rustemier (2002:2) conversely, acknowledges that there are still large numbers of learners with disabilities in the UK who continue to be subjected to exclusion from quality education.

5.3.5 Inclusion as an educational movement

Inclusion is a term which seems to have its origins in the USA in the late 1980's which grew in strength during the early 1990's. A substantive volume of literature has been generated in the USA and has impacted on the UK context. (Dyson & Millward,

2000:3). In general terms, inclusion was born out of the idea that it is wrong to exclude certain learners on grounds that are beyond their control, such as, *inter alia,* disability and poverty from regular schools, and to subject them to inferior standards which inevitably leads to inferior social and educational outcome (Vaughan, 2002a:2).

Inclusion specifically shifts the focus onto the school rather than on the learner when thinking about excluded learners thus implying a more radical set of changes for schools to be inherently capable to embrace all learners (Thomas *et al.*, 2000:10&12; Wood, 2000:120). Within the inclusive practice, specific attention is placed on the cooperation between schools, educators, parents, and learners through which the individual voices of each are not just heard but also listened to (Simpson, 2004:74-75). In this regard Clifton (2004:78-79) emphasis the importance of the voice of learners to be taken into account as too much is done for the learners without ever listening to what learners themselves think or feel (Cook, Swain & French, 2003:104). The latter also correlates with section 12 of the CRC (UN, 1989) who asserts that learners have the right to express their opinion in all matters concerning them and thus having a say in their own future. If adults keep deciding for learners, they are often underestimated and put into situations which are inappropriate and in which they are open to indignity and injustice (Thomas *et al.*, 2000:64).

In the aforesaid aspects inclusion differs from integration (*cf.* 3.2.2) which implies only finding ways of supporting all learners in essentially unchanged mainstream schools (Dyson & Millward, 2000:8). It also differs radically from mainstreaming in which learners needs are not met, since they are merely dumped into existing regular classes without adequate support, and without change (Nelson *et al.*, 2000:422-428).

The key aspect of inclusion is to accommodate all learners, including those who are at a disadvantage for any reason which necessitates a redefining and modernizing of the term *special needs* (Clough & Nutbrown, 2003:87). Dyson and Millward (2000:9&11) prefer the concept *individual differences* over the concept of *special needs,* as it casts light not on *which* learners to include but rather on *how* to include all.

In the USA inclusion is regarded as a civil right issue against discrimination bringing about social justice by providing all equal educational opportunities through full

participation and the enjoyment of resources and activities to build fulfilling lives in society (Nelson *et al.*, 2000:420&427). But inclusion is also about recognizing equal responsibilities and expectations by all parties involved (Thomas *et al.*, 2000:7).

The concept of inclusion was brought to the UK through Green Paper (UK, 1997) to be handled through a whole school response to the diverse characteristics of learners. Inclusion stems from a concern about human rights (Thomas *et al.*, 2000:7) and correspondingly a desire to end discrimination (Rustemier, 2002:3) which drives policy.

The entitlements to self-advocacy by learners over the age of fourteen in the UK are brought into focus by the legislative framework of the USA's Education for All Handicapped Children Act (94-142/1975). This Act provides such learners the right to be part of pre-evaluation meeting, the drawing-up of an IEP, and the right to all records and reports regarding their progress. The Education for All Handicapped Children Act (94-142/1975) was referred to by the US Supreme Court in *Smith v Robinson*[70] as providing the exclusive remedy for learners with disabilities to assert their right to equal access to free and appropriate public education.

In addition, the Education Circular: Better Choices – The Principles of 1994 (Department of Education, 1994) imposes obligations on schools to ensure the integration of learners with special educational needs and to involve parents as partners in the educational process As a result, schools should contribute to towards an atmosphere supporting real dialogue in inclusive classrooms, building self-esteem of all learners, providing models of interaction, celebrating cooperation, encouraging peer support and sensitivity, and establishing ground-rules for expectations of good behaviour (Thomas *et al.*, 2000:65&70).

In both countries inclusion is regarded as having a broader aim than just inclusive schools, it is about bring along an inclusive society (Dyson & Millward, 2000:16; Nelson *et al.*, 2000:422; Thomas *et al.*, 2000:7).

For some, inclusion is only an ideal, an unrealizable state, an empty rhetoric without guidelines, just another politically correct view, an extension of the American myth

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[70] *Smith v Robinson 468 U.S. 992 (1984)*

that everyone was created equally. It does not mesh with the day-to-day realities (Clough & Nutbrown, 2003:88; Thomas *et al.*, 2000:ix). Nelson *et al.* (2000:429) show that critics of inclusion believe that it will deny learners the right to be different, it will lead to a decline in existing high-quality of special care and attention they receive in special schools, and that learners will not benefit from being included in regular schools since general educators and schools will never be capable of meeting the diverse needs of all learners. In short, inclusion is not in the best interest of all learners.

Some are apprehensive about inclusion as they feel that the existing systems seems to work well while the proposed change means a trip into the unknown. It is evident, therefore, that the mooted venture into inclusion would be contentious and that there may be uncertainties along the way (Thomas *et al.*, 2000:ix)

Then again, inclusion is, as shown by Phillips and Jenner (2002:63), an ongoing process of learning, of critical review and development, not a once off activity. Difficulties will be experienced and mistakes will be made along the way (Dyson & Millward, 2000:148).

Research has shown how diversity of experience and attitudes towards needs and the concept of inclusion changes with knowledge about true inclusion, how educators came to realize just how inclusive their practices have already become to be (Clough & Nutbrown, 2003:89). Research has also indicated that only 4% of learners with disability drop out of education while 25% of other learners drop out (Nelson *et al.*, 2000:433). Over the past 25 years Dyson and Millward (2000:183) report that the UK has indeed discovered means of enabling a grater diversity of learners to participate more freely in regular schools. Mainstream schools are already operating successfully in many ways that would have not been possible in the past due to new ways of techniques and support, differentiation and management or more inclusive forms of educational provision.

Conversely, the road towards inclusion has been painfully slow (Thomas *et al.*, 2000:1). There is still a long way to go, particularly since the word *inclusion* is often misused and abused by some (Vaughan, 2002a:2). Likewise, an awareness of conflict can not escape countries to look behind any resolution that is proposed in

order to understand who really benefit from inclusion an whether it does not further disadvantage learners who are already marginalized (Dyson & Millward, 2000:184)

It must, right from the outset, be kept in mind that inclusion is not merely about learners with special educational needs. It is about the development of a comprehensive community, about prioritizing community over individualism beyond education. Inclusion is about a history of struggles for an educational system that will serve the interests of communities and in the process do not exclude anyone (Clough & Nutbrown, 2003:87)

Inclusion can work, the factors needed for success depend upon learners' responses as well as those of educators and parents, and on the ability of adults so involved to listen, really listen to the learner's voices (Vaughan, 2002a:5).

In view of the fact that the mere presence of all learners in regular schools does not mean that all are sufficiently included (Simpson, 2004:63; Thomas *et al.* (2000:47), but rather that the individual needs of all should be attended to so that each can reach his full potential, adaptations to regular education is needed. These adaptations should be made according to the diverse needs of learners which necessitates firstly, the correct identification of such needs and secondly, understanding the diversity of learners, and thirdly providing high-quality, individualized instruction (Nelson *et al.*, 2000:422; Clough & Nutbrown, 2003:91)

5.3.5.1 Identification of learners' needs

Most legal challenges against differentiation made among learners are not aimed at the differentiation *per se,* but against the devices whereby learners are classified, such as standardized aptitude or achievement tests. Challenges are more likely to be those made on due process grounds – the right to a fair decision-making procedure – before a learner's needs is identified. The concern is that tests and other practices misidentify or misclassify learners, or are racially discriminatory, or are unfair, or the result of the classification is that learners are denied an equal educational opportunity by being placed in a classroom where a watered-down curriculum is provided (Levin. 1990:44).

The main reason for identifying and evaluating learners with special or exceptional needs in the USA is to provide them with the special educational support they need

(Nelson *et al.*, 2000:361). During a process called *prereferral placement* in the USA, the disability of a learner is identified (if any) and a plan of action is established in general classrooms even if such a learner experience difficulty with class work or with behaviour and/or emotional issues. If it is found that the learner needs further attention, the process continues. The learner's specific concerns are noted, and he may be evaluated and identified as having a specific disability. It will be determined if the learner requires special services or accommodations. An Individualized Education Plan (re-evaluated every year; hereafter referred to as IEP) is then developed and a placement (re-evaluated every three years) in which to receive services is identified (Wood, 2002:32).

Thomas *et al.* (2000:15), however, caution that it is inconsistent to define special needs purely in terms of the constructs of learning difficulties or disabilities by which they had traditionally been defined. For learner's special needs may arise from a multiplicity of factors related to disability, family income, cultural origin, gender or ethnic origin, amongst which it is inappropriate to differentiate. There is no discrete class of learners who are disabled. The stressing of a minority status – in disability or in other areas – emphasizes the presumed weakness and vulnerability of the group in question rather than the inadequacies of the supposedly supportive system (Thomas, *et al.*, 2000:15).

The Audit Commission and Her Majesty's Inspectorate report on special need provision in 1992 found serious deficiencies in the way in which learners with special education needs were identified and provided for in the UK. It was established that Local Education Authorities (hereafter referred to as LEAs) took much too long to complete assessments and statements, thus devaluing the process, statements made were far too vague, a lack of clarity as to what constitutes special education needs existed, and resources were found not to follow learners to mainstream classes (Vaughan, 2002b:4).

Since many disabling conditions can be identified at birth or within the first twelve months of a child's life, health and social services in the UK have developed support services for families offering home-based support to parents and providing guidance on activities to promote a child's development from as early as possible (McConkey, 2003:14).

The UK government's Special Education Needs Code of Practice contained in Education Circular: Better Choices – The Principles (Department of Education, 1994) formalizes the expectation that schools will have staff with designated responsibility for coordinating special needs provision, and for deploying rigorous assessment procedures to identify learner's educational needs and that they will meet those needs for the most part within the ordinary classroom and out of own resources (Dyson & Millward, 2000:5).

The idea was originally promoted in the UK that only specialists could assess, teach and make decisions about learners who were significantly different from others. More recent trends in the UK believe that there is no separate knowledge base for teaching learners classified as mildly retarded or learning disabled (Thomas *et al.*, 2000:13).

In the matter of *Hobson* [71] the use of aptitude tests, to assign learners to separate tracks, was found unconstitutional. The Court noted that the aptitude tests measured the background of the learners and not the ability to learn. This included the lack of resources available to some learners – mostly poor and minority learners. Thus, the concern of the Court was that the tests did not predict ability to learn, but reflected the learner's environment. The latter was found to rather infringe on the rights of minority learners.

The use of IQ tests, as basis for ability grouping, as found in the case of *Larry P*[72], results into a disproportionate number of minority learners ending up in special education classes. The Court, however, pointed out that unless it could be shown that IQ tests was administered with a racially discriminatory purpose, the use of such tests, even if the result was to misclassify the learners, would not violate the Equal Protection Clause of the 14th Amendment (1787). It was further established that the tests used were not validated and that it did not use a variety of information as required by statutes and regulations, but primarily relied on IQ tests. Thus the Court declared that the State violated statutes.

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[71] *Hobson v Hansen 269 F.Supp. 401 (D.D.C. 1967)*

[72] *Larry P v Riles 793 F. 2nd 969 (9th Circuit, 1984)*

5.3.5.2 Diversity among learners

Teaching all learners within inclusive schools inevitably implies addressing issues of diversity (Wade, 2000:25) since inclusion emphasizes diversity over assimilation, striving at including learners at the margins and avoiding the colonization of minority groups (Clifton, 2004:77). In the opinion of Nind and Cochrane (2003:189) inclusion is to be regarded as less about participation and more in terms of commitment to develop classroom practices and forms of school organization that respond positively to learner diversity.

Both the UK and the USA, conversely, experience complicatedness in achieving inclusion since regular schools are, as a result, confronted to deal with learners with different home languages, cultural background, religious beliefs, emotional development, and racial and ethnic origin, before even adding a wide range of intellectual abilities and disabilities (Alston, 2006; Wade, 2000:25).

Dealing with diversity leads to a dilemma over differences, as pointed out by Dyson and Millward (2000:160). Differences are dealt with by treating certain learners differently (such as educational programmes for limited English proficient learners) or the same. Whether learners are treated different or the same, the end results are similar, both affirm differences. Thus, it appears that to acknowledge differences in any way creates a dilemma that poses insurmountable choices between similar or preferential treatment, between neutrality versus accommodation, or between integration and separation.

Accordingly, the dealing with diversity, presents a fundamental contradiction within mass education systems. However, if education is to fulfill certain set functions, it can only do so by acting at the level of diverse *individual* learners. Alongside, therefore, the education system need to do something recognizably *similar* for all learners, there is an equal and opposite requirement for it to do something *different* for every learner. Education systems, it follows, are necessarily pulled in different directions by these different requirements (Dyson & Millward, 2000:161).

In order to deal with dilemma in the past, learners with special educational needs were placed in separate schools. If these learners are to be included in regular classrooms, a new role for special schools is needed.

5.3.5.3 Including all learners

The notion of inclusion does not set parameters around kinds of putative ability or disability. Rather, it is about a philosophy of acceptance, it is about providing a framework within which all learners can be valued equally, treated with respect and provided with equal opportunities at schools. In short, accepting inclusion means moving from an obsession with learning difficulties to an agenda of rights (Thomas *et al.*, 2000:15).

An emphasis is placed on the needs of all learners, detracted from a proper consideration of the rights of those who are educated (Thomas *et al.*, 2000:9). To give effect to the rights of all learners, inclusive education should address the needs of learners in order for them to benefit from the education they receive. Another prerequisite is that the addressing of learners needs to their benefit must take place within safe educational settings in which all can feel a sense of belonging (McWhirter *et al.*, 2004:63).

The restructuring of schools to comply with these requirements implies intense cooperation between educators among themselves, with all learners, and with the community as a whole (Wood, 2002:25). Nelson *et al.* (2000:431) are of the opinion that special education and the exceptional programmes that went along with it, offered important benefits to groups of learners, which will be reduced with the advert of inclusion. To substantiate their argument, the authors hold that regular schools are unprepared to offer similar services in addition to their regular tasks, that educator-learner ratio's are too high, and that any extra funding for inclusion will soon dry up or be absorbed in the ongoing operation of schools.

Since emphasis is placed on adhering to the rights of all learners within inclusion, the rights and needs of groups of learners with similar problems will forthwith be discussed.

5.3.5.3.1 Including gifted learners

If inclusion requires schools to eliminate special programmes, Nelson *et al.* (2000:430) explain that gifted learners will be subjected to regular schools, classes and curricula. The latter is not sufficient to support these learners to reach their full potential, as such learners, have more complex needs, and if these needs are not

met, they will not attain their ability, it will be lost and wasted (Nelson *et al.*, 2000:430).

In light of the above Russo (2001:758) calls for the redress of the ongoing inequality in education as it fails to provide equal educational opportunities for gifted learners. The same author (Russo, 2001:732) enlightens that gifted learners should be entitled to some protection by law. In addition Nelson *et al.* (2000:431) proposes that the five per cent of gifted learners nationally deserves special financing, special support, special educators, and special programmes to ensure that they will become productive members of society. In agreement with the latter, Russo (2001:737) enlightens that the recognition that learners with giftedness have the ability to make significant contributions to the nation's welfare, especially in the essential areas of science and technology, it is vital to develop programmes to assist them in achieving their full potential.

Aside from rhetoric progress that has been made in the struggle for educational equality, many gifted learners are not being fully served. Schools are still reluctant to support special programming for gifted learners because of a fear and suspicion that intellectualism may lead to elitism. Too much emphasis on the needs of the educationally disadvantaged and economically deprived is hindering the development of programmes for the gifted (Russo, 2001:738). Subsequently, over a half of the population of learners with giftedness, do not match their tested ability with comparable achievement in school (Nelson *et al.*, 2000:432).

Although the Supreme Court of Pennsylvania had unanimously affirmed that gifted learners have a right to gifted education in the matter of the *Contennial School District*[73], it held that educational instruction need not maximize the learner's ability to benefit from an individualized education program in accordance with the IDE Act (105-117/1996b), as long as what a school board makes available is appropriate to a learner's needs.

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[73] *Contennial School District v Commonwealth 503 A2d 1090 (Pa.Commw. Ct. 1986), affd. 539 A2d 785 (Pa. 1988)*

In the case of Broadley[74] the Court, conversely, held that a gifted learner's state constitutional right to a free public education did not include the right to special education.

5.3.5.3.2 Including learners with special educational needs

Albeit the fact that learners with disabilities have educational rights equal to those experienced by other learners in the USA, the education they received was not always equal (Wood, 2002:3). Flowing from the latter a number of cases were filed, challenging the exclusion of learners with disabilities from public schools, and simultaneously from social, emotional, behavioural, physical, academically experiences as a violation of the Equal Protection Clause (1787:14th Amendment).

In the matter of *Pennsylvania Association for Retarded Children*[75] the Court recognized the right to appropriate education for learners who are mentally retarded in the LRE possible in accordance with their needs and prescribing due process safeguards prior to their being placed outside regular classrooms. The Court also stated that it is arbitrary and irrational to exclude learners with disabilities totally from an education since they could benefit from it. Such learners may only be excluded if certified as *uneducable and un-trainable* or had not attained the mental age of a normal five year old. Accordingly, the State has an obligation to place learners with disabilities in a free public appropriate programme.

The latter was underscored by the Court in the matter of *Mills*[76]. Both of these cases were decided on the basis of equal protection and due process. Viewed together, these cases stand for two principles that permeate later developments. First, learners with disabilities have the substantive due process right to receive a public school education based on their unique, individual needs. Second, learners with disabilities are entitled to the protection of procedural due process before they can be classified as being disabled, placed in a non-regular classroom, or transferred to a new placement (Russo, 2001:735).

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[74] *Broadley v Board of Education 639 A.2d 502 (Connecticut. 1004)*

[75] *Pennsylvania Association for Retarded Children v Pennsylvania 334 F. Supp. 1257 (E.D. Pa. 1971)* (note 68 above)

[76] *Mills v Board of Education 348 F. Supp. 866 (DDC 1972)* (note 69 above)

The abovementioned was incorporated in the IDE Act (105-117/1990b) who guarantees that learners with disabilities have equal access to education provided at public expense, under public supervision and direction. Such education must (Kauffman & Hallahan, 1995:340):

- conform with the Individualized Education Plan developed for the learner with disability,
- be designed in such a way as to allow learners to benefit from instruction, and
- include related services and specially, eligible instruction to meet the unique needs of the learner who has been found eligible to receive such services and instruction.

The IDE Act (105-117/1990b) define a learner with a disability as a learner with one of the following disabling conditions: mental retardation, a hearing-, visual-, speech or language impairment, emotional disturbance, autism, traumatic brain injury, an orthopedic or other health impairment, a specific learning disability, deaf- or blindness, who, because of that disability, needs special education and related services (Sullivan, 2000:1).

Laws and policies have led to a significant change in service delivery models for learners with disabilities. This change is evident in the fact that approximately 83% of learners with hearing loss in the USA are currently served, at least part-time, in general education classrooms (Pottas, 2005:38-39).

Wood (2002:27) concede that inclusion has positive effects on learners with disabilities, such as enabling them to participate in typical school activities, benefit academically, socially and emotionally and become more accountable for their own learning. The inclusion of learners with disabilities also benefits other learners in regular classes as they acquire a more realistic view of the heterogeneous society and learn to accept that differences are a reality (Levin, 1990:55).

To the contrary, the Learning Disabilities Association of America believes that inclusion will not benefit all learners with disabilities or other learners, as full inclusion would take away the right of learners with disabilities to alternative placements and the right to free and appropriate education from many regular learners (Kauffman &

Hallahan, 1995:340). In support, Cohen (1996:2) remarks that it seems as though rhetoric and value judgments have taken over the so-called *regular classroom movement* to such an extent that a reasoned and informed consideration of the real needs of learners is obliterated. Social acceptance, and not academic realization, appears to be the primary measure of the success of inclusion (Cohen, 1996:2).

Since inclusion was initiated to benefit learners with special educational needs, Sullivan (2005:2) points out that it is imperative that it truly meet their needs. However, more that not, this is not happening. New or additional educators are often not brought in to deal with these learners, support services such as interpreters for the deaf are not made available, class sizes are not reduced to ensure that educators can attend to their needs (Sullivan, 2005:2). Rather than receiving individualized attention, these learners are merely dumped in regular schools and therefore do not have the opportunity to advance as much as could.

Contrary to the claims of those who favour the idea of *normalization*, placement in a school setting that lacks appropriate communication with peers and adults creates *abnormal* and impoverished milieu (Cohen, 1996:2). In this regard Levin (1990:55) put forward that the assigning of sign language interpreters to learners with hearing impairments is not responsive to the research on early language acquisition in general and on deaf learners in particular. Promises of support services, is naïve at best, and irreparably harmful at worst. Simplistic solutions to complex problems are not helpful (Cohen, 1996:3).

Despite legislative developments, Vaughan (2002b:4) enlightens that various learners with disabilities experience that their enforceable civil rights are not adhered to in practice. In support, Gwynn (2004:105) challenges the self-claimed idea of *experts* purporting to act in the best interest of particular learners while their policies sustain continued separation and marginalization. Her research showed a lack of respect and disregard for learners' right to decide even simple aspects of their social experiences.

Moreover, Alderson & Goodey (2003:72), Norris and Closs (2003:21) as well as Phillips & Jenner (2003:63) found, through respective research done, that educationalists in the UK, for generations, have done little to tackle the educational dimensions of disability in a coherent way. The social consequences of this is that

91% of learners with disabilities attend special settings, 92% live in congregated overcrowded settings, 95% never marry and only 60% have some friends (McConkey, 2003:11).

5.3.5.3.3 Including marginalized learners

In the USA there are federal and state statutes dealing with special learner populations, such as the disabled, the educationally or economically disadvantages, and those providing for equal access and opportunities without discrimination on the basis of race or gender (Levin, 1990:40).

McWhirter *et al.* (2004:xvii) refer to these learners as *learners at risk*. The latter term is used to describe young people whose potential for becoming responsible and productive adults is limited by challenges within the ecology of their lives. They include those who are culturally deprived, marginalized, underprivileged, language minority learners, and low performing or achieving learners. (Wood, 2002:113).

The 14th Amendment's Equal Protection Clause (1787) has been used as the basis for seeking to establish rights of special learner populations (Levin, 1990:40). Albeit legislative measures for equal opportunities, Nelson *et al.* (2000:422) reveal that many of these learners, coming from minority ethnic and social class groups of society, are placed in special classes where they are deprived of realistic social interaction. As such, the historical mistreatment and marginalization of some learners in the USA continues, while negative outcomes such as poor living conditions, poor quality, under funded schools, and a lack of economic opportunity, still prevail – a recipe for the continuation of discrimination (Nelson *et al.*, 2000:419).

In addition, the parental choice of marginalized learners in the USA is limited since they cannot afford schooling and/or transportation to better schools (Nelson *et al.*, 2000:75). The saddest is that even the educators in rich schools tend to be better than those in poor schools due to higher salaries and better education opportunities (Nelson *et al.*, 2000:98). The USA, thus, still need to make early intervention and support approaches more culturally relevant, sensitive, and accessible to larger number of learners (Levin, 1990:14).

The UK also accepts that learners differ greatly in their background, experience, culture, language, and pedagogical orientation. Consequently, they vary in the tools

they possess to interact, in the motives they construct, in the assumptions they challenge, in the issues they identify as important, and in the solutions they propose (Wade & Moje, 2000:9).

Hart (2003:231) concede that there is a common concern that the talents and capabilities of many learners remain untapped throughout their compulsory education due to being, according to Potts (2002:2), excluded as a result of their poverty, cultural background, gender, sexual orientation, or by the competitive and selective procedures that increasingly characterize State education in the UK. These learners are generally referred to as marginalized learners (Brodie, 2003:32).

According to Hart (2003:231) there is a widespread wish in the UK to challenge assumptions that not much can be expected of learners from disadvantaged backgrounds, and a common commitment to concerted action to reduce class-based discrepancies of achievement. The latter, as admitted by Nind and Cochrane (2003:198), presents a significant challenge to educators and managers of schools.

These learners frequently act in disruptive ways, their behaviour is often misjudged, they get into fights because their peers have difficulty to accept them, while educators are afraid of such learners' impact on the rest of the class (Lloyd, Stead, Jordan, & Noris, 2003:164-167). Accommodating marginalized learners also presents a challenge for inclusive education to respond positively to diversity in many ways as they may not necessarily conform to schools norms and values (Charles, 2004:94).

Placing emphasis on another marginalized group of learners in the UK, Fazil, Bywaters, Ali, Wallace and Singh (2003:137) refer to learners from minority ethnic groups who are repeatedly stigmatized, disadvantaged, and discriminated against. The main barrier ethnic learner's encounter is language barriers as they cannot understand educators (Fazil *et al.*, 2003:148).

Since learners with special educational needs were previously accommodated in special schools, it is necessary to explore their new role within inclusive settings.

5.3.6 Special schools within an inclusive framework

Historically, as stated by Zalaieta (2004:39), special and mainstream schools were placed at conflicting and opposing ends of the continuum in the USA.

Nelson *et al.* (2000:362) elucidate that the intent in the USA is to stop separating learners as much as possible. Under some circumstances, however, it is also recognized that some learners' needs may be so severe or restricting, that, for some structural purposes, they have to be accommodated in resource settings or be subjected to separate educational programmes (Wood, 2002:320). Subsequently, the USA retains a dual system of *special* and ordinary education (Rustemier, 2002:2).

The advantages of resource rooms are that they, amongst others, (Wood, 2002:320):

- enhance learners self esteem;
- provide learners to build and maintain relationships with other learners with disabilities;
- provide more opportunities for intentional and incidental learning;
- provide opportunities for resource educators to reinforce class work, while providing learners with extra time to complete tasks;
- provide an anxiety free environment, alternative materials, and equipment; and
- provide close attention to needs.

In the UK a similar approach is taken. Although the Department of Education and Science (Department of Education & Science, 2003) provides for new roles for special schools there is no compulsion on mainstream schools in the UK to develop capacity in response to a more diverse population. Subsequently, LEAs are currently pressurized, on the one hand to make funds available for inclusion, but on the other hand, to maintain an establishment of special schools (Thomas *et al.,* 2000:23). This is also the result of genuinely hold professional beliefs that maintaining segregation has several benefits and parents who are still cautious about inclusion and prefer a special school place for their children (Thomas *et al.*, 2000:22). In this regard, Nind and Cohrane (2003:189) illuminate that numerous LEAs have no proposed closure of special schools although it has increasingly, for many years, pursued a largely unofficial policy of mainstreaming many learners who would otherwise have gone to special schools. A conscious choice was made to work, right from the start, upon increasing the inclusive capacity of the local special schools and mainstream schools.

Support for maintaining special schools in the UK can also be found amongst the deaf community who suggests that inclusive dialogue has stressed political, economic, bureaucratic, professional and administrative issues, rather than the effects of inclusion on individual learners (Thomas *et al.*, 2000:5). Special schools must thus be valued since they have always strived to accommodate learners with *extreme individual differences.*

On the opposite spectrum there is, conversely, support for the closure of special schools. Supporters of the latter in the USA, as illustrated by Zalaiesta (2004:39), believe that the continued existence of special schools promotes segregation which is regarded as a violation of learner's fundamental rights. The reason being, that segregation provides a major barrier to inclusive education in which all learners are welcomed in community schools on an equal basis, regardless of differences. Similarly, Nind and Cochrane (2003:199) propose that the categorization or labeling of learners in the UK presents barriers to inclusive thinking and to extending the diversity of learners with whom educators feel competent and confident.

Inclusion is winning ground as evidence from research in the UK continues to demonstrate that special schools are not as efficient as expected and that education of a low quality is provided (Cook *et al.*, 2003:105). Thomas *et al.* (2000:6) show that there are, still, discrepancies among researchers in the UK about the benefits of either placing learners in special schools or mainstream schools. On the one hand, no evidence of the academic, social and emotional benefits of integrative programmes are found as earlier promised. On the other hand, some research show a small beneficiary of special school placement while definite academic and social benefits arising from inclusion became evident. Studies also show that learners with physical disabilities, who attended mainstream classes were 43% more likely to be employed post-school than counterparts who had attended special schools.

Despite many years in special school, with so-called professionals and specialists, Scoles (2002:1) writes that he experienced segregated schooling that simply reinforced the prejudice that segregated him as a learner in the first place. Scoles (2002:1) has memories of being bullied, both physically and mentally and being labeled as *thick, stupid* and *dim.* Scoles (2002:2) reports that, although his school was called *special* it was not special at all, since his special educational needs were never met. Later in his life Scoles was assessed which indicated that he had

dyspraxia. With extra support he soon developed strategies that enabled him to put his thoughts down on paper. Scoles (2002:2) emphasizes that he did not need specialist educators but educators who were prepared to listen to him. Scoles (2002:3) further states that to be separated from your friends and family is bad enough, to be separated and taught that you are *less than* the rest of the world, is unforgivable.

In order to prevent a repetition of the above and to support an inclusive movement in the UK, Dyson and Millward (2000:7) illustrates that a whole school approach implies a relocation of special needs education in mainstream schools. Flowing from this, the entirely separate structures of special classes and remedial groups must to be dismantled, resources, which sustain them, must be redistributed to ordinary classes. In support of the latter, Zalaieta (2004:39), in the USA, as well as Nind and Cochrane (2003:189), in the UK, note that special schools are *valuable sources of intellectual capital* which must in future be used in sharing experiences of changing curricula, organization and attitudes, and in helping mainstream education to gain confidence and skills to tackle issues needed for the successful inclusion of all learners.

Underscoring the above, the Report of the Special Schools Working Group (Department of Education & Science, 2003) illuminates that, positioned in special schools in the UK are the specialist skills and knowledge whose training is seen as highly advanced, extensive and intensive and as institutions that have a vast wealth of knowledge, skills and experience which, if harnessed, unlocked and effectively utilized by mainstream schools, can help ensure that inclusion is a success.

The prominence given to new roles of special schools in the UK is that it must be outward-looking centers of excellence working with their mainstream partners and other special schools to support the development of inclusion (Department of Education & Science, 2001a). Accordingly, mainstream schools will be restructured to eventually be capable to accommodate all learners. Within this scenario, special schools will become redundant and will be phased out (Vaughan, 2002a:2).

Contrary to the belief that special schools being a barrier to the introduction of inclusive education in the USA, Zalaieta (2004:39-40) found that special schools are often the instigators of initiatives to promote inclusion. Examples of the latter are the

creation of an Inclusive Forum to gain mutual support for inclusion, the principle of desegregation through the return of numbers of learners to the mainstream.

Since there are divisive opinions on the successful implementation of inclusion, it is necessary to address various barriers that prevent its practicality.

5.4 BARRIERS IN THE WAY OF SUCCESSFUL INCLUSIVE EDUCATION IN THE USA AND UK

In moving from exclusion to inclusion McCabe *et al.* (2004:149) designate that courts in the USA have hesitated to require anything more that the removal of barriers to inclusion. In the matter of *Green*[77], however, the Court stated that schools have an affirmative duty to take whatever steps are needed to convert to a unitary school system and to eliminate the effects of past discrimination. Resulting from this, the notion of State neutrality was transformed into a positive duty to desegregate and not just to remove barriers.

In the UK, schools are equally expected to ensure barrier-free environments for all learners, being open, diverse, not selective, nor selective or rejecting (Visser *et al*, 2003:45). Barrier-free schools imply, according to Thomas *et al.* (2000:15), that all schools are accessible to all, physically in terms of buildings and educationally in terms of curricula, support systems and methods of communication. It also means that schools promote equality where all members have rights and responsibilities, with the same opportunities to benefit from and take part in the education provided.

To achieve the above, Dyson and Millward (2000:134) and Simpson (2004:63) elucidate that deliberate, collaborative, problem-solving approaches need to be taken to reduce all barriers which presents many challenges and changes.

The most crucial barriers in the way of successful inclusion are, as identified by Charles (2004:92), financial constraints, a lack of leadership, organizational difficulties, resistance to inclusion, and negative attitudes from educators, transport and staff difficulties, and excessive pressure on regular schools. To draw comparisons with the barriers experienced by South Africa, only those barriers similar to the ones of South Africa will be discussed.

5.4.1 Socio-economic aspects

The longstanding practice in the USA has been for public schools to obtain their financial support from their communities, as pointed out by Nelson *et al.*, (2000:44), while Cambron-McCabe *et al.* (2004:3) point out that all public school funds, regardless of where collected, are considered as being State funds.

With regard to the inter district differences, Levin (1990:13) indicates that the principal source of inequality per learner expenditures among districts has been the heavy reliance on local property tax to fund education. Firstly, low-income communities bear a heavier tax burden than rich communities and secondly, disparity is that even when the poor make extra effort to support schools, they come up with less money per learner (Nelson *et al.*, 2000:44). To take taxpayers' money in richer communities to pay for the education of learners in poorer communities would imply that rich districts' families will have to pay additional taxes for the benefit of someone else's child. Their own children will not benefit from this in fact their education will become relatively devalued (Nelson *et al.*, 2000:105).

Financial funds available will, conversely as illuminated by McWhirter *et al.* (2004:59&75) and Wood (202:23), have to be spread more thinly than before since sufficient funds are not made available. The same authors show that, in 1995 USA States spend more on prisons than on colleges. Supporting the latter, Nelson *et al.* (2000:45) show that, even with State's additional assistance, learners in poor communities will remain receiving a less expensive education that those in rich communities. Cambron-McCabe *et al.* (2004:4) avows that different grades of school accreditation exist in some States with financial incentives to encourage local schools to attain the highest level of education.

Over the years learners with special educational needs were labeled for funding purposes seeing that school districts, with a number of special educational classes were assigned extra funds educators. As a direct consequence, many states still divide their special population into areas of mild, moderate and severe disabilities (Wood, 2002:90).

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[77] *Green v County School Board 391 U.S. 430 (1968)*

In this regard, Sullivan (2005:1) draws attention to the fact that one fourth of a State's budget in the USA is generally being spent on learners with special educational needs, who only make up eleven per cent of all learners in schools. Because of the amounts spent on learners with disabilities, regular learners are suffering - their funds are being drained for the purpose of inclusion (Sullivan, 2005:2).

The observable consequences of the overall lack of funds in the USA are large class sizes, run-down buildings, outdated textbooks, inexperienced and emergency-certificated educators, and inadequate supplies and space in many schools (Nelson *et al.*, 2000:45).

Whatever the case may be, Cambron-McCabe *et al.* (2004:77&80) reveals that public schools face mounting financial pressure due to escalating costs of facilities, supplies, insurance, and services required with special needs. Thus, it is not surprising that school officials are attempting to transfer some of the financial burden to learners and their parents. The latter is aimed at by charging parents with various *user fees* such as transportation, textbooks, and course materials. The legality of such practices varies across states and depends primarily on the state judiciary's assessment of state constitutional provisions. To the contrary, Cambron-McCabe *et al.* (2004:78) confirms that States do not have the same discretion regarding transportation for learners with disabilities as transportation is a related service that must be provided free if necessary for a learner with disabilities to participate in the educational programme under federal and state laws.

In the matters of *Salazar*[78] and *Kadrmas*[79] the US Courts respectively declared that the charging of transport fees was allowable as transportation is not an essential part of a learner's entitlement to free public schooling. Correspondingly, the Court held in the case of *Johnson*[80] that the charging of user-fees for educational textbooks, courses and materials did not violate 14th Amendment (1787) equal protection rights, even though it disadvantaged learners from poor families.

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78 *Salazar v Eastin 890 P.2d. 43 (Cal. 1995)*

79 *Kadrmas v Dickenson Public Schools 487 U.S. 450 (1988)*

80 *Johnson v N.Y. State Education Department 449 F.2nd. 871 (2nd Circuit. 1971)*

The charging of course fees was, to the contrary, ruled to impair learners' rights to free public schooling in the matter of *Caruthersville School District*[81] by the Supreme Court of Missouri. In *Abbott v Burke*[82] the Supreme Court of New Jersey ruled that the Public School Education Act was unconstitutional as applied to poorer urban school districts. The court concluded that even if no cure *money will help and that these learners are constitutionally entitled to that help.*

Similar problems as in the UK arise in the USA, as illuminated by Thomas *et al.* (2000:21), where, despite legislative commitments to inclusion in many states, money does not follow learners as they move to inclusive placements. The solution, as suggested by various advocates, is for states to change their special education financing formulae.

Although numerous schools, contributing to research done by Zelaieta (2004:42) in the UK, reported positively on the development of their various inclusive practices, a very large proportion reported that they wished to do more but were restricted by financial constraints. Inclusion cannot be done cheap. Special provision in special schools has always been made on the axiom that resources should be provided in direct ratio to need. Therefore, Thomas *et al.* (2000:5) put forward that resources have to be redistributed to achieve social justice within an inclusive educational system. Supportive of the latter, Zalaieta (2004:43) reveals that a proper activity-led funding formula which applies to all schools is needed in order to move forward on an inclusive path.

In the UK every school is classified according to categories. County schools are fully controlled and maintained by LEAs. Voluntary aided and voluntary controlled schools receive the vast bulk of their capital and running costs from LEAs. Grant-aided and City Technology Colleges receive a per capital grant directly from the government, while independent and private schools, derive their income entirely from investments and fees paid directly to them by parents(Partington, 1990:95).

Bowe *et al.* (1992:137) caution that the insertion of the *financial* into the *educational* can impose profound limits on ways of thinking about inclusion as financial priorities

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[81] *Parents v Caruthersville School District.No.18 ,548 S.W. 2nd 554 (Mo. 1977)*

[82] *Abbott v Burke (693 A. 2d 417, N.J. (1990)*

confront interpretations of good inclusive practices very directly. The changes brought along by integration in the UK, as a consequence, imply the re-arranging support that can be afforded in the mainstream. This movement presents serious difficulties to funding integrated placement in the absence of *new* and/or extra money from central government to fund integration. The fixed costs of existing special schools have also not diminished sufficiently to liberate the necessary resources to make integration arrangements satisfactory (Thomas *et al.*, 2000:21). Because of limited funds, Bowe *et al.* (1992:131) indicate that some LEAs are already concerned that the inclusion of too many learners with special educational needs will put excessive pressure on their overall school budget.

The Audit Commission (UK, 1992a), moreover, realizes that inclusion in the UK is being held back by the financial systems operating in local government. Findings of the Commission demonstrate that LEAs are reluctant to delegate more funds to schools to enable inclusion, since they are not confident that delegated money will be used wisely or correctly (Thomas *et al.*, 2000:21). At the other end of the spectrum, Alston (2006) informs that unions feel that the failure of providing sufficient funds is allowing vulnerable learners to experience failure over and over again, while educators perceive inclusion only as a way of cost-cutting with essential resources not being provided.

Thomas *et al.* (2000:9), on the contrary, caution that existing inequalities between learners cannot be compensated for simply by the provision of physical, personnel and financial resources. Equalization, more importantly, lie in opportunities to do the same as other learners, to share the same places as others and to speak the same language as others. Reducing inequalities is thus about more than providing money and better resources, it is about providing the chance to share in the common wealth of the school and its culture.

5.4.2 Negative attitudes

People are becoming to realize the concept that some are disabled more by their environment and experience of society's attitudes towards them than by their actual medical condition (Sorsby, 2004:55).

With regard to education in the USA, Wood (2002:154) emphasizes that educators are the ones who set the tone in classes as they are responsible for setting an

affective atmosphere and the stage for learning. Suffice to say, educators play a crucial role in the successful inclusion of all learners (Clifton, 2004:88).

Wade's study (2000:128), conversely, shows that UK educators often have low or negative expectations, fears and beliefs regarding inclusion. Educators believe that they are not ready for including all learners in their classes. In this regard, Wood (2002:217) enlightens that educator's attitudes in the USA collaborate with, *inter alia*, their own feeling of incompetence and lack of confidence, knowledge, training, and support. This implies that if educators are empowered, their attitudes towards inclusion will also improve.

Clifton (2004:89), however, indicates that there is still a need for a considerable shift in terms of attitudes and practices at all levels of school organization to embrace all learners in UK schools. In support, Wood (2002:154) as well as Nind and Cochrane (2003:199) aver that educators' attentiveness, expectations, encouragements, and attitudes, strongly influence learners' perceptions of themselves, while also affecting their interaction and achievement in the USA and the UK. Educator's attitudes and behaviour, thus, influence learner behaviour. Negative attitudes lead to the stereotyping and labeling of learners which deny them to participate as equals in every day life (Herbert & Moir, 1996:59). Seeing that the interactions at schools are governed by the values, attitudes and beliefs held by educators, Visser *et al.* (2003:41) point out that learner rights to education in inclusive settings are seriously infringed if successful interactions do not occur.

To remedy the problem in the UK, Hart (2003:231) offers readily sustainable and self-generating approaches rooted in the educators' own values, commitments and aspirations. Seeing that the driving force needs to come from educators' passion and sense for social justice, changes must not be imposed on educators (Hart, 2003:231). It is, nonetheless, essential that educators recognize the importance of valuing individual learners. According to Simpson (2004:74), educators need to be taken out of their comfort zones and start rethinking their assumptions regarding teaching in ways that challenge their own practices within schools. This is important seeing that inclusion is as much about attitude as it is about response (Clough & Nutbrown, 2003:85). Clifton (2004:60) suggests that UK educators should develop a culture of listening to the view of all members (of which learners form a part) involved since they are important in bringing about change.

Wade (2000:128) demonstrates that educators' attitudes can change positively with experience in working with all learners. If educators realize that parents enroll their children in regular schools because they want them to interact with others and not become, once more, dependent on others, they will (Clough & Nutbrown, 2003:85) come to realize that they do not need to always make special arrangements for them. All learners can benefit from the same structured, enriched and stimulating classroom.

5.4.3 Language and communication

Dunklee and Shoop (2002:200) point out that, with each passing year, the USA learner population becomes more diverse. The most recent figures indicate that cultural and language minority learners are the fastest growing group of learners. Many of these learners need special language programmes to overcome language barriers in their way of enjoying equal education and participation in society. In view hereof the Equal Educational Opportunities Act (USA, 1974) presents that the failure by an education agency to take appropriate action to overcome language barriers which impede equal participation by learners in instructional programmes, is an unlawful practice that provides individuals the right to sue. As such, school officials have a positive duty to treat learners differently, that is, special educational services are provided to enable them to take advantage of the education being offered (Levin, 1990:59) which, according to Trinidad and Villenas (2000:142) can only be attained if learners understand their educators.

Levin (1990:59), also, expresses that the fundamental right not to be discriminated against on the basis of national origin also necessitates that language minority learners or limited English-proficient learners be treated equally with regard to educational provision.

In practice, Trinidad and Villenas (2000:141) avow that learners' native language often presents a barrier to education since many educators lower their expectations of such learners. To solve problems centered around cultural and language minority learners, many school districts have established newcomer centers, in which learners are placed for no longer that a year, to adapt to their new surroundings. These centers, conversely, should be multiethnic, multiracial, and multi-linguistic.

Enrollments in such centers must be voluntary, and comparable education must be provided (Levin, 1990:59).

A number of federal court cases emerged in the USA who have defined the parameters of bilingual or special language programmes and established a legal basis for challenges to school districts in failing to provide bilingual or special language programmes or providing inadequate programmes. (Dunklee & Shoop, 2002:200).

In the matter of *Lau v Nichols*[83] the USA Supreme Court strongly supported the right to quality education for language minority learners and ruled that the school district had violated the rights of these learners by failing to provide them with an education commensurate with their language needs. Consequently, schools have an obligation to rectify language barriers that result in the exclusion of linguistic minority learners from meaningful participation in educational programmes. The Court's decision was based on section 504 of the Civil Rights Act (102-166/1966) providing that no person, on the ground of race, colour, or national origin, shall be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any programme.

In *Serna v Portales*[84] the USA Federal Court ruled that schools must implement a bilingual and bicultural curriculum, revise procedures for assessing achievement, and hire bilingual personnel to provide equal education opportunities for learners whose home language and culture was Hispanic. In *Clinton v Brentwood*[85] the Supreme Court ordered a school district to retain its bilingual programme rather than substitute a program that would segregate Spanish-speaking learners from their English-speaking peers in certain classes. In *Castaneda v Pickard*[86] the Supreme Court imposed a dual obligation on educators, namely to teach learners English while taking appropriate action to ensure that English language deficiencies do not constitute a barrier to the acquisition of substitute knowledge, and to overcome all barriers to an equal education.

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[83] *Lau v Nichols 414 U.S. 563 (1974) & 483 F.2d 791*

[84] *Serna v Portales F.2d 1147 (10th Cir. May 1974)*

[85] *Clinton v Brentwood 455 F. Supp. 57 (1987)*

[86] *Castaneda v Pickard 648 F. 2d 989 (5th Cir. 1981)*

Protherough (2005:73) expresses that the learning of the mother tongue in the UK has been socially and politically controversial from the very beginning. There has been no general consensus for over five hundred years about who should be taught what or how.

The Swan Report, entitled *Education for All* (Department of Education & Skills, 1985) criticizes any policy for minority ethnic groups that saw them as *problem* of *disadvantaged*, and states that learners should come to appreciate the positive aspects of living in a linguistically diverse society. In Protherough's (2005:84) view the Swan Report and the subsequent essentiality of a mono cultural UK education system has failed as it does not concern itself with the preparation of all individuals to function in a society composed of varied races, cultures, social norms, values and life-styles, each different but interdependent.

Since the UK's National Curriculum documents (Department of Education, 1988) offer no real guidance about how the language needs of bilingual learners might best be met, two contrasting ideals have been promoted (Protherough, 2005:85). The first urges full bilingual programmes, in which mother tongue is taught alongside English as medium of instruction, but this has rarely been attempted because of the expense, the variety of languages and the educational problems involved. The second promotes a common English culture, which are criticized as being an oppressive kind of *cultural imperialism* as it implies ignoring or down grading of other cultures.

According to UK Department of Education and Skills (Department of Education & Skills, 2003:29) learners' English language development is best served within mainstream classes.

Educators in the UK, however, frequently raise the concern that learners cannot learn effectively before they are fluent in English. During research Clifton (2004:81&85) found that some educators perceive pre-teaching of technical vocabulary not as part of their role. As a consequence, learners from minority language groups receive very little support from educators, some are not even provided with textbooks or exercise books, educators tend to wait for learners to first gain proficiency in English before teaching him, no credit is given for such learner's prior knowledge and understanding, while evaluations is made on learners' performances which do not reflect their real abilities.

5.4.4 Inclusive school and classroom environments

Wade and Moje (2000:7) expound that the building of a UK community in which learning can occur requires responsibility, directiveness, determination, discipline, as well as group solidarity and participant sensitivity. Equally, Thomas *et al.* (2000:47) indicate that the move towards inclusive schools necessitates hard work since the success of inclusion depends crucially on how teaching is organized and how interaction among learners is structured and supported.

McWhirter *et al.* (2004:64) explain that UK school culture is determined by learner involvement, educator factors, community support, curriculum focus, and educational leadership – factors that also define effective schools. A culture provides its members with two things. Firstly, it establishes a set of rules, expectations, and norms for its members. Secondly, personnel, who take pride in their school culture, are likely to do better that those who do not. Participation and attendance in school activities can greatly enhance school connectedness and pride. In addition, Nelson *et al.* (2000:226) designate that USA class environments and relationships need to be built on trust, respect, and goodwill.

In the USA it is recognized that school buildings, which are considered to be State property, should be adapted to accommodate all learners (Cambron-McCabe *et al.*, 2004:3). Firstly modifications need to be made to allow access to all, and secondly, the necessary equipment should be provided (Wood, 2002:154). Nelson *et al.* (2000:226) indicate that risk-free environments are necessary to maximize learning opportunities.

Within the UK context, emphasis is placed on individuality and equality, flexible approaches to the curriculum, an avoidance of labeling, and a willingness to experiment with learning groups defined by characteristics other than the usual age or ability. An environment in which all learners feel trusted, accepted and comfortable is needed to enable all of them to flourish educationally (Thomas *et* al., 2000:52).

Although educationalists in the UK admit that schools must be physically accessible to all learners, Wood (2000:155) report that the unavailability of structural adaptation is still a reality. As such, the inaccessibility of schools still hinders inclusion in many schools and is, therefore, a factor that needs long-term planning and investment (CSIE).

As a short-term solution to the problem, Thomas *et al.* (2000:194) show that simple low-tech solutions to physical problems are often as effective as expensive structural changes. Initiative, knowledge of learners' needs and staff goodwill often appear to be more than adequate to compensate for deficiencies in physical provision. It appears, from research findings, that effective change is more dependent on a sympathetic culture than on the physical fabric and design of buildings. While physical problems can be irritating and at times causes serious impediments to inclusion, ways round can be found if staff are supportive of inclusive ideals (Thomas *et al.*, 2000:195). Structural barriers need thus not be held as an excuse to prevent learners from attending UK regular schools.

5.4.5 Availability of support services

The IDE Act (105-117/1990b) defines *related services* to include transportation as well as any developmental, corrective, and other supportive services required to enable a learner with disabilities to benefit from education. Such related services may encompass, *inter alia*, Speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreational services, counseling services, orientation and mobility services, school health and social work services, as well as parent counseling and training (Dunklee & Shoop, 2002:143). According to Edwards (2005:5) support services usually refer to services which ensures that learners do not only receive education, but that they receive quality education which is fundamental to their success. Dunklee and Shoop (2002:143-144) note that learners may also need supplementary aids and services such as various devices, materials, modifications, adaptations, and accommodations to instruction that are required to meet the educational needs of learners with disabilities.

Although the availability of services differs from State to State in the USA, learners will be more or less doomed to failure without most of them (Edwards, 2005:3). In order for learners to receive related service in the USA, they must be found eligible for special education by specialists (Dunklee & Shoop, 2002:143).

Within the UK context, Thomas *et al.* (2000:192) acknowledge that an inclusive process needs a well-coordinated array of services and in-class support whereby all learners can *access* the curriculum and be maintained in regular classrooms. Dyson and Millward (2000:139), on the other hand, report that the practice of in-class

support provision is highly variable and offers no guarantees of quality education. Special support for the physical disabled may mean special equipment such as magnification devices for the visually impaired, for learning disabled learners it may mean specially prepared teaching materials, while for the gifted learner it my imply special artistic tutoring or advanced academic work (Nelson *et al.*, 2000:361).

Thomas *et al.* (2000:26) point out that, despite the worth of support services, little attention has, thus far, been paid in the UK to the ways in which support is effective in classrooms.

5.4.6 Parental involvement and choice

The constitutions of the USA and the UK contain an implicit right of parents to make decision on behalf of their children (Cummings, Mawdsley & De Waal, 2006:44). Consequently, in both these countries, learners have no legal right to take action about their education on their own behalf or to appeal against being excluded from school attendance, permanently or temporally (Partington, 1990:106). In the UK, the Education Act (UK, 1944: sections 37-40) requires LEAs to interfere only if it appears that the parental duty to educate is not being carried out, whether suitable education is being received is not considered (Partington, 1990:106).

In the USA, there has been a growing tendency to increase the choice of parents regarding the education of their children in an attempt to retain the role and authority of States and school districts to control public education and to increase the general quality of education (Fujita, 2000:6-7). Resulting from the latter, parents now have new roles as advocates for their children. To fulfill these roles parents have to become knowledgeable about, not only their rights and those of their children, but also the general education curriculum (Wood, 2002:3). This is important since parents are now seen as part of a team who has to develop an appropriate educational plan for their children's optimal development (Wood, 2002:29). In addition, parents also have the right to their children's educational records as well as procedural due process rights. They must be notified and give permission before their child can be moved from a general classroom.

The No Child Left Behind Act (107-110/2001) further expanded the choice of parents of children attending schools that do not meet State standards. If learners are in schools that have been identified as low performing, they must be given the option of

attending a better school within the district, including charter schools. Such a learner must be permitted to use funds, provided by government, to obtain supplement educational services from either public or private providers. Persistently failing schools not only loose funding as learners select other schools, but also face mandated reconstitution if they do not make adequate yearly progress (Cambron-McCabe *et al.*, 2004:15).

In the UK collaboration with parents is similarly important. Simpson (2004:72) points out that extensive work with parents is one of the main characteristics of schools identified as successful in their approach to inclusive education. Parental choice was changed radically by the Education Act (UK, 1980: section 6). Accordingly LEAs now have the duty to respect parental choice of school except where:

- to do so would prejudice the provision of efficient education or the efficient use of resources,
- in the case of special agreement, the preference would be incompatible with any arrangements between the governors and the LEA about admission to the school, or
- the preference would be incompatible with arrangements for admission based wholly or partly on selection by reference to ability or aptitude.

Section 6(5)(a) of the same Act also permits parents, for the first time, to choose a school not belonging to the area of the local education authority. The duty to respect parental choice was further reinforced by the statutory requirement (UK, 1980: section 7) to publish information about individual schools upon which parents might make an informed choice. LEAs must now also publish the criteria by which learners are admitted to each school and make formal arrangements for parents to express a preference (UK, 1980: section 8).

The Education Act (60/1981), moreover, places a duty on LEAs to educate learners with disabilities in mainstream schools, while taking parent's wishes into account as long as other learner's education is not adversely affected, and there is efficient use of resources.

Expanding the involvement of parents in education in the UK, the Education Act (UK, 1980: section 2) provides parents with the statutory right to be represented on SGBs and, as such, act as governors of schools. In this new role parents have voting and participatory rights in staff appointment (Partington, 1990:98). Subsequently, SGBs now have budgetary control of their schools and the freedom to determine the shape and size of the teaching and other staff within the budget. They also have statutory power to give written instructions to head educators about school discipline (40/1986: section 22).

The Education Act of 1986 (40/1986) reduced learner's rights while increasing parent's rights in that the presentation of learners on the SGBs was abolished on the basis that the spending of school funds should not be left in the hands learners (Partington, 1990:106).

In practice the cooperation between schools and parents are, alas, not without problems. Norris and Closs (2003:25), for example, report that many parents complain about schools' defensive attitude towards parents. In this regard Phillips and Jenner (2003:65) inform that schools need to work hard to gain parents' trust.

5.4.7 Human resources

Educators in the USA often feel that they are not being rewarded sufficiently for their efforts. In this regard, McWhirter *et al.* (2004:59) explain that educators and counselors in the USA are paid less that the national average, and are poorly remunerated relative to other to other professionals. According to the same authors low educator salaries reflect the value society places on education, and are one contributor to the current shortage of educators. In line herewith McWhirter *et al.* (2004:59) caution that the brightest and best people will not be attracted into education until this profession is respected as a priority or until all realizes the enormous difference an individual educator can make in the lives of hundreds of learners (Clifton, 2004:89).

In contrast to the important roles educators have to play, McWhirter *et al.* (2004:59) highlight that a disturbing forth of new educators in the USA do not even meet states licensing requirements, with a much greater percentage of educators at poorer schools having poor academic skills. Moreover, the disparity between rich and poor schools is increasing. Richer school districts spend 56% more per learner that the

poorest schools. Subsequently, McWhirter *et al.* (2004:59) put forward that, if schools are expected to combat societal problems of at-risk learners, the USA government must commit to the education of all learners as their highest priority, which includes attracting and training enough qualified educators and providing them with adequate compensation.

Because of the growth of society's expectations of schools in the UK, increased demands are placed on educators, made to an extent that the profession feels itself increasingly under pressure and not well rewarded for its efforts (Partington, 1990:103). In the USA educators are also constantly bombarded about how they are doing their jobs, how schools are inadequate and failing, and how educators must do more with less (McWhirter *et al.*, 2004:62). Moreover, within an inclusive educational system, educators are bestowed with new, roles of, *inter alia,* assisting in developing materials, individualizing lessons, modifying curricula as well as of building new relationships (Wood, 2002:28).

Correspondingly, Zalaieta (2004:39) explicates that, despite a general commitment to inclusion, many educators in both countries are experiencing anxieties, difficulties and concerns in embedding inclusive values in their day-to-day practices. The challenge to educate learners with diverse needs is often regarded as impossible by educators who have no experience of responding to these great challenges.

Wood (2002:425) indicates that special educators in the USA fear losing their expert status or jobs, while ordinary educators fear that they will not be prepared for including all learners. Following the latter, there is a general resistance to school reform efforts.

Norris and Closs (2003:29), additionally, state that reform will never be achieved by reviewing appropriations, restructuring schools, rewriting curricula, and revising tests if society continues to demean and dishearten educators on who so much depends. Educators must be better compensated, freed from bureaucratic harassment, given a role in academic governance, and provided with the best possible training, methods and materials. Dyson and Millward (2000:151) equally stress that institutions cannot be developed without enhancing the abilities, capabilities, professionalism and active involvement of the people in them.

Seeing that one of the main differences between inclusion and integration lies in the preparation of staff for the process, Thomas *et al.* (2000:28) suggest that there should be preparatory training and ongoing professional training of a practical nature - instead of amounts of formal training - backed up with sufficient information and reading material for educators to overcome their initial resistance towards an inclusive approach. There should also be ongoing professional development for mainstream staff provided by inclusion project staff in the practicalities of making inclusion work and, thus, to educate diverse learners and meet their individual needs (Wood, 2002:425).

Additionally, Zalaieta (2004:41) identifies the need for support and shared professional development opportunities for educators in mainstream schools in the UK to further their inclusive practices. This is essential since these educators cannot solely focus on the assumed *expertise* of special educationalists.

Cambron-McCabe *et al.* (2004:24), moreover, points out that educators should also be trained to be aware of legal constraints placed on their rule-making prerogatives by school board policies as well as by federal and state constitutional and statutory provisions. Russo (2004:24) enlightens that, although educators' actions will be upheld if challenged in court as long as they act reasonably and do not impair the protected rights of learners, school personnel cannot plead *ignorance of the law* as a valid defense for illegal actions.

Inclusive interaction between learners and educators has, as illuminated by Nind and Cochrane (2003:190), also marked the beginning of a redefinition of the concept *support* in the UK. Instead of providing more funds or more educators to provide support, educators themselves were offered additional support (Nind & Cochrane, 2003:190)

Zalaieta (2004:42), forthwith, express the need to realize that both special and mainstream educators in the UK have aspects of expertise with regard to recognizing the uniqueness of learners, which if used in collaboration, would increase the quality and flexibility of teaching approaches and farther extend participation in learning on democratic principles. Wood (2002:170), consistently, reports that both special and ordinary educators, as stakeholders in learners' development, in the USA should acknowledge that they have specialized skills, while simultaneously cautions that it

should also be realized that their experience, values, and knowledge bases may differ.

Although some learners certainly need additional support, Thomas *et al.* (2000:192) are of the opinion that there is no special pedagogy which has been shown to be especially useful with learners who have disabilities or learning difficulties. There is, thus, no reason why ordinary educators cannot handle such learners. From personal experience in the UK, Scoles (2002:2) emphasizes that it was not needed of his classroom educators to be specialists, but that they only had to be prepared to listen and learn from the learners with whom they are working. In support, Thomas *et al.* (2000:46), designate that there is no need to assume that certain special teaching styles or strategies are accessible only to those who have had long training or expertise. The main requirement is for creativity and imagination to make the curriculum come alive for learners. If creativity and imagination are used, then all learners will benefit, not simply those with lower achievement or special needs.

Subject educators in the UK are gradually enabled to coordinate the planning for learners with special educational needs in their lessons with support from three sources. One is the school-based special education needs department who is responsible for offering advice on methods of learning and diagnosis of particular learning deficiencies. Another source is the key post-holder within subject areas, *i.e.* educators whose role is to remind subject departments of the presence of learners with special needs in their lessons and to explore subject-based materials (Bowe *et al.*, 1992:129). The third source of support for subject educators would be the in-class presence of support educators provided by Statements of Special Educational Need for those learners who have been through the assessment and *statementing* procedure.

Special educators in the USA also find that their roles have to be expanded from providing direct services to learners in self-contained settings to working as consultants with general educators, at times even team teaching with their colleagues (Wood, 2002:3).

Having special educators or assistants in mainstream classes, paying only attention to some learners may, as illuminated by Thomas *et al.* (2000:32) cause additional problems. Learners may become over reliable on receiving continuous support, while

the presence of an assistant may hamper good relationships between learners receiving support and the class educator or peers. Therefore, it is advised that assistants should provide whole class support rather than being restricted to only a few learners.

As the line of demarcation between special and general education in the USA becomes less rigid and is eventually erased, Wood (2002:195) stresses the fact that general educators, special educators, support and ancillary staff, administrators, and parents will continue to be faced with the challenge of working collaboratively to extend the benefits of inclusion efforts to all learners and the community (Thomas *et al.*, 2000:192). This is extremely important since these educators must now be able to provide the sort of differentiated access to the mainstream curriculum which neither of them could achieve separately (Dyson & Millward, 2000:147).

For efficient cooperation Thomas *et al.* (2000:195) point out that communication between staff members is essential. It assists not only appropriate pedagogy activities but also help guide staff inside and outside any inclusive venture on who is responsible for what, and who is accountable to whom. The relationship between educators and support personnel and learners should be built on trust and the perception of equal status. However, it is acknowledged that tension, which may arise, is difficulty to overcome. Moreover, very few educators had training for working with special support staff, while almost all regard support staff of possessing special non-transferable knowledge and skills and many find advisory suggestions difficult to incorporate in the classroom (Thomas *et al.*, 2002:28). Similarly, Du Toit (2006c:170) explicates that class educators in the USA frequently find themselves left all alone to deal with large amounts of learners on their own.

5.4.8 Curriculum

Dyson and Millward (2000:3) place emphasis on the fact that every learner in the USA, within inclusion, has a right to access a culturally valued curriculum as full-time members of age-appropriate mainstream classes. Cambron-McCabe *et al.* (2004:80) notify that school curriculum is controlled primarily by States and school boards within the framework of federal constitutional guarantees, while federal government indirectly influence the curriculum through funds it provides for particular initiatives. Subsequently, State laws usually stipulate that school boards must offer a State-

mandated minimum curriculum, which they may supplement unless there is a statutory prohibition (Levin, 1990:11; Wood, 2002:158).

Cambron-McCabe *et al.* (2004:7), moreover, outline that local school boards in the USA have delegated powers, which encompasses the authority to determine the specifics of the curriculum offered within the district, to raise revenue to build and maintain schools, select personnel, to close schools, to contact private companies to provide various services, and to enact other policies necessary to implement the educational programme pursuant to law.

If constitutional rights are not implicated, Cambron-McCabe *et al.* (2004:81) point out that the courts will uphold decisions of State and local education agencies in curriculum matters. Where it, however, infringes on these rights courts will intervene.

In the matter of *Nebraska*[87] the USA Supreme Court, for instance, reasoned that an educator's right to teach, a parent right to engage educators to instruct their child, and the learner's right to acquire knowledge were protected liberties under the Due Process Clause of the 14th Amendment (US Constitution). In the case of *Edwards v Aguillard*[88] it was decided by the Supreme Court that Biblical instruction was unconstitutional as it advanced only a specific religion.

With regards to USA school curricula, Nelson *et al.* (2002:426) enlighten that inclusion offers learners with disabilities the opportunity to be educated to *the maximum extent appropriate* in regular classes which they would have attended if they had no disability. The latter is made possible since inclusive schools should offer broad educational programmes more consistent with a society based on democracy and ethics.

Accordingly, local school boards in the USA and education staff have the right, if not a duty, to develop reasonable means and determine the effectiveness of their educational programmes with respect to all individual learners. The latter was confirmed in the matter of *Debra P. v Turlington*[89] in which case the USA Court held that the continuous testing of learners to determine remediation needs was

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87 *Meyer v Nebraska, 262 U.S. 390 (1932)*

88 *Edwards v Aguillard, 482 U.S. 578 (1987)*

89 *Debra P. v Turlington, 644 F2nd. 397 (5th Circuit, 1981)*

constitutionally permissible. The Court held that the disproportionate placement of minority learners in remedial programmes *per se* does not abridge the Equal Protection Clause (1787) without evidence of intentional discrimination. The Court, in addition, also found that the passing-rate gap between majority passing-rates and minority failure-rates was narrowing as a result of appropriate education and that the testing and remediation programmes were indeed addressing the effects of past discrimination.

Since the teaching of learners with special educational needs in inclusive classrooms may require changes to existing curricular contents in order to make it equally accessible to all learners – one size does not fit all – (Wood, 20002:195), the IDE Act (105-117/1990b) presents that educators must provide useful alternatives in both curricular materials and instructional delivery. The latter is, unfortunately, not an easy task, as Nelson *et al.* (2000:200) inform that there are often complex and changing relationships between the kinds of individuals a society desires, the society than needs to be developed and the schooling that need to be provided to attain such a society. These relationships often send conflicting signals to schools, which become enshrined in the school curriculum.

In order to adapt curriculum contents in the USA, Nelson *et al.* (2000:426) advise that educators must consider how a learner's disability affects his involvement and performance in the general classroom. For this, educators should become better informed and more actively involved in individualizing instruction for all learners. In this regard, Wood (2002:142) sets forward that effective and efficient IEP development is dependent upon full participation by all who are being affected by the outcomes of the plan. Learners must have as much input as they can in developing their long-term goals and objectives. Parents, special education educators, regular educators, and adult service providers must be outcome orientated while being respectful of the other learners' needs, interests, and preferences. Transitions services must progress from being identified to being delivered in a sequential way that will maximize the opportunity for learners to move from school to adult post school settings with minimum disruption in their life plans (Wood, 2002:142).

On the contrary, Nelson *et al.* (2000:353) report that many in the USA believe that control over the curriculum remains the rightful province of the State or community and not the educator. To empower the educator with authority over the curriculum is

to dis-empower taxpayers. On the other hand, some believe that school reform has failed because reformers have ignored the important role educators have to play. Educators must be allowed to assume a rightful place as professionals with genuine authority in schools they should control matters of curriculum, instruction, and policy (Nelson *et al.*, 2000:354). During the early 1990s, nearly everyone is advocating *restructuring* for school reform sought ways to include educators in making decisions about curriculum and teaching.

Since the drawing up of IEPs (tailor-made for learners) is time-consuming, Sullivan (2005:3) informs that it will leave educators with little or no time to plan for other learners which may lead to a decline in the quality of their general instruction or teaching.

The National Curriculum of the UK was introduced by the Education Reform Act (40/1988) to make certain that State schools of all LEAs have a common curriculum ensuring that certain basic material is covered by all learners. According to this National Curriculum it is the responsibility of schools to provide a curriculum that meets the specific needs of individuals and groups of learners. It sets out three principles that are essential for educators and schools to follow when developing an inclusive curriculum, namely to set suitable learning challenges for all learners, to respond to learners' diverse learning needs, and to overcome potential barriers to learning and assessment for individuals and groups of learners (Bowe *et al.*, 1992:124).

The UK reform measures such as the instruction of the National Curriculum, National Assessment Tests and new schemes for public funding were expected to improve the quality of schooling and to reduce the role of LEAs (Fujita, 2000:2).

Thomas *et al.* (2000:36), however, caution that the physical presence of learners in classrooms does not guarantee their involvement in class activities. Supportive hereof, Clifton (2004:77) emphasizes that participation in education implies learning alongside and collaborating with others in shared lessons. It involves active engagement with what is learnt and taught and having a say in how education is experienced as well as being recognized and accepted as an equal. Learners' individual identities need, thus, be reflected in the school curriculum, and the diversity

of learners' lives and cultures celebrated as an enriching resource for schools and the community to which they belong.

Phillips and Jenner (2003:66), in addition, believe that a curriculum in the UK should be broad and balanced for inclusion to be successful. An emphasis on sport and art, *inter alia,* would allow all learners to participate more fully and would open ways of communication that do not only rely on the spoken or written word. Core subjects alone are not enough. The ideal relationship between educators and learners within inclusion is, according to Wade and Moje (2000:7), one of inquiry. The educator's role is not to be the authority in the classroom and to transmit a prescribed and fixed body of knowledge to learners, but rather as a facilitator who assists learners to unlock realities on their own.

Classroom changes in favour of inclusion in the UK may, according to Thomas *et al.* (2000:52), come about as a result of a whole school initiative. Emphasis must be placed on individuality and equality through a flexible approach to the curriculum, an avoidance of labeling, and a willingness to experiment with learning groups defined by characteristics other that the usual age or ability.

Research done in the UK by Dyson and Millward (2000:181) prove that the notion of a *common curriculum* has disappeared from many schools. Since the aim is no longer participation but engagement and attainment, the curriculum is driven by considerations of *relevance*. Relevance to what learners is likely to perceive as a need and to what professionals believe they will need if they are to flourish in the labour market and in society after they have completed their schooling. A move away from a *common curriculum* could, however, mean a reduction of opportunities for participation and hence greater exclusion.

In this regard, Hamill and Boyd (2003:128) caution that if some learners are seen to learn a different curriculum, the complex messages are being transmitted about their status in the school and indeed about their status as learners and people. Some should not be exposed to a *watered down* curriculum. In inclusive projects, the development of an inclusive curriculum has been addressed in a variety of ways, including altering the format of the lesson, changing the arrangements of groups and the ways instruction is delivered, using different materials, adapting goals

(differentiation by outcome), and providing alternative tasks (differentiation by activity), Thomas *et al.*, 2000:193).

The National Curriculum (40/1988), in view of (Bowe *et al.*, 1992:124), presents a highly complex and problematic challenge of providing for learners with special educational needs in UK schools. It places a whole new set of demands on educators' time, skills and commitments such as establishing good learning environments which includes *an atmosphere of encouragement, acceptance, and respect for achievements, and sensitivity to individual needs.* Too much may be expected from educators given current levels of, or even reducing levels of, resources and support (Bowe *et al.*, 1992:126). The National Curriculum is also criticized as being too fixed and prescriptive which negates educators and learners control over their education practices and undermines its flexibility. Another aspect is that too little attention is given to the practical, financial, and political factors which may serve to inhibit good practice.

5.4.9 Theory versus reality

Theoretical assumptions have changed traditional goals of the educational system in the USA (Wood, 2002:25). Learners and parents have become more aware of their rights. Within the classrooms, the different abilities of learners have changed teaching methods, materials, and training, while technology has become a way of life for many people and a way for many learners with disabilities (Wood, 2002:26).

An education that is equal, free, and appropriate is now within the reach of all American learners. Legislation has brought multicultural diversity and issues to the fore. Learners are more aware of differences between people and have learnt to understand and accept it better. Today, ignorance is no excuse for the mistreatment of any learner since the knowledge base about differences has expanded. This has been made possible by the passage of laws establishing rights and by the growing visibility of the community of learners with special educational needs. Assessment strategies are changing. More holistic measures are used (Wood, 2002:26).

However, inclusion also has a dark side in the USA. Although it is theoretically possible to include all, the practical implementation is not so straightforward. Wood (2002:26) and Nelson *et al.* (2000:432-4) highlight the following negative factors concerning inclusion in the USA context:

- Curriculum decisions are often taken by uninformed people while it is ethically owed to learners that qualified personnel should make the very best educational provision available.

- Insufficient funding provision continues to hamper inclusive practices.

- The diversity of learners leads to the missing of the special needs of some.

- Learners are too often conformed to group standards imposed by state officials.

- Large class sizes make it difficult or even impossible for educators to provide special assistance.

- Inclusion will not have the proposed social benefits. A sorry history of taunting, labeling, and exclusion by regular learners is not likely to disappear because of some legislated programme of interaction. There is no evidence that learners with learners with special educational needs will suddenly develop appropriate social behaviour patterns.

- Parents of non disabled learners will have sympathy for others, but will not suddenly accept that their children are being disadvantaged.

- Life in many schools is not pleasant for learners from poor families, learners who stutter, who are noticeably shorter, taller, plump, slower in speed or intellect.

- School subcultures create cauldrons of despair for many learners who are not accepted because of minor differences.

Similar problems are experienced in the UK contents. Dyson & Millward (2000:13), for instance, highlight that UK policies are often inclusive in one way and exclusive in another. Practices are often neither clearly inclusive nor exclusive, but could be read in either way. Schools seem to be torn between their avowedly inclusive aims on the one hand and their need to obey the imperatives of somewhat differently-orientated government policy on the other. In support, (Nind *et al.*, 2003:2) avow that academics and policy makers may have shared values in common, but educators and parents have different shared values in common, different *inclusion'*.

Gwynn (2004:117) cautions that the gap between the rhetoric of inclusion and inclusive practices in the UK will continue to widen unless power holders become power shares and listen to the voices of those they claim to support – the learner. Learners are too often seen as the recipients of expert advice and not experts of their own lives. They become known as labels that depersonalize and dehumanize and legitimate their non-participation, isolation and exclusion but we are often in a state of denial about what is really happening. Their voices frequently go unheard and most of the time they acquiesce, accepting all they are offered, including an identity that has been created by external forces.

Potts (2002:2), moreover, enlightens that the UK government still sanctions the exclusion of significant numbers of learners, which could be seen as a barrier to the assumption by mainstream schools of full responsibility for all learners in their areas.

Despite important development on the front of legislation and the welcome rhetoric from government circles that disabled people should have full enforceable civil rights in the UK, for many experiences are different. Almost all still encounter prejudice, bullying, insensitive treatment and discrimination at some time in their lives (Gwynn, 2004:118). Nind and Cochrane (2003:199) inform that the ubiquitous tendency to locate problems within learners rather than within schools still presents a formidable challenge for educators in practice.

The translation of the commitment to inclusion often resulted in the UK into something quite different from its original, rhetoric form (Dyson & Millward, 2000:142). The very practices and structures which are intended to realize the vision of inclusion became ambiguous, not only inadequate to the task but actually sustaining an approach which appears inimical to the vision itself. Moreover, this takes place within an external policy context which limits the freedom of action of managers and educators in the schools and which demands the pursuit of goals which are, if not opposed to the original vision, at least significantly different from it.

Policies which should drive the movement towards inclusion in the UK are contested as they are turned into practice they are only directives, articulating some necessarily generalized intent rather than a detailed prescription for action. The disjuncture between espoused policy of schools an the policies pursued nationally become all the more significant (Dyson & Millward, 2000:174)

5.5 SUMMARY

In this chapter only the most basic principles underpinning the right of learners in the USA and the UK was addressed. It is acknowledged that there are still numerous aspects that may influence inclusive education in these countries.

The rights of learners in the USA and the UK were discussed as embedded in various legal documents. Attention was paid to the legal framework and historical background of both countries as having an influence on educational systems. The respective educational systems, compulsory schooling and learners' rights to equality and quality education were conversed as factors influencing the fundamental rights of American and British learners in inclusive education.

Inclusion, as an educational movement, the identification process of learners' needs and diversity among learners were also communicated. The possibility of both countries' educational systems of including all learners was analyzed while notice was taken of the position of special schools in an inclusive frame. In close cooperation with the latter, barriers in the way of successful inclusive education, such as socio-economic barriers, negative attitudes, language and communicational barriers, unavailability of support services, inflexible curriculum, and uninvolved parents, similar to those found in South Africa (*cf* 3.8 & 4.4), were recognized.

Albeit inclusive education being held, at statutory level, to be the ultimate goal in both the USA and the UK, it became apparent from the discussion in this chapter that inclusion has not yet successfully materialized in reality in either of the two countries.

Elaborating on the literature review presented in the previous chapters, chapter 6 provides a summary and findings arrived at on the basis of the experiences of inclusion in South Africa, the USA and the UK. Recommendations, as guidelines in addressing the fundamental rights of all learners in South African education on the main aspects of the research, is also provided.

CHAPTER SIX

SUMMATION, FINDINGS AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter comprises of a summary of the previous chapters, followed by specific findings that have become clear from the research in order to establish whether the fundamental rights of all learners are addressed within an inclusive education system, focusing specifically on South Africa. Finally, recommendations are made, aimed at educating all learners in South Africa, while addressing their fundamental rights.

6.2 SUMMATION

In Chapter 1 the problem which instigated the research, was expounded. The objectives of the research were determined, the research method was demarcated and the chapter divisions were finalized. The research method, consisting of a literature review of primary and secondary legal and educational sources, was outlined. A comparative school law study was envisaged in which the fundamental rights of learners within an inclusive educational system in the context of South Africa, the United States of America (USA), and the United Kingdom (UK) were examined in order to establish whether inclusive education can successfully adhere to the fundamental rights of learners in practice.

Chapter 2 provided an international and South African legal framework for studying the fundamental rights of learners. Attention was given to the historical background regarding fundamental human rights and to international perspectives on the fundamental rights of learners in particular, by referring to relevant international conventions and declarations. This chapter furthermore made reference to the SA Constitution as the supreme law of the country, with specific mention of the various provisions of fundamental rights in its Bill of Rights.

Inclusive education within a South African legal framework was discussed in Chapter 3 by referring to the prominent education policies and White Papers aiming at providing for the fundamental rights of all learners within an inclusive framework. In order to comprehend the nature and extent of inclusion fully, concepts such as

mainstreaming, integration, exclusion and segregation were defined. Reference was also made to what an inclusive educational system should entail to give effect to learners' fundamental rights, such as their right to quality education and equal educational opportunities. The latter led to the recognition of learners' diverse educational needs and barriers within the system that hinder the movement to include all learners successfully.

Chapter 4 consisted of a discussion regarding the legal, theoretical and other expectations that the inclusion of all learners creates. This chapter included information on the possibility of including learners with giftedness, disabilities and special educational needs as well as other marginalized learners, while attention was focused on the barriers that continue to exclude many learners from quality education.

In an attempt to provide recommendations as guidelines in addressing the fundamental rights of all learners within inclusive education in South Africa, the legislative framework, fundamental rights of learners and inclusive educational provision in the USA and the UK were expounded in Chapter 5.

6.3 FINDINGS

6.3.1 Findings based on research objective 1: Studying literature in order to identify the fundamental rights of learners in South Africa against the background of an international perspective

The following notable findings regarding the fundamental rights of learners in South Africa against the background of an international perspective have been concluded:

- Within the ambit of international documents, State Parties are called upon to recognize, *inter alia,* the following fundamental rights of learners: the right to education (which must be compulsory, available, accessible and at least during the fundamental stages, free) directed at the full development of learners, the right to dignity and equality (equal opportunities, equal access to public schools, equal protection of the law, equal enjoyment of all rights and equal respect), the right to an adequate standard of living and the right not to be discriminated against (*cf.* 2.3).

- Children are viewed as vulnerable and in need of protection due to their general position in society arising from their inherent vulnerability or from specific groups having more pronounced needs (*cf.* 2.1 & 2.3.2). Notwithstanding their need for protection, children are also independent bearers of fundamental rights (*cf.* 2.1) which confer a status on learners that has practical implications for their relationships. As a consequence, the State, parents and educational officials are called to respect, promote and adhere to the rights of learners (*cf.* 2.2) by providing quality education, sufficient resources and support services (*cf.* 4.2.1).

- In order for a right to be a fundamental human right, it has to be explicitly or implicitly guaranteed by the constitution of a country (*cf.* 2.1).

- The SA Constitution (*cf.* 2.4), as the supreme authority (*cf.* 2.4.1.3), explicitly guarantees learners fundamental rights to, *inter alia,* equality (equal educational opportunities and equal access to schools; *cf.* 2.4.1.6.3), dignity (*cf.* 2.4.1.6.4), and education (basic quality education (*cf.* 2.4.1.6.10 & 3.5.1), which is not subject to progressive realization; *cf.* 4.2.1.1) in the language of the learners' choice (*cf.* 2.4.1.6.10.2). Free education is not guaranteed, although the exemption of paying school fees is provided for by the SA Schools Act (*cf.* 3.5.2) with practical complications (*cf.* 4.2.1.1).

- Section 36 of the SA Constitution (*cf.* 2.4.1.6.13), in line with section 29 of the UNDHR (*cf.* 2.3.1), provides for the limitations determined by law on the rights of learners for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society.

- The CRC (section 3; *cf.* 2.3.2) and the SA Constitution (section 28(2); *cf.* 2.4.1.6.9) provide explicitly for the best interests of learners as a primary or paramount consideration to be taken into consideration when addressing issues regarding children. Subsequently, the protection of the needs of learners must be balanced against concerns for their growth and independence, and respect for their rights as individuals (*cf.* 4.2.3).

- Although inclusive education is often regarded as referring only to the inclusion of learners with disabilities or other special educational needs, it became evident

that inclusive education in the context of South Afica (*cf.* 1.2 & 3.4.2) refers to the inclusion of all learners. The CRC (*cf.* 2.3.2) explicitly refers to learners who live under exceptionally difficult conditions (the vulnerable and disadvantaged) who need special consideration (*cf.* 4.3.5).

- Although reference was made to the pros and cons of inclusive education, it seems as if the case for inclusive education has been made within the framework of the fundamental rights of all learners at legislative or theoretical level in South Africa.

6.3.2 Findings based on research objective 2: Reviewing existing policies and legislation with reference to an inclusive education system in South Africa to determine consistency with the theory of such a system

Based on the review of the existing policies and legislation with reference to an inclusive education system in South Africa, the following points emerged on their consistency with theory:

- The successful execution of inclusive education requires a clear appreciation of the pertinent policies of a country (*cf.* 3.1).

- The various policies in South African education designate the first initiatives towards moving away from a dual, social and/or general education system. A unified educational system is proposed in order to be acquainted with and attend to diverse learning needs by identifying barriers to learning, as well as to development and procedures to overcome these barriers (*cf.* 3.7.2, 3.7.3, & 3.8) which hamper the inclusion all of learners as well as giving effect to their fundamental rights.

- Recommendations are made by legislature to combat socio-economic barriers (*cf.* 3.8.1), to do the best with limited financial means (*cf.* 3.8.1.1), to redistribute existing educational resources (*cf.* 3.8.1.2), to overcome negative attitudes towards including all learners in regular classes (*cf.* 3.8.2), to bridge language and communication barriers at schools (*cf.* 3.8.3), to adjust school environments to be safe havens for learners (*cf.* 3.8.4), and to adapt the curriculum to accommodate the diverse learner population in South Africa (*cf.* 3.8.5.5).

- In order to arrive at inclusive education, White Paper 6 (SA, 2001) has provided special schools with a new role as resource centres to assist neighbouring schools in accommodating all learners (*cf.* 3.8.5.1), while the establishment of full-service schools (*cf.* 3.8.5.2) and District-Based Support Teams (*cf.* 3.8.5.3) are envisaged to implement inclusive education successfully. Contrary to many beliefs, special schools will continue to exist in the unified educational system to educate learners with severe disabilities only.

- Several White Papers have acknowledged the importance of parental involvement in the education of their children (*cf.* 3.8.5.6) and the ongoing training of parents and educators to enable them to adapt to the concept of inclusion (*cf.* 3.8.5.7). Subsequently, various recommendations were made regarding parents as equal partners to education and providing them with more say in the governance of schools through membership on public School Governing Bodies, as well as on pre-service and in-service programmes for the training of educators in curriculum flexibility, as well as classroom and teaching method adaptations to address the needs of individual learners.

- From reviewing literature, it became apparent that South African policies and succeeding White Papers can present an opportunity for all learners to be sited in regular educational settings if, and only if, the commendations can be put into practice. Conversely, the definite realization of inclusive education will not be easy, as it will be a slow and ongoing process. It will be worth fighting for, instead of assuming that it will become a reality without hard work.

6.3.3 Findings based on research objective 3: Establishing what the expectations of inclusive education in South Africa are

The following notable findings regarding the expectations of inclusive education in the South African context have been made:

- Despite a legislative framework for inclusion being provided to redress education, to achieve greater equality and to move pro-actively towards the realization of equal opportunities in education, the real success thereof can only be evaluated by the degree to which it is feasible in practice and therefore by the benefit learners gain (*cf.* 4.1). The formulation of policies is only the first stage in meeting

the State's obligations in term of a constitution. In order to constitute its responsibilities, inclusion must be implemented successfully (*cf.* 4.2).

- The illusion may exist that, since the State is providing sufficient numbers of public schools in which millions of learners can be accommodated without fear of discrimination (equal access), the State is indeed fulfilling its constitutional responsibilities. The State is, conversely, required not only to provide equal access to schools, but rather to afford each learner to benefit equally from the education he receives (*cf.* 4.2.1).

- Education is promised, and thus expected, to be an indispensable means to appreciate and exercise fundamental rights, to develop the ability to make political and civil choices, to reach one's full potential and live a fulfiling life. As such, educating learners in preparation for their future plays an immense role (*cf.* 1.2, 2.4.1.6.10, 3.5 & 4.2.1).

- Free education is expected by many South Africans due to international consensus (*cf.* 2.3) and past promises, to an extent that is not legally provided for (*cf.* 3.5.2 & 4.2.1.1).

- Although inclusion is not explicitly required by law in South Africa (*cf.* 4.3), it is considered, at policy level, to be the most effective means of combating discriminatory attitudes, creating a welcoming society and achieving education for all. As such, inclusion creates expectations of social, emotional, behavioural, physical and academic inclusion from which all learners can benefit (*cf.* 3.4.3).

6.3.4 Findings based on research objective 4: Determining how the fundamental rights of learners are provided for by inclusive educational systems in the United States of America and the United Kingdom

Based on the literature review of how the fundamental rights of learners are provided for by inclusive educational systems in the USA and the UK, the following comparisons can be drawn:

- Similar to South Africa, the USA and the UK recognize that inclusion is the one best system to give effect to the rights of learners, since it is based on the principles of equality, human rights and social justice in line with principles of

democracy (*cf.* 5.2). As such, education cannot be reserved for some and denied to others (*cf.* 5.2.1).

- Both the USA and the UK agree that inclusion is much more than equal access to education, as it implies education unique to learners' individual needs (*cf.* 5.2).

- Contrary to SA, neither the USA nor the UK explicitly provides learners the right to education through a national constitution. Although education is mentioned by State Constitutions in the USA, education is not a fundamental right of learners entitling them to specific protection. Similarly, the right to education in the UK is not provided through a constitution, but is determined by *rule of law* and, as such, is not a substantive right provided with particular security (*cf.* 5.3.4).

- Despite the above, free public education is indeed regarded as a constitutional value and a state entitlement in the USA whose States, respectively, have a duty to provide this (*cf.* 5.4.1). Free, compulsory education is provided for learners in the UK through the Education Act of 1944 according to which LEAs have a duty to provide this (*cf.* 5.4.1).

- Contrary to the SA Constitution, which entitles learners to fundamental rights, the legal tradition in the USA is based on the requirement that a person be vested with legal capacities in order to be able to exercise his fundamental rights. Consequently, although a learner of minority age may be vested with the same fundamental rights as a person of majority age, the minor in the USA may not be bequeathed with the full capacity to exercise these rights. As a result, parents have to act on behalf of their minor children. The legal system of the UK, similarly, provides parents with the implicit right to make decisions on behalf of their children. The SA Constitution does not distinguish, as the legal systems of the USA and UK do, between learners able and learners unable to exercise their fundamental rights independently (*cf.* 2.4.1.6.1, 3.5, 4.2 & 5.4.6).

- Because of their similar backgrounds, the RSA and the USA provide constitutional protection against segregation and unfair discrimination on the basis of race (*cf.* 2.4.1.6.3 & 5.3.3.2). Both countries take affirmative action to integrate schools where *de jure* segregation still exists. As a result, both countries aim at the transition to a unitary, non-racial system of public education as the ultimate goal (*cf.* 3.4.2 & 5.3.1). Similarly to the latter, the UK also recognizes that

drastical reform of their educational system is necessary for inclusion to be successful (*cf.* 5.4).

- Although the US Constitution does not contain a limitation clause (*cf.* 5.2.2), similar to that of the SA Constitution (*cf.* 2.4.1.6.13), judicial rulings since 1975 have supported governmental authority to improve restraints on individual freedoms at schools in the interests of collective welfare.

- Parental choice, to choose the education setting for their children, is specifically provided for by the UDHRD (section 26(2); *cf.* 2.3.1). In line herewith, the RSA, the USA and the UK place importance on the choices made by and participation of parents in the education of their children (*cf.* 3.8.5.6, 4.4.6, & 5.4.6).

- Although inclusive education in the USA is mainly regarded as referring only to the inclusion of learners with disabilities or other special educational needs, the UK (*cf.* 5.3.5), similar to South Africa, regards inclusion to imply the inclusion of all learners, including the vulnerable and disadvantaged. As such, the UK aims at including all previously marginalized learners (*cf.* 4.3.5 & 5.3.5.3.3).

- For inclusive education to be flourishing, USA and UK educators are required to be committed to equality, to widening the participation of all learners and to adopting an inclusive ethos at schools (*cf.* 5.4.4). The active participation of learners is regarded as a prerequisite for inclusion in both countries as the mere physical presence of learners in regular classrooms is not enough (*cf.* 5.3.3.1).

- Although it became evident to both the USA and the UK that mainstreaming learners into regular, unchanged schools cannot work, it is obvious that inclusion is not yet a reality for a wide range of learners who receive education at regular schools in the USA, as learners do not receive equal support and are often treated as if they are the same. As a result, some Americans perceive inclusion as denying learners the right to special education which they can only receive at special schools (*cf.* 5.3.6). Equally, the educational system of the UK was found not to be ready or even prepared to adjust its practice efficiently to meet the needs of all learners in inclusive settings (*cf.* 5.3.1, 5.3.3 & 5.4.4).

- The USA and the UK place emphasis on quality education to enable learners to reach their full potential and to live successful lives (*cf.* 5.3.4.1). Although the

educational system of the USA strives at attaining appropriate and meaningful education, all learners in the USA are not receiving quality education. The educational system of the UK aims at providing efficient education that offers more enriching and rewarding educational experiences to all learners. In practice it is, conversely, evident that numerous learners are continuously being excluded from receiving quality education (*cf.* 5.3.1 & 5.3.5).

- Both the USA and the UK experience complexity in achieving inclusion because of the diverse range of their learners (*cf.* 5.3.5.2 & 5.3.5.3). Regular schools are confronted with dealing with learners using different home languages, having different cultural backgrounds, religious beliefs, emotional development and racial and ethnic origin, before even adding a wide range of intellectual abilities and disabilities (*cf.* 5.3.5.3.1, 5.3.5.3.2, 5.3.5.3 & 5.4).

- USA courts acknowledge that gifted learners have an entitlement to free public education that is appropriate to their needs, but avow that gifted learners do not have an entitlement to education specially adapted for their exceptional needs (*cf.* 5.3.5..3.1).

- Despite legislative measures in the USA and UK (*cf.* 5.2.2 & 5.2.3), the needs of learners with special educational needs are not met in USA schools as support services (*cf.* 5.4.5) are not provided for, while class sizes remain too large for their appropriate inclusion (*cf.* 5.4.7). Educationalists in the UK have equally been found to have done little, thus far, to tackle the dimensions of addressing the needs of learners with special educational needs (*cf.* 5.3.5.3.2 & 5.4.7).

- With regard to marginalized learners, it has been revealed that many learners, coming from minority ethnic and social class groups of society, are placed in special classes where they are deprived of realistic social interaction (*cf.* 5.3.5.3.2). The historical and contemporary maltreatment and marginalization of some learners in the USA therefore continue. Marginalized learners are, similarly, found to be repeatedly stigmatized, disadvantaged and discriminated against at UK schools (*cf.* 5.3.5.3.3).

- Similar to South Africa, both the USA and UK continue to experience financial constraints as the one major barrier preventing inclusive education (*cf.* 5.4.1).

Although funds are provided by the US government to supplement State funds for schools, inequality of per learner expenditure remains.

- The availability of efficient support services to lead learners to reach their full potential is regarded as of prominent importance to the USA and the UK, although it is recognized that such services are still highly variable and often do not guarantee quality education (*cf.* 5.3.4.1 & 5.4.5).

- The USA, as well as the UK, places emphasis on a culturally valued, broad and balanced curriculum for learners to accommodate their diverse needs (*cf.* 5.3.5.1) and to overcome all barriers to learning (*cf.* 5.4). It is considered the duty of educators to provide useful adaptations relevant to the needs of learners by individualizing instruction methods and strategies (*cf.* 5.4.7). The National Curriculum of the UK is criticized as being too fixed and prescriptive, thus rendering it inflexible (*cf.* 5.4.8).

- In both the USA and the UK, the diverse language needs among their learners prevail constituting barriers to learning on which general consensus has not yet been attained (*cf.* 5.4.3).

- Although school environments in the USA and the UK still need restructuring to provide equal access to all learners, it is not regarded as an obstacle that could not be overcome by educators with initiative (*cf.* 5.4.7).

- With regard to negative attitudes among educators, both countries believe that they are generated largely by feelings of incompetence among educators which can be changed positively when they gain experiences in working with different learners (*cf.* 5.4.2 & 5.4.7).

- Educators are placed under enormous pressure when faced with including all learners and collaborating with assistants and other support teams (*cf.* 5.3.6 & 5.4.5). To alleviate the problem, both the USA and the UK recognize that educators should be respected for the work they do and be subjected to continuous training (*cf.* 5.4.7).

- Although the concept of inclusive education was only formally introduced in SA in 2001 through White Paper 6 (SA, 2001; *cf.* 3.3.3 & 3.4), it has been alive in the

USA since the 1980s (*cf.* 5.1) and in the UK since 1997 (*cf.* 5.2.3). Little progress was made in both the USA and the UK while barriers within the educational system continue to hinder the implementation of inclusive education (*cf.* 5.3.1 & 5.3.5). Against this backdrop and the minimum progress made in SA (*cf.* 4.4) thus far, the conclusion could be drawn that inclusion is an idealistic dream. Other forms of educational provision need to be found to hold fast to the fundamental rights of learners.

6.3.5 Findings based on research objective 5: Ascertaining the feasibility of an inclusive educational system that addresses the fundamental rights of all learners in South Africa

From the research done, the following specific findings regarding the feasibility of an inclusive educational system that adheres to the fundamental rights of learners came to the fore:

- In order for an existing education system to move towards adhering to the fundamental rights of learners, various changes and reconstructions have to be made (*cf.* 3.4.3 & 4.3). A commitment to change can only be attained through endowing educators, parents and learners with a voice and a chance to be heard, to share responsibilities, accountability and ownership, and by allowing them to have maximum input in envisaged changes through shared decision-making processes (*cf.* 4.2).

- Whenever learners are not provided with equal educational opportunities to develop their unique potential to its fullest (*cf.* 1.2, 3.6 & 4.2.2) and are not treated with dignity (*cf.* 2.4.1.6.4), or do not receive quality education (*cf.* 3.5.1 & 4.2.1), their fundamental right to education and equal protection of the law is violated, which is definitely not in their best interests (*cf.* 2.4.1.6.9 & 4.2.3). The mere presence of all learners at the same school does not provide fulfilment of the fundamental right to education, since quality is as necessary as equality in education (*cf.* 4.2.1)

- Despite large amounts of funds being allocated to education (*cf.* 3.8.1 & 4.4.1), the fact that the State has to deal with the past inadequate distribution of educational resources (*cf.* 3.8.1.2 & 4.4.1.1) and with many instances of corruption, inexperienced public School Governing Bodies (*cf.* 4.4.3) and

inefficient management of school funds, free education will not become a reality in the near future for learners in South Africa (*cf.* 3.5.2 & 4.2.1.1).

- The inclusion of learners with disabilities is not a reality (*cf.* 4.3.2) in South Africa yet. Schools in general fail to demonstrate the necessary adaptability to include these learners (*cf.* 4.3.1), as building requirements are not met (*cf.* 4.4.4), educators are not trained to accommodate them (*cf.* 4.4.7) and necessary resources and support services are not available (*cf.* 4.3.2, 4.4.1.1 & 4.4.5).

- The inclusion of learners with giftedness has, up to date, been an idealistic dream, as their exceptional educational needs are not attended to at regular schools (*cf.* 3.3.3,1). Such learners are neglected and misused as assistants to help other learners (*cf.* 4.3.3).

- Including learners who experience barriers to learning and development, necessitates definite criteria in determining which learners should be accommodated at regular schools and which would better be accommodated at special schools (*cf.* 3.8.5.1, 3.8.5.2 & 4.4.5.1). The latter is important, to maximize the educational opportunity for learners to benefit from education and to minimize the possibility of including such learners at regular schools from which they may not gain any advantage (*cf.* 3.3.1.1 & 4.3.4).

- The expectation regarding the inclusion of the full range of marginalized learners in South Africa is, at present, only a theory. The education system still struggles to be available to these learners and to address their diverse educational needs (*cf.* 3.4.2, 4.3.1 & 4.3.5).

- The theoretical expectancies regarding successful inclusion in the sphere of education appear to cause, rather than to prevent, barriers to learning and development. Socio-economic factors cannot, and will not, meet the challenges that inclusion sets due to, mainly, a lack of sufficient resources (*cf.* 3.8.1.2 & 4.4.1). Negative attitudes among educators, parents and learners prevail, causing barriers to learning (*cf.* 3.8 & 4.4.2) while language and communication barriers remain unsolved (*cf.* 3.8.3 & 4.4.3). School buildings and environments are still not equally accessible or conducive to successful inclusive education (*cf.* 3.8.4 & 4.4.4), while inaccessible and scarce support services (*cf.* 3.8.5 & 4.4.5) continue

to hamper inclusion. The proposed OBE and RCSN curriculum apppears to be flexible enough to address learner diversity in practice (*cf.* 3.8.5.5 & 4.4.5.2).

- Due to several factors such as illiteracy, poverty and inexperience among parents and a lack of respect and cooperation between schools and parents, the absence of parental involvement is mounting (*cf.* 3.8.5.6 & 4.4.6). It has also transpired that educators, despite continuous training, remain uneducated, overstressed and unable to cope with the diverse needs of learners under pressurized circumstances such as oversized classes (*cf.* 3.8.5.7 & 4.4.7).

- Empowerment to the full participation of all has been over-promised (*cf.* 3.6 & 4.2.2). In practice, hierarchical chains of command exist which silence educators, parents and learners, and hamper the implementation of empowerment and participatory democracy (*cf.* 3.8.5.6, 3.8.5.7, 4.4.6 & 4.4.7).

- Inclusion in the South African context provides intricate challenges regarding the inclusion of its diverse learner population (*cf.* 3.3.3, 3.6.2, 4.2.2.1 & 4.3). Learners display a variety in their use of language (*cf.* 3.8.3 & 4.4.3), religion, learning style, intelligence level, developmental potential, historical experience, social class and colour, as well as many other characteristics resulting from their vastly different economic and cultural backgrounds (*cf.* 3.6.2 & 4.2.2.1). Apart from the challenges these aspects present for equality of educational provision, diversity also posits difficulty in creating healthy relationships and social security (*cf.* 3.6 & 4.2.2).

- Including all learners at regular schools may provide equal access to education (*cf.* 3.6.1), but not quality education or equal educational opportunities (*cf.* 3.5.1, 4.2.1, 4.2.2). Inclusion may remove the labelling and stigmatization of learners (*cf.* 3.3.3), but if learners' diverse needs are not met and they, subsequently, do not benefit from the education they receive, nothing is gained (*cf.* 3.3.1.1, 3.6.2, 4.2.1, 4.2.2.1 & 4.3).

- Equality does not imply sameness and equal treatment (*cf.* 2.4.1.6.3). It is impossible to regulate inclusive education without differentiation, as it is necessary to put learners in different categories according to their different needs, in order to provide them with different support so that each learner can benefit to fulfil his fullest potential (*cf.* 1.2, 3.3.3, 4.2.1.1 & 4.3).

- Although inclusion became a priority through White Paper 6 in 2001 (*cf.* 3.4), many schools have remained dysfunctional and are, as a consequence, providing education of a poor quality (*cf.* 3.5.1 & 4.2.1) which goes hand-in-hand with race, social class and geographic location therefore persistently reinforcing marginalization and exclusion (*cf.* 3.3 & 4.3.5). Teaching methods have lingered unchanged and ineffective in benefitting all learners (*cf.* 3.8.5.5, 3.8.5.7, 4.2.1, 4.4.5.2 & 4.4.7). Schools are overcrowded, poorly resourced and managed. Many learners still do not experience equal educational opportunities (*cf.* 4.2.2), as they are continuously hampered by the vicious circle of poverty, disease and hopelessness (*cf.* 4.3.5). Genuine respect for diversity among educators and learners is not a reality (*cf.* 3.6.2 & 4.2.2.1). Differential value judgments are still made and the dignity of everyone is not respected (*cf.* 3.8.2 & 4.4.2). As such, inclusion which focuses on celebrating diversity and dealing with differences, is not becoming a reality (*cf.* 3.3.3 & 4.3.1).

6.4 RECOMMENDATIONS

The following recommendations are made towards developing educational-juridical guidelines in an effort to ensure that the fundamental rights of learners are provided for within an inclusive education system in South Africa:

6.4.1 Training

This research started by identifying the heated debate on inclusion in South Africa because of the various perspectives held by people regarding the meaning of inclusion (*cf.* 1.5). Throughout the study ,the eminence of knowledge and the evident lack thereof were enlightened. It is, subsequently, recommended that ongoing quality training must be provided:

- In view of international documents and the SA Constitution, which emphasize the fundamental rights of learners, it is imperative that all role players in the education sphere gain sufficient knowledge with regard to the fundamental rights of learners. The latter is important, to prevent the infringement of learners' rights and to ensure that learners do not abuse their rights for personal gain. This could be achieved through quality pre-service and in-service training programmes for educators in Education Law.

- Public School Governing Bodies, principals and administration staff should be educated on the effective management of school funds in order to ensure that they are able to combat corruption and use all funds effectively in providing quality education for all learners.

- In order to enable educators to adhere to the fundamental rights of all learners simultaneously, educators need to be trained on an ongoing basis. In-service training should be provided on a more practical in-class basis where educators could see and experience for themselves how existing methods and techniques could be adapted effectively to address the individual educational needs of each learner.

6.4.2 Democratic participation

Fundamental rights include everyone. As such, everyone involved in education should take responsibility for upholding one another's fundamental rights and making it a daily reality in the lives of learners, including those at rural and township schools. Education officials need to incorporate the wishes and feelings of learners into decision-making by accepting the benefit of listening to them and by allowing them to participate and take responsibility for their own learning and be accountable for their own future.

6.4.3 Learner diversity

- Acknowledging the fundamental rights of learners, as embedded in the SA Constitution (SA, 1996a), requires a shift in focus from the inherent abilities or disabilities of learners to a focus on the external factors that continue to cause barriers to learning, development and participation. In line herewith, everyone should continue to resist exclusionary pressures of any nature in order to adhere to the fundamental right of learners to equality.

- Differences between and the accordance of dignity to learners must be respected. A learner's total situatedness should be taken into account, *i.e.* his individual circumstances, family conditions, cultural situation, background and previous experiences, when educating and developing a curriculum aimed at leading each learner to achieve his fullest potential.

- In order to accommodate all learners in education equally, honest self-examination by all role players is necessary in order to assist everyone to come to understand and acknowledge the personal biases that everyone so often holds. This could be attained through accommodating and working with different learners at regular schools, thereby experiencing them as unique individuals with equal worth. It must be remembered that it is an inherent characteristic of human beings to be subjective and skeptical about change and suspicious of people being different. These inherent characteristics are, conversely, open to question and could be changed. Accepting all learners and recognizing their equal worth are essential to respecting their fundamental rights.

6.4.4 Quality education

- Above all, quality education must be provided as it prepares learners for effective future employment and enables them to live a dignified quality life. Equal access to all schools must not be seen as synonymous with quality education. Quality education refers to education from which each learner can benefit optimally and which will guide each learner to achieve his fullest potential. In order to attain quality education, educators must know all learners thoroughly (which is only possible if class sizes are reduced), by identifying the root causes of barriers to education, development and participation and applying efficient remedies to remove such causes (for which meticulously qualified educators and sufficient

resources and support services are essential). Quality education also implies mother-tongue education, which is still far from being a reality in South Africa.

- Assistants should be made available in South Africa as a matter of urgency, which will help to decrease educator-learner ratios and support educators in addressing learner diversity, thereby ensuring that each learner could be led to achieve his fullest potential.

- More funds should be allocated and properly managed to ensure that educators receive the essential teaching material and devices needed by the South African learner to take optimal advantage of the education he receives.

6.4.5 The placement of learners in educational settings

- The best interest of the learner should prevail as of paramount importance when considering the placement of learners in educational settings, as learners are currently pushed into schools which are not inherently ready or equipped to accommodate them.

- In order to establish the educational placement which best serves a particular learner's educational needs, all the social, emotional, behavioural and academic needs of such a learner must be taken into consideration. At the moment, inclusion overemphasizes the learner's social needs.

- The view and experiences of learners should be taken into account. It is extremely important that a learner must be able to benefit from the education he receives. The voices of vulnerable learners with individual and unique needs, must be heard: decisions cannot continue to be made on their behalf.

- The absence of reliable statistical data on the best placement for learners from their own perspective creates an undesirable environment of speculation, confusion and often misinformation.

6.4.6 Inclusive education is a vision for the future

- Schools should not only prepare learners for life. They should represent life itself, since learners live now and are now in need of adequate support and real experiences to develop fully, they cannot live on promises of future adaptations,

support, opportunities, prospective benefits and ideals or dreams. In South Africa, learners have a constitutional right to basic education, a legal entitlement to immediate relief and special protection. As such, the State has a duty to provide basic education to each learner with immediate effect which cannot be constituted within inclusive settings, as the educational system is not, and will not in the near future be, ready or even prepared for it.

- The inclusive process, to adhere to the fundamental right of learners, is over-simplified by quick-fix solutions which are not practically feasible. This statement was, yet again, stressed in the news by reporting on learners leaving the Oprah Winfrey Academy for Girls due to the inability of the school to provide for cultural and linguistic differences among its learners (Prins, 2007:1). Inclusion must rather be proposed as a vision and, as such, a dream – not unattainable - which will *sine die* (without a definite date; definitely not within twenty years, as proposed by White Paper 6, SA 2001) be accomplished. In the meanwhile a more realistic, attainable mission and long and short term goals must be identified to work towards the vision. Too many young learners are falling by the wayside. In fact, so many remain at risk, that it might be said that society itself is at risk. The scope of the problem is enormous. Statistics and facts, as discussed in this dissertation, provide a reminder of the problems that confront the education system. Before South Africa can start dreaming about including learners into inclusive settings, it must first ensure that education is available to those learners who have never attended any school whatsoever.

- Within the South African perspective, such a mission could be to give effect to the fundamental rights of all learners with emphasis on the plight of exceptionally vulnerable learners, the previously disadvantaged and marginalized, by providing them with quality basic education in the best available educational setting. Short and long term goals could be to provide and manage school funds effectively to gradually improve school settings and gain more resources, services and material to make education of quality available to all learners through quality trained educators.

- The educational resources, material and devices, *inter alia,* are too scarce to be divided among schools. Extra resources, material and devices should first be attained before learners are reallocated to regular schools.

- The eminent role that educators play in the education of learners must not be under-estimated by others, or by educators themselves. If each educator starts to make changes for the better within the ambit of his own classroom today, there is hope for the future.

- Schools have to engage in recurrently restructuring processes to respond positively to all learners as unique individuals. Schools should keep growing, continue to make changes, learn from one another, keep sharing accounts of how different groups have addressed the challenge of bringing down barriers of involvement and what they have learned along the way, keep aiming at a just and fair educational system providing for all learners to achieve their full potential.

- In esponse to Venter's (2007:6; *cf.* 1.5) probing question as to whether South African schools are ready for inclusion (which is officially on its way to our schools), the answer is no.

6.5 POSSIBLE THEMES FOR FURTHER RESEARCH

The following themes are identified as in need of further research:

- In order to decide on the most favourable placement for learners according to their best interests, the experiences of learners themselves within an inclusive or in a special setting should be taken into consideration. The absence of such reliable first-hand statistical data on the best placement for learners creates an undesirable environment of speculation, confusion and often misinformation.

- Quantitative research should be done to test the perceptions of parents, as equal partners in the education of their children, concerning the placement to be regarded as in their children's best interests.

- Inclusion with the aim of reallocating learners with disabilities and learners with special educational needs has been overemphasized. Since inclusion also refers to the accommodation of gifted and a wide range of marginalized learners, further research on their successful accommodation needs to be done.

6.6 CONCLUDING REMARKS

A successful educational system in South Africa is vested in the clear demarcation of the fundamental human rights of all learners and how these rights can be given effect to in order for each learner to reach his fullest potential. Learners cannot just be accommodated in existing schools without the necessary aids, as this would only imply a repetition of mainstreaming, which did not prove to be successful in either South Africa, the USA or the UK.

After 37 years, inclusion is not yet a reality in the USA nor in the UK after 10 years. Short-term goals, set by White Paper 6 for South Africa in 2001, have not been realized up to date. Against this background, inclusive education will not be reached by the proposed date in 2021. Learners in and out of South African schools cannot wait for inclusion to materialize, they need quality education *now*.

The onus rests on all educational role players to educate themselves in the rights, diverse backgrounds and needs of all learners, in how to provide equal educational opportunities and respect to all learners, and to stay abreast of changes on the educational front.

"We should keep on trying to reach all learners.

Everything in us wants them to be safe and warm,

with us rather than isolated in a place we do not understand.

We keep trying because they all are our own, after all.

It has been said that there is nothing as strong

as the love for a child that we fear we will lose...

We keep them as strong as a foghorn in the mist,

a sound to keep them onto the bridge."

Miller (2006:18-19)

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