

The realisation of the right to inclusive education of children with mild and moderate intellectual disabilities in South Africa

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"Education is the most powerful weapon which you can use to change the world."

Nelson Mandela

ABSTRACT

Title: The realisation of the right to inclusive education of children with mild and moderate intellectual disabilities in South Africa

The right to education is an essential human right that must be afforded to all children. The right to education is governed by global, regional and national law.

Article 24 of the *CRPD* is the first binding provision that comprehensively recognises the right to education of children with disabilities. Article 24 provides that such education must be free from all forms of discrimination and implemented on the basis of equal opportunity. Inclusive education aims to educate children with disabilities in mainstream schools by eliminating the existing barriers that hinder their access to education and by providing reasonable accommodation to ensure that they can effectively participate with children without disabilities.

Section 29(1)(a) of the *Constitution* guarantees everyone a right to basic education. This right is guaranteed to children without disabilities and children with disabilities. The *Constitution* and the *SASA*, that governs the right to basic education, do not contain any provisions on the right to inclusive education of children with disabilities. *White Paper 6* was adopted in 2001 with the aim of implementing inclusive education in South Africa over a 20-year period. In the *WCFID* case it was held that the existing policy and practice that are in place to guide the realisation of the right to inclusive education of children with severe and profound intellectual disabilities infringe on their basic rights.

The purpose of this dissertation is to evaluate the South African legal position on the realisation of the right to inclusive education of children with mild and moderate intellectual disabilities against the global and regional international human rights standards to determine to what extent the South African standard complies with the international human rights standards.

Key terms: right to education; primary education; basic education; intellectual disability; mild and moderate intellectual disability; rights of persons with disabilities

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LIST OF ABBREVIATIONS

AAIDD	American Association on Intellectual and Developmental Disabilities
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADRY	African Disability Rights Yearbook
APA	American Psychiatric Association
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DSM	Diagnostic and Statistical Manual of Mental Disorders
ESR	Economic and Social Rights in South Africa
GG	Government Gazette
ID	Intellectual Disability
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISCED	UNESCO International Standard Classification of Education
IQ	Intelligence Quotient
MEC	Member of the Executive Council
NQHR	Netherlands Quarterly of Human Rights
PELJ	Potchefstroom Electronic Law Journal
SAJE	South African Journal of Education
SALJ	South African Law Journal
SAPL	South African Public Law
SASA	South African Schools Act 84 of 1996
UDHR	Universal Declaration of Human Rights

UNESCO	United Nations Educational, Scientific and Cultural Organisation
WHO	World Health Organization
WPRPD	White Paper on the Rights of Persons with Disabilities

1 Introduction

1.1 Introduction

The right to education is acknowledged as an inherent, fundamental human right that must be afforded to all children.¹ Education is an indispensable building block in the life of every child and must be "directed to the full development of the human personality and the sense of its dignity."²

The right to education is guaranteed in various, global, regional and national legal instruments. The *Convention on the Rights of the Child*³ places states parties under the obligation to recognise every child's right to education.⁴ Children with disabilities⁵ are also guaranteed a right to education under the provisions of the *CRC*.⁶ The right to inclusive education of children with disabilities is recognised in article 24 of the *Convention on the Rights of Persons with Disabilities*.⁷ This right is to be realised without any form of discrimination and on the basis of equal opportunity.⁸

The ratification of the *CRPD* by South Africa brought with it a "paradigm shift in the treatment of disabled people at a domestic level, including in the education field."⁹ However, the implementation of the *CRPD* and the significant change that it can

¹ Article 26(2) of the *Universal Declaration of Human Rights* (1948) (hereafter *UDHR*); also see Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966) (hereafter *ICESCR*); also see the preamble of the *World Declaration on Education for All* (1990); also see General Comment No 13 to the International Covenant on Economic, Social and Cultural Rights *The right to education (article 13 of the Covenant)* (1999) UN Doc E/C12/1999/10 (hereafter *General Comment 13*) para 1.

² Article 26(2) of the *UDHR*; also see Article 13(1) of the *ICESCR*; also see General Comment No 9 to the Convention on the Rights of the Child *The rights of children with disabilities* (2007) CRC/C/GC/9 (hereafter *General Comment 9*) para 62; also see General Comment No 5 to the International Covenant on Economic, Social and Cultural Rights *Persons with disabilities* (1994) UN Doc E/1995/22 (hereafter *General Comment 5*) para 35.

³ Article 28(1)(a) of the *Convention on the Rights of the Child* (1990) (hereafter *CRC*).

⁴ Article 28(1)(a) of the *CRC*.

⁵ For the purpose of this dissertation, children with disabilities are included in the scope of the phrase "persons with disabilities" as provided for in the *Convention on the Rights of Persons with Disabilities* (2006) (hereafter *CRPD*).

⁶ Article 2 of the *CRC* read with article 28 of the *CRC*; article 23 of the *CRC*.

⁷ *Convention on the Rights of Persons with Disabilities* (2006) (hereafter *CRPD*).

⁸ Article 24 of the *CRPD*.

⁹ Ngwena 2012 *ADRY* 139; South Africa signed the *CRPD* and its Optional Protocol on 30 March 2007 and ratified both instruments on 30 November 2007.

bring for children with disabilities have not yet been achieved to their full potential.¹⁰ The implementation of the obligations under the *CRPD* has been rather irresolute in South Africa, but some attempts has been made to establish an enabling legal and policy framework for the realisation of the right to inclusive education.¹¹

The *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC)¹² case, decided by the High Court in 2010, is a leading example of an instance where the South African government was found to have failed to promote a system of inclusive education for children with intellectual disabilities.¹³ The applicant in the *WCFID* case challenged the fact that the amounts of the financial subsidies provided by the state per head for purposes of education of children with severe and profound ID were far less than the amount provided for children with mild and moderate ID and for children without ID.¹⁴ The High Court found that the government had infringed the rights to education, equality, human, dignity, protection from neglect and degradation of these children.¹⁵ Although the case concerned children with severe and profound ID, many of the Court's statements are relevant to children with mild and moderate disabilities and are therefore of importance in the context of the present study.

The issues that were raised in the *WCFID* case were not isolated. The provision of basic education of children with ID in South Africa is a major predicament.¹⁶ Children with ID face a number of barriers to education, which include budgetary restrictions, a lack of skilled educators, an inadequate curriculum that fails to meet the educational needs of these children and an overall exclusion from the mainstream schooling system.¹⁷ All of these factors can possibly be related to the inadequate

¹⁰ Chataika et al 2012 *Disability & Society* 386.

¹¹ Ngwena 2012 *ADRY* 140-141.

¹² *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) (hereafter *WCFID* case).

¹³ Hereafter ID.

¹⁴ *WCFID* case para 4.

¹⁵ *WCFID* case para 52.

¹⁶ Wood *et al* "Access to Education for Children with Severe to Profound Intellectual Disability in South Africa" 136.

¹⁷ Wood *et al* "Access to Education for Children with Severe to Profound Intellectual Disability in South Africa" 136; also see Murungi 2011 *ESR Review* 10; also see Donohue and Bornman 2014 *SAJE* 2.

legislative and policy framework on inclusive education in South Africa. It can therefore be said that children with ID in South Africa currently appear to be deprived of their right to quality basic education in an inclusive environment on an equal basis with all other learners.

1.1.1 Problem statement and research question

The international human rights standards prescribe that children with mild and moderate ID must be educated at a level that is in accordance with their general mental abilities and enhances their day-to-day adaptive functioning.¹⁸ Children with mild and moderate ID must also be allowed to be educated in an inclusive system that accommodates their individual needs and does not discriminate against them.¹⁹ The *CRPD* provides the global standard on the right to inclusive education, whilst the *Disability Rights Protocol*, although it is not yet in force, provides the regional standard on inclusive education.

The South African policy framework on inclusive education is set out in *White Paper 6*.²⁰ The *White Paper 6* policy was adopted as a result of a need for change in the provision of education to a diverse spectrum of learners with different learning needs.²¹ *White Paper 6* describes inclusive education with reference to the understanding that all children have certain learning needs that must be accepted and respected. The fact that all children can learn if they are given the necessary support must also be acknowledged in the understanding of what inclusive education entails.²² *White Paper 6* was released in 2001 and it was estimated that the full realisation thereof would take place within 20 years.²³ The reality, however, with the 20-year period coming to an end, is that major concerns exist with regard to the successful implementation of the policy.²⁴

¹⁸ Article 24(1) of the *CRPD*.

¹⁹ Article 24(1) of the *CRPD*.

²⁰ Department of Education *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (hereafter *White Paper 6*).

²¹ *White Paper 6* 12.

²² *White Paper 6* 16; also see Murungi 2015 *PELJ* 3171.

²³ *White Paper 6* 45.

²⁴ Donohue and Bornman 2014 *SAJE* 6-8, 9.

In South Africa, children with ID are still discriminated against on a daily basis. The Committee on the Rights of Persons with Disabilities, the body of independent experts supervising implementation of the Convention, in their Concluding Observations on the initial state report of South Africa in 2018,²⁵ identified that major gaps exist in the realisation of the right to inclusive education in South Africa. The South African approach to inclusive education falls short of the envisaged global standard and the existing legislative framework fails "to give full effect to the right to inclusive education for all children" with ID.²⁶

The *status quo* of the realisation of inclusive education in South Africa is summarised by Wood *et al*, who state that:

...very little of the policy's vision has been realised, and education for disabled children in South Africa is in acute crisis.²⁷

This dissertation will analyse the South African legislative and policy framework on the right to inclusive education of children with mild and moderate ID against the international human rights standards. In this analysis the gaps that exist in the South African position will be identified and critically discussed to determine to what extent the South African position complies with the international standards.

The aims and objectives of this dissertation are to:

- provide the reader with a thorough understanding of what mild and moderate ID entails;
- critically discuss the international human rights standards on the right to inclusive education and identify specific elements of the right that are specifically relevant to children with mild & moderate ID;

²⁵ Committee on the Rights of Persons with Disabilities *Concluding Observations on the initial report of South Africa* (2018) CRPD/C/ZAF/CO/1 (hereafter *Concluding Observations*);

²⁶ *Concluding Observations* para 12.

²⁷ Wood *et al* "Access to Education for Children with Severe to Profound Intellectual Disability in South Africa" 136; also see Khumalo and Fish Hodgson "The Right to Basic Education" 112.

- critically discuss the South African legislative and policy framework on the right to inclusive education and identify the gaps that exist in the framework when compared to the international standards;
- determine to what extent the South African position on the right to inclusive education of children with mild and moderate ID complies with the international standards.

1.1.2 Overview of contents

In answering the research question, Chapter 2 of this dissertation will firstly provide an overview of ID, the diagnostic criteria and the mild and moderate levels of severity of ID. Chapter 3 discusses the right to education as it appears in the global and regional legal instruments. Chapter 4 will provide an analysis of the right to inclusive education at global and regional level. Chapter 5 sets out the South African position on the right to basic education and the interpretation of inclusive education. Finally, the South African position will be critically discussed in the light of the international standard.

1.1.3 Research method

This study is a desktop study of relevant primary and secondary sources. The primary sources that are used includes global and regional legal instruments and materials of international law (such as *ICESCR*, *CRC*, *CRPD*), national legislation, policies and case law (such as the South African Schools Act, *White Paper 6* and the *WCFID* judgement). Reference is also made to secondary sources that includes books, journal articles and appropriate electronic resources.

1.2 The concept of intellectual disability

Persons with disabilities are described by the *CRPD* as:

...those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.²⁸

For the purpose of this dissertation, ID will be interpreted as follows:

[Any] significant limitations both in intellectual functioning and in adaptive behaviour as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.²⁹

According to the American Psychiatric Association, ID can be divided into four categories according to different levels of severity, i.e. mild, moderate, severe and profound.³⁰ These levels of severity are determined by the child's functional abilities and not solely on the basis of an intelligence quotient.³¹

This dissertation will focus on the right to inclusive education of children with mild and moderate ID only. This focus will determine the extent of inclusion in the education system of children who require low-intensive and moderate support. The support needs of children with severe and profound ID are more complex and therefore fall beyond the scope of this dissertation.

1.3 The concept of the right to education

The right to education is provided for in several binding global and regional legal instruments. This dissertation will analyse the nature and content of the right to education as it appears in the *ICESCR*, the *CRC*, the *African Charter on Human and People's Rights*³² and the *African Charter on the Rights and Welfare of the Child*.³³

²⁸ Article 1 of the *CRPD*.

²⁹ The AAIDD Ad Hoc Committee on Terminology and Classification *Intellectual Disability: Definition, Classification, and Systems of Support 5* (hereafter *AAIDD Definition Manual*); also see Schalock *et al* 2007 *Intellectual and Developmental Disabilities* 118; also see American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (hereafter *DSM-5*) 33.

³⁰ *DSM-5* 33.

³¹ Hereafter IQ score.

³² Article 17(1) of the African Charter on Human and Peoples' Rights (1981) (hereafter *Banjul Charter*).

³³ *African Charter on the Rights and Welfare of the Child* (1990) (hereafter *ACRWC*).

The right to education in South Africa is laid down in section 29 of the *Constitution of the Republic of South Africa*³⁴ and "governed" by the *South African Schools Act*.³⁵

The different legal instruments recognise the right to education in different forms. The *ICESCR*³⁶ and the *CRC* make reference to primary and secondary education whilst the *ACRWC* and section 29(1)(a) of the *Constitution* refer to basic education.³⁷ UNESCO's *ISCED* of 2011 provides the recognised definitions of the different levels of education and makes a distinction between *inter alia* primary education, lower secondary education and upper secondary education. Primary education is described as a period of 6 years, which commences between the ages of 5 and 7 years.³⁸ Lower secondary education follows the period of primary education and is usually completed within a period of 3 years or at the time that the child reaches the approximate age of 13 years.³⁹ The final stage of secondary education, which is referred to as upper secondary education, follows the completion of the period of lower secondary education. Upper secondary education is also completed over a period of three years, at the time that the child reaches the approximate age of 18 years.⁴⁰

Section 29(1)(a) of the *Constitution* recognises a right to basic education.⁴¹ The period of compulsory schooling in South Africa is the equivalent of primary and lower secondary education under international law. Section 3(1) of the *SASA* states that the period of compulsory schooling starts at the beginning of the year during which a child reaches the age of 7 years or starts to attend school in grade 1. The period

³⁴ *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*).

³⁵ *South African Schools Act* 84 of 1996 (hereafter *SASA*).

³⁶ Article 13(2)(a) of the *ICESCR*.

³⁷ The *ACRWC* uses the term basic education, however, as the equivalent of primary education, as it uses the terms basic, secondary, and higher education .

³⁸ *ISCED* paras 30-32.

³⁹ *ISCED* paras 33-37.

⁴⁰ *ISCED* paras 38-42.

⁴¹ Section 29(1)(a) of the *Constitution*; also see Cheadle and Davis *South African Constitutional Law: The Bill of Rights* 24; for the purpose of this dissertation "... adult basic education" under section 29(1)(a) of the *Constitution* will not be referred to, as the focus here is on the child's right to education.

of basic education terminates at the end of the year that the child reaches the age of 15 years or completes grade 9 in school, whichever event occurs first.⁴²

The period of compulsory schooling is used as a means to align primary and secondary education with basic education. This is useful in the South African context due to the lack of an accepted definition or interpretation of what basic education exactly is. The applicability of this interpretation is complicated for the right to basic education of children with disabilities in South Africa because a period of compulsory education has not yet been established for them. The focus of this dissertation is not on the period of compulsory schooling, but on the general theme of realising the right to inclusive education of children with mild and moderate ID.

1.4 The concept of the right to inclusive education

Inclusive education is an approach to education that accommodates the individual needs of every learner as far as possible within the mainstream education system.⁴³ A system of inclusive education "must not exclude individuals from it nor discriminate against individuals."⁴⁴

Article 24 of the *CRPD* recognises the right to inclusive education of children with disabilities. The provisions of article 24 acknowledge that the right to primary and secondary inclusive education must be realised without discrimination, based on the principle of equal opportunity in the general education setting.⁴⁵

The *CRPD* states that inclusive education must be implemented in mainstream schools to ensure that children with disabilities develop to their fullest potential and

⁴² Section 3(1) of the *SASA*; also see *Governing Body of the Juma Masjid Primary School and Others v Essay* 2011 8 BCLR 761 (CC) (hereafter *Juma Masjid* case) para 38; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 3 BCLR 177 (CC) paras 45-47; *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA) para 37.

⁴³ Murungi 2015 *PELJ* 3166.

⁴⁴ Murungi 2015 *PELJ* 3166; the *World Report on Disability* describes inclusive education as an education system where "children with disabilities must be educated in regular classrooms with age-appropriate peers" *World Report on Disability* 209.

⁴⁵ Article 24 of the *CRPD*.

to enable them to participate in society.⁴⁶ The *CRPD* focusses not only on the inclusion of learners in the classroom, but also on components such as the content of education, the duty to provide individualised support to and reasonable accommodation of learners with disabilities, and the preservation of a standard of equality for all learners in the mainstream education system.⁴⁷ Article 24 of the *CRPD* sets the global standard on the right to inclusive education of children with disabilities.

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa*⁴⁸ provides the regional standard on the right to inclusive education of children with disabilities on the African continent.⁴⁹ The provisions that are contained in article 16 of the *Disability Rights Protocol* are similar to those of article 24 of the *CRPD*. The *Disability Rights Protocol* was adopted on 29 January 2018 but has not yet entered into force.⁵⁰ The content of the *Disability Rights Protocol* is therefore not binding on any states party yet.

⁴⁶ The wording of article 24(1)(a) of the *CRPD* is similar to that of article 26(2) of the *UDHR* and article 13(1) of the *ICESCR*; article 24(1)(b)-(c), (3) of the *CRPD*.

⁴⁷ Murungi 2015 *PELJ* 3170.

⁴⁸ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* (2018) (hereafter *Disability Rights Protocol*).

⁴⁹ Article 16 of the *Disability Rights Protocol*.

⁵⁰ Article 38(1) of the *Disability Rights Protocol* states that the protocol will enter into force 30 days after the 15th ratification is obtained.

2 An overview of intellectual disability

2.1 Introduction

ID is recognised as a neurodevelopmental disorder that limits the intellectual functioning and adaptive behaviour of a person. These limitations are usually diagnosed during childhood and are present in the conceptual, social and practical domains.⁵¹ Children with ID are more than often excluded from society and forced to grow and learn in segregated environments due to these limitations. Children with ID are perceived by society as different, unequal and disabled.⁵²

Brown and Stoffel perfectly describe children with ID in a manner that society often fails to recognise:

Intellectual disability may be a life-long disorder and relatively static, or it may respond to circumstances or intervention... Many individuals with intellectual disabilities enjoy a life rich with social relationships, productive employment, and participation in the community.⁵³

In the *WCFID* case it was evident that the state was of the opinion that children with severe and profound ID were uneducable and that it would be wasteful to incur expenses and allocate resources to meet the educational needs of this group of children.⁵⁴ The question therefore arises whether children with ID are in fact uneducable and whether the intensity of their support needs may justify their exclusion from the mainstream education system.

The purpose of this chapter is to provide an outline of ID and to ultimately establish whether children who are diagnosed with mild and moderate ID have the ability to participate in an inclusive education environment with their abled peers. This first part of this chapter will explore the definition of ID. Thereafter, the diagnostic criteria of ID will be analysed to establish how the children are diagnosed with the

⁵¹ Barlow and Durand *Abnormal Psychology* 530; also see Brown and Stoffel *Occupational Therapy in Mental Health* 111; Moeschler and Shevell 2014 *Pediatrics* 904.

⁵² Barlow and Durand *Abnormal Psychology* 530; also see Brown and Stoffel *Occupational Therapy in Mental Health* 112.

⁵³ Brown and Stoffel *Occupational Therapy in Mental Health* 112.

⁵⁴ *WCFID* case para 17.

disorder. The third part of this chapter focusses on the classification of mild and moderate levels of ID and whether children with mild and moderate ID would be able to benefit from learning in an inclusive education system.

2.2 The nature of intellectual disability

ID is a type of neurodevelopmental disorder that manifests during childhood and is characterised by significantly below-average intellectual and adaptive functioning.⁵⁵

Barlow and Durand recognise that ID is characterised by:

...deficits in general mental abilities, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. The deficits result in impairments of adaptive functioning, such that the individual fails to meet standards of personal independence and social responsibility in one or more aspects of daily life, including ... academic or occupational functioning ...⁵⁶

Crouch and Ahlers explain that:

ID involves the impairment of general mental abilities having an impact on the functioning in three domains, which determines how the child copes with activities of daily life.⁵⁷

ID is one of the most frequently diagnosed forms of disability in childhood, which impacts the child's abilities in the conceptual,⁵⁸ social⁵⁹ and practical domains.⁶⁰

Brown and Stoffel note that the diagnosis of ID must be evaluated with "clinical and standardised assessments" of the child's intelligence.⁶¹

⁵⁵ Barlow and Durand *Abnormal Psychology* 530; also see *DSM-5* 31.

⁵⁶ Barlow and Durand *Abnormal Psychology* 530.

⁵⁷ Crouch and Ahlers *Occupational Therapy in Psychiatry and Mental Health* 304.

⁵⁸ The conceptual domain includes abilities such as reading, language, mathematics, writing, reasoning, memory and knowledge; Crouch and Ahlers *Occupational Therapy in Psychiatry and Mental Health* 304; also see *DSM-5* 37.

⁵⁹ The social domain includes abilities such as empathy, interpersonal communication skills, social judgement, making and sustaining friendships; Crouch and Ahlers *Occupational Therapy in Psychiatry and Mental Health* 304; also see *DSM-5* 37.

⁶⁰ The practical domain includes abilities such as self-management in the personal and school work context, recreation, money management and job responsibility; also see Crouch and Ahlers *Occupational Therapy in Psychiatry and Mental Health* 304; *DSM-5* 37; Brown and Stoffel *Occupational Therapy in Mental Health* 111.

⁶¹ Brown and Stoffel *Occupational Therapy in Mental Health* 111.

ID is formally identified by reference to three criteria that must be met before a child can be diagnosed with ID.⁶² The first criterion is identified through deficits in the child's intellectual functioning.⁶³ The second criterion is identified by deficits in the child's adaptive functioning and the third criterion recognises that deficits must start to exist during the child's developmental phase.⁶⁴ Once a diagnosis of ID has been made, the disorder is classified in accordance with the severity thereof. The classes of the disorder include mild, moderate, severe and profound levels of severity.⁶⁵

2.3 Diagnostic criteria of intellectual disability

As stated above, in order for a child to be diagnosed with ID deficits in the child's intellectual functioning and adaptive functioning must be identified during the child's developmental phase.

2.3.1 Deficits in the child's intellectual functioning

The first criterion that must be present is deficits identified in the child's intellectual functioning. These intellectual functions include abilities such as problem solving, reasoning, abstract thinking, planning, academic learning and learning from experience.⁶⁶ These deficits are identified through the use of standardised and individualised psychometric tests.⁶⁷

⁶² *DSM-5* 33.

⁶³ *DSM-5* 33.

⁶⁴ *DSM-5* 33; also see Barlow and Durand *Abnormal Psychology* 532.

⁶⁵ *DSM-5* 33; it has to be noted that the *AAIDD* has a different classification of ID and classifies the levels of ID as intermittent, limited, extensive and pervasive; Ofuani *The viability of supported decision-making* 58.

⁶⁶ *DSM-5* 33, 37; also see Barlow and Durand *Abnormal Psychology* 532.

⁶⁷ *DSM-5* 33; also see Barlow and Durand *Abnormal Psychology* 532; Brown and Stoffel *Occupational Therapy in Mental Health* 112; Brue and Wilmhurst *Essentials of Intellectual Disability* 31; it has to be noted that prior to the adoption of the *DSM-5* standard, intellectual intelligence was determined on the basis of the child's IQ score, to which an IQ cut off was attached. The author of this dissertation recognises that the use of IQ as a sole criterion in indicating the existence of ID has been subjected to critique. This notion will not be investigated for the purpose of this study; Arias *et al* 2013 *International Journal of Clinical and Health Psychology* 160; Ofuani *The viability of supported decision-making* 67-70; Moeschler and Shevell 2014 *Pediatrics* 904.

A diagnosis of ID requires that the child must show levels of intellectual functioning that are significantly below average.⁶⁸ A cut-off standard of an approximate IQ score of 70 has been set to differentiate between children with ID and those without ID,⁶⁹ but the IQ score is merely an estimation of the child's conceptual functioning and it is insufficient to reflect the child's ability to reason in real-life circumstances and the ability to mastery practical tasks.⁷⁰ It is therefore essential that clinical judgement is also utilised when interpreting the child's IQ results.⁷¹

2.3.2 Deficits in the child's adaptive functioning

The second criterion is the existence of deficits in the child's adaptive functioning. This criterion refers to the child's ability to adapt in and navigate through society. *DSM-5* indicates that these deficits must result in the child not being personally independent and socially responsible when compared to children without ID who are of the same age.⁷²

Barlow and Durand state that it is important not to diagnose with ID children who can function well in society but who do poorly on an IQ test.⁷³ *DSM-5* affirms that the child's adaptive functioning is further influenced by external factors such as:

...intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders...⁷⁴

This criterion is met when the child shows signs of sufficient impairments in either the conceptual domain, the social domain or the practical domain.⁷⁵ Sufficient impairment means that the child will need ongoing support that will support him or her in order to perform adequately in a specific life setting, such as a school.⁷⁶ In

⁶⁸ Barlow and Durand *Abnormal Psychology* 532.

⁶⁹ Barlow and Durand *Abnormal Psychology* 532; also see Brown and Stoffel *Occupational Therapy in Mental Health* 111-112.

⁷⁰ *DSM-5* 37; also see Moeschler and Shevell 2014 *Pediatrics* 904; McKenzie *et al* 2016 *Current Developmental Disorders Reports* 104, 105.

⁷¹ *DSM-5* 37; also see Arias *et al* 2013 *International Journal of Clinical and Health Psychology* 160.

⁷² *DSM-5* 33.

⁷³ Barlow and Durand *Abnormal Psychology* 532.

⁷⁴ *DSM-5* 37.

⁷⁵ *DSM-5* 37.

⁷⁶ *DSM-5* 38.

order for a child to be diagnosed with ID, the impairments in the child's adaptive functioning must be related to the impairments in the child's intellectual functioning.⁷⁷

2.3.3 Onset of intellectual and adaptive deficits during the child's developmental period

The final diagnostic criterion of ID requires that the aforementioned two deficiencies must emerge during the child's developmental period, which comes to an end when the child reaches the age of 18 years.⁷⁸ Barlow and Durand state that a cut-off age is adopted because the deficiencies emerge during the time that the child's brain develops and this distinguished ID from other developmental disorders that are diagnosed during adulthood.⁷⁹

2.4 Mild and moderate levels of intellectual disability

The *DSM-5* identifies four levels of ID that are classified according to the level of severity of the ID. The mild and moderate levels are recognised as the levels in which the intensity of support that is required are least serious. These levels are associated with a certain IQ and several specifiers are also identified in each of the three domains to assist with the differentiation of the levels of ID.⁸⁰ The specifiers that relate to the child's ability to perform in each of the three domains are used so as to indicate the degree of assistance that the child may require due to the deficits in his or her adaptive functioning.⁸¹

2.4.1 Mild intellectual disability

Mild ID is mostly recognised in children who exhibit an IQ score of between 50 and 70.⁸² *DSM-5* states that in most instances mild levels of ID are identifiable only at

⁷⁷ *DSM-5* 38.

⁷⁸ *DSM-5* 38; also see Barlow and Durand *Abnormal Psychology* 532.

⁷⁹ Barlow and Durand *Abnormal Psychology* 532; also see *DSM-5* 38.

⁸⁰ *DSM-5* 34-35; also see Brue and Wilmhurst *Essentials of Intellectual Disability* 32-33.

⁸¹ Brue and Wilmhurst *Essentials of Intellectual Disability* 32.

⁸² Barlow and Durand *Abnormal Psychology* 532; also see Kok *et al* 2016 *Clinical Child Psychology and Psychiatry* 157.

the time that the child starts to attend school, when learning difficulties are identified.⁸³ Children who are diagnosed with mild ID require the lowest intensity of support in their daily activities.⁸⁴

In the conceptual domain, children with mild ID who are of school-going age experience difficulties in acquiring essential academic skills such as writing, reading, arithmetic, and telling the time. These children need support in several academic areas to enable them to meet the age-related expectations.⁸⁵

When children with mild ID are compared to children without ID, it has been found that these children are more immature in their social interactions, which include their communication, conversation and language abilities. Other age-dependant impairments that children with ID may have include the inability to control their emotions and to behave in an age-appropriate manner.⁸⁶

Children with mild ID in most instances have the age-appropriate ability to take care of themselves. However, the need still exists to support these children with more complex daily activities. When compared to children without ID, children with mild ID have the same recreational abilities.⁸⁷

2.4.2 Moderate intellectual disability

Children with moderate ID are identified by their having an IQ score that ranges from 35 and 55.⁸⁸ They require greater support in the execution of their daily activities than children with mild ID, but less than children with severe and profound ID.⁸⁹

⁸³ *DSM-5* 38.

⁸⁴ Brue and Wilmhurst *Essentials of Intellectual Disability* 36.

⁸⁵ *DSM-5* 34; also see Brue and Wilmhurst *Essentials of Intellectual Disability* 32.

⁸⁶ *DSM-5* 34; also see Brue and Wilmhurst *Essentials of Intellectual Disability* 32.

⁸⁷ *DSM-5* 34; also see Brue and Wilmhurst *Essentials of Intellectual Disability* 32.

⁸⁸ Barlow and Durand *Abnormal Psychology* 532; also see Kok *et al* 2016 *Clinical Child Psychology and Psychiatry* 157.

⁸⁹ Brue and Wilmhurst *Essentials of Intellectual Disability* 36.

The conceptual skills of children with moderate ID "lag markedly behind those of their peers" during the developmental period.⁹⁰ Children of school-going age show slow progress in abilities such as writing, reading and mathematics.⁹¹ Increased support is needed to develop the academic abilities of these children.⁹² Further ongoing assistance is required to assist children with moderate ID to complete their daily activities, and in some instances, the responsibility to complete these activities may be taken over by another person who will do so on behalf of the child.⁹³

In the social domain, children with moderate ID also show marked differences in their abilities to communicate and socialise, when compared to children without ID.⁹⁴ Children with moderate ID further require significant support to communicate and socialise at the same level as children who do not have ID.⁹⁵

Children with moderate ID have the ability to successfully complete self-care activities such as eating, personal hygiene and dressing, but a lengthy period of time and intensive teaching and practising is needed for the children to master these skills.⁹⁶

2.5 Conclusion

ID is recognised as a type of neurodevelopmental disorder that is diagnosed during childhood. It is associated with deficiencies in the child's adaptive functioning and with intellectual impairments which affect the conceptual, social and practical domains of the child's being.

Children that are diagnosed with mild ID initially display the same characteristics as children without ID, and the impairments are often recognised only when the child starts to attend school. These children function and learn at a slower pace than their peers and they often require more support and attention to ensure that their abilities

⁹⁰ *DSM-5* 35.

⁹¹ *DSM-5* 35.

⁹² Brue and Wilmhurst *Essentials of Intellectual Disability* 33.

⁹³ *DSM-5* 35; also see Brue and Wilmhurst *Essentials of Intellectual Disability* 33.

⁹⁴ *DSM-5* 35.

⁹⁵ *DSM-5* 35.

⁹⁶ *DSM-5* 35; also see Brue and Wilmhurst *Essentials of Intellectual Disability* 33.

are developed at an age-appropriate level. On the other hand, children with moderate ID require more time and attention, and in some instances permanent support, to acquire and master basic skills to the best of their abilities. Children with moderate ID are not able to function at the same level as children without ID who are of the same age, but an increased intensity of ongoing support in the classroom can enhance their academic abilities.

From the above discussion it is evident that children ID have the ability to be educated. Children with mild and moderate ID requires support in the classroom, but the intensity of the support that they require does not justify their exclusion from the mainstream education system.

3 Overview of the right to education

3.1 Introduction

...the importance of education is not just practical: a well-educated, enlightened and active mind, able to wonder freely and widely, is one of the joys and rewards of human existence.⁹⁷

The right to education is universally accepted as a fundamental human right that all persons, including children must be afforded.⁹⁸ The realisation of the right to education provides children with the opportunity to transcend social and economic hardship and it enables them to participate fully in society.⁹⁹ The right to education therefore functions as an empowerment right that can be utilised to realise other human rights.¹⁰⁰

The right to education for all persons was notably established in the provisions of articles 13 and 14 of the *ICESCR* and the child's right to education is established in the provisions of articles 28 and 29 of the *CRC*.¹⁰¹ At regional level, the right to education is laid down in article 17(1) of the *Banjul Charter*. The right to education of the African child is recognised in article 11 of the *ACRWC*.

This chapter will provide an overview of the nature of the right to education on global and regional level. The right to education as it appears in the *ICESCR*, *CRC*, *Banjul Charter* and the *ACRWC* will be explored. The nature of the right to education, the principle of progressive realisation, and the applicability of the latter to the right will be discussed in this chapter. The content of this chapter will only contain limited aspects of the right to education to give the reader background on the basic principles of the right that sets the foundation of the right to inclusive education.

⁹⁷ *General Comment 13* para 1.

⁹⁸ Article 26 of the *UDHR*; also see Article 13 of the *ICESCR*; *General Comment 13* para 1; Veriava "Realising the right to basic education in South Africa" 81.

⁹⁹ *General Comment 13* para 1; also see Beiter *The Protection of the Right to Education by International Law* 1; Djoyou Kamga "The Right to a Basic Education" 517.

¹⁰⁰ *General Comment 13* para 1; also see Beiter *The Protection of the Right to Education by International Law* 1; Djoyou Kamga "The Right to a Basic Education" 517; Quennerstedt 2009 *Journal of Human Rights* 162.

¹⁰¹ Johnson 2010 *International Journal of Children's Rights* 187

3.2 The global standard

3.2.1 Background

The universal right to education is recognised under article 26 of the *UDHR*. The *UDHR* proclaims that education must be directed towards the "full development of the human personality."¹⁰² This phrase is regarded as expressing the main aim of the right to education.¹⁰³ The right to education is also laid down in the provisions of articles 13 and 14 of the *ICESCR* and articles 28 and 29 of the *CRC*.

3.2.2 ICESCR

Articles 13 and 14 of the *ICESCR* establish the legal framework for the global right to education.¹⁰⁴ Article 13 provides the right to education and it provides the obligations that are placed on states parties to implement this right.¹⁰⁵ Article 14 of the *ICESCR* contains specific obligations of states parties with regard to the realisation of the right to primary education.¹⁰⁶

Article 13(1) of the *ICESCR* confirms the main objective of the right to education by adding that education should enable an individual to effectively participate in society.¹⁰⁷ Article 13(2)(a) places an obligation on states parties to ensure that primary education be compulsory and free to all children.¹⁰⁸ Article 14 places an obligation on states parties to establish and adopt a detailed plan for the realisation of this right within a limited period of time.¹⁰⁹ *General Comment 11* was adopted by the Committee on Economic, Social and Cultural Rights, the independent expert body supervising implementation of the Covenant, to guide states parties in the

¹⁰² Article 26(2) of the *UDHR*.

¹⁰³ *General Comment 13* para 4; also see Beiter *The Protection of the Right to Education by International Law* 470.

¹⁰⁴ Beiter *The Protection of the Right to Education by International Law* 86; also see Waddington and Toepke *Moving Towards Inclusive Education* 14.

¹⁰⁵ Article 13 of the *ICESCR*; also see Beiter *The Protection of the Right to Education by International Law* 68.

¹⁰⁶ Article 14 of the *ICESCR*; also see Beiter *The Protection of the Right to Education by International Law* 68.

¹⁰⁷ Article 13(1) of the *ICESCR*.

¹⁰⁸ Article 13(2)(a) of the *ICESCR*.

¹⁰⁹ Article 14 of the *ICESCR*.

fulfilment of their obligations under article 14.¹¹⁰ The *CESCR* emphasises that the right to compulsory primary education cannot be infringed upon and that no child may be denied this right. The Committee further adds that compulsory primary education must "be adequate in quality" and "relevant to the child".¹¹¹

The provisions of articles 13 and 14 of the *ICESCR* do not explicitly guarantee children with disabilities a right to education. However, in 1994 the *CESCR* adopted *General Comment 5* focusing on the economic, social and cultural rights of persons with disabilities, in which it is acknowledged that children with disabilities have entitlements under the provisions of the *ICESCR* as the Covenant applies to "all members of society".¹¹²

The provisions of articles 13 and 14 of the *ICESCR* were subsequently incorporated into by the *CRC* and adapted to specifically apply to children.

3.2.3 *CRC*

The *CRC* specifically promotes the right to education of children, which is governed by articles 28 and 29. Article 28 identifies the content of the right to education and confirms several obligations to which states parties are bound in the implementation of this right.¹¹³ Article 29 provides an expanded version of the main aims of education. Article 29(1) includes the statement that education must be directed to develop the mental abilities of children.¹¹⁴ Verheyde *et al* indicate that the two articles on the right to education must be read in conjunction with one another in order to appreciate that:

...the right to receive education does not only guarantee access to education but also implies that the aims of education must be achieved.¹¹⁵

¹¹⁰ General Comment No 11 to the International Covenant on Economic, Social and Cultural Rights *Plans of action for primary education* (1999) UN Doc E/C12/1999/4 (hereafter *General Comment 11*).

¹¹¹ *General Comment 11* para 6.

¹¹² *General Comment 5* para 5.

¹¹³ Article 28 of the *CRC*; also see Verheyde *et al Article 28 the Right to Education 1*.

¹¹⁴ Articles 29(1)(a) and (d) of the *CRC*; also see Verheyde *et al Article 28 the Right to Education 1*.

¹¹⁵ Verheyde *et al Article 28 the Right to Education 1*.

Article 28(1)(a) of the *CRC* recognises every child's right to primary education.¹¹⁶ As in the provisions of the *ICESCR*, article 28(1)(a) reiterates that states parties must make primary education compulsory and available free to all children.¹¹⁷ States parties must make secondary education available and accessible to all children and adopt measures that aim to provide free secondary education to all children.¹¹⁸

The right to education under the provisions of the *CRC* must be realised on the basis of equal opportunity.¹¹⁹ Article 28(1) of the *CRC* strongly emphasises the need for equality in education.¹²⁰ An obligation is placed on states parties to ensure that the right to education is realised at all levels through the principle of non-discrimination and on the basis of equal opportunity.¹²¹ The *CRC* is the first international legal instrument that explicitly prohibits discrimination on the basis of disability in the exercise of Convention rights, including the right to education.¹²² This prohibition of discrimination in education applies to "access to education, the standard and quality of the education and the conditions under which it is given."¹²³ This clearly indicates that no child, including that with disabilities, may be denied access to "educational opportunities" and that all children must be afforded the opportunity of education on a footing equal to that of their peers.¹²⁴ Verheyde *et al*/suggest that the principle of equality implies that special attention must be given to the right to education of children with disabilities to accommodate their specific needs.¹²⁵ They further note that policies must be in place to assure that the education that is provided to these children can be adapted to suit their specific educational needs and that these children are included in the mainstream education system.¹²⁶

¹¹⁶ Article 28(1)(a) of the *CRC*.

¹¹⁷ Article 28(1)(a) of the *CRC*.

¹¹⁸ Article 29(1)(b) of the *CRC*.

¹¹⁹ Article 28(1) read with article 4 of the *CRC*.

¹²⁰ Article 28(1) of the *CRC*; also see Verheyde *et al* *Article 28 the Right to Education* 36.

¹²¹ Article 28(1) of the *CRC*.

¹²² Article 2(1) of the *CRC*; also see Byrne 2013 *Disability & Society* 235.

¹²³ Verheyde *et al* *Article 28 the Right to Education* 3.

¹²⁴ General Comment No 1 to the Convention on the Rights of the Child *The Aims of Education* (2001) UN Doc CRC/GC/2001/1 para 10 (hereafter *General Comment 1*).

¹²⁵ Verheyde *et al* *Article 28 the Right to Education* 40.

¹²⁶ Verheyde *et al* *Article 28 the Right to Education* 40; article 23(3) of the *CRC* guarantees the right to education of children with disabilities, which will be further discussed later in this study.

3.3 The regional standard

3.3.1 Banjul Charter

Article 17(1) of the *Banjul Charter* contains a short formulation on the right to education which merely places an obligation on states parties to ensure that "every individual shall have the right to education".¹²⁷ The limited scope of the right to education provided in the *Banjul Charter* has been extended through the adoption of soft law as well as Concluding Observations and Recommendations made by the ACHPR.¹²⁸

In 2016 the ACHPR adopted *Resolution 364* to urge states parties to ensure that children in Africa are guaranteed the "full scope of the right to education".¹²⁹ *Resolution 364* extends the provisions of article 17(1), stipulating that primary education must be free and compulsory and that the right to primary education must be made available to all children without any form of distinction.¹³⁰

3.3.2 ACRWC

The *ACRWC* recognises the right to education for children on the African continent.¹³¹ The right to education is provided for in article 11 of the *ACRWC*. The wording of article 11 is similar to the provisions on the right to education as they appear in articles 28 and 29 of the *CRC*.

Article 11(1) guarantees every child the right to education. Article 11(2) formulates the aims of education in an African context and reiterates, to some extent, the aims

¹²⁷ Article 17(1) of the *Banjul Charter*; also see Beiter *The Protection of the Right to Education by International Law* 213; Beiter 2018 *Georgetown Journal of International Law* 18.

¹²⁸ Beiter 2018 *Georgetown Journal of International Law* 19; the soft law instrument that will be discussed in this dissertation is the *African Commission on Human and Peoples' Rights, Resolution on the Right to Education in Africa* ACHPR/Res346 (LVIII) (2016) (hereafter *Resolution 364*).

¹²⁹ *Resolution 364* para i.

¹³⁰ *Resolution 364* para i.

¹³¹ Beiter *The Protection of the Right to Education by International Law* 216.

of education as per the provisions of the *CRC*.¹³² It is specifically added that education must promote African morals, values and cultures and promote and celebrate African unity and solidarity.¹³³

Article 11(3) regulates the social aspects of the right to education.¹³⁴ States parties accept the obligation to take appropriate steps to progressively achieve the full realisation of the right to education.¹³⁵ States parties are obliged to provide free and compulsory primary education to all children, while free and accessible secondary education must be progressively realised.¹³⁶ The realisation of the right to free and compulsory primary education must be immediately realised by states parties.¹³⁷ The quality of education that is provided to all children on the African continent must also conform to the minimum standards that are set by the individual states party.¹³⁸

3.4 The four essential features of the right to education

In *General Comment 13*, the CESCR identified four essential features that education in all its forms must exhibit at all levels.¹³⁹ The main aim of education is given substantive content through these four features.¹⁴⁰ Veriava recognises them as "the most useful foundations from which to begin to interpret" the right to education.¹⁴¹ They are the availability, accessibility, acceptability and adaptability of education.¹⁴²

The "availability" of education refers to the obligation of states parties to ensure that the means through which education is made available and facilitated are sufficient.¹⁴³ This includes the provision of a sufficient number of schools,

¹³² The wording and content of articles 11(2)(b)-(c), (e)-(f) and (h) of the *ACRWC* were adapted to apply specifically to African history and the current circumstances that children in Africa face; also see Beiter *The Protection of the Right to Education by International Law* 217-218.

¹³³ Articles 11(2)(d) and (g) of the *ACRWC*.

¹³⁴ Beiter *The Protection of the Right to Education by International Law* 218.

¹³⁵ Article 11(3) read with article 1(1) of the *ACRWC*.

¹³⁶ Articles 11(3)(a)-(b) of the *ACRWC*.

¹³⁷ Beiter *The Protection of the Right to Education by International Law* 218.

¹³⁸ Beiter *The Protection of the Right to Education by International Law* 218.

¹³⁹ *General Comment 13* para 6.

¹⁴⁰ *General Comment 13* para 6.

¹⁴¹ Veriava "Realising the right to basic education in South Africa" 86.

¹⁴² *General Comment 13* para 6.

¹⁴³ *General Comment 13* para 6(a).

infrastructure, facilities and other school related facilities.¹⁴⁴ The global and regional legal instruments explicitly mention this obligation of states parties to ensure the availability of education. At a bare minimum, primary education must be free to and compulsory for all children.¹⁴⁵ The availability of secondary education must be progressively realised, and it must be made progressively free to all children.¹⁴⁶

Secondly, schools and other means through which education is provided must be made "accessible" by states parties to everyone within their borders.¹⁴⁷ The CESCR provides that the accessibility of education may not be hindered by any form of discrimination and education must also be physically and economically accessible.¹⁴⁸ Beiter correctly records that:

...the criterion of the 'accessibility' of education signifies that obstacles impeding admission to education must be eliminated.¹⁴⁹

The CESCR indicates that education, at all levels, must be presented to children in a manner that is "acceptable."¹⁵⁰ According to the CESCR, the acceptability of the form and substance through which education is presented is established through the relevance, cultural appropriateness and quality thereof.¹⁵¹

¹⁴⁴ *General Comment 13* para 6(a); also see Kalantray, Getgen and Koh 2009 *Cornell Law Faculty Working Papers* 29; Waddington and Toepke *Moving Towards Inclusive Education* 14.

¹⁴⁵ Article 13(2)(a) of the *ICESCR*; also see article 28(1)(a) of the *CRC*; article 11(3)(a) of the *ACRWC*.

¹⁴⁶ Articles 13(2)(b) of the *ICESCR*; also see article 28(1)(b) of the *CRC*; also see article 11(3)(b) of the *ACRWC*; Johnson 2010 *International Journal of Children's Rights* 187; Kalantray, Getgen and Koh 2009 *Cornell Law Faculty Working Papers* 29; Beiter *The Protection of the Right to Education by International Law* 99, 476.

¹⁴⁷ Kalantray, Getgen and Koh 2009 *Cornell Law Faculty Working Papers* 30.

¹⁴⁸ *General Comment 13* para 6(b); also see Beiter *The Protection of the Right to Education by International Law* 487; Waddington and Toepke *Moving Towards Inclusive Education* 14.

¹⁴⁹ Beiter *The Protection of the Right to Education by International* 487.

¹⁵⁰ *General Comment 13* para 6(c).

¹⁵¹ *General Comment 13* para 6(c); also see Kalantray, Getgen and Koh 2009 *Cornell Law Faculty Working Papers* 33; Waddington and Toepke *Moving Towards Inclusive Education* 14; Beiter *The Protection of the Right to Education by International Law* 492.

Finally, the CESCR addresses the necessity for education to be "adaptable".¹⁵² Kalantry, Getgen and Koh are of the opinion that education must be "flexible and respond to the needs of students within their diverse social settings."¹⁵³

Waddington and Toepke correctly state that:

Education is not a 'one-size-fits-all' concept, and because education is a right, it must adapt to the learning needs of students – not the reverse.¹⁵⁴

States parties must ensure that education is presented in a manner that allows for it to be adapted to ensure that the main aim of the right to education is achieved.¹⁵⁵ Education must further be adaptable to ensure that the diverse educational needs of every individual child are met.¹⁵⁶ This essential feature clearly indicates that the provision of education must be adapted to accommodate the needs of children with disabilities.¹⁵⁷

3.5 Progressive realisation

The effective implementation and full realisation of socio-economic rights, under which the right to education is classified, is at most levels subjected to progressive realisation.¹⁵⁸ The principle of progressive realisation is entrenched in article 2(1) of the *ICESCR*.¹⁵⁹

The notion of progressive realisation implies that achieving the full realisation of socio-economic rights is generally not an immediate obligation. It is instead one that requires states parties to take expeditious and effective steps, within the resources

¹⁵² *General Comment* 13 para 6(d).

¹⁵³ Kalantry, Getgen and Koh 2009 *Cornell Law Faculty Working Papers* 34.

¹⁵⁴ Waddington and Toepke *Moving Towards Inclusive Education* 14-15.

¹⁵⁵ Kalantry, Getgen and Koh 2009 *Cornell Law Faculty Working Papers* 34.

¹⁵⁶ Beiter *The Protection of the Right to Education by International Law* 507.

¹⁵⁷ Beiter *The Protection of the Right to Education by International Law* 507; General Comment No 4 to the Convention on the Rights of Persons with Disabilities *The Right to Inclusive Education* (2016) UN Doc CRPD/C/GC/4 (hereafter *General Comment 4*) provides commentary on the essential features of the right to inclusive education that will be discussed in Chapter 4 of this dissertation.

¹⁵⁸ Chenwi 2013 *De Jure* 742; also see Beeckman 2004 *The International Journal of Children's Rights* 76; Waddington and Toepke *Moving Towards Inclusive Education* 15.

¹⁵⁹ Article 2(1) of the *ICESCR*.

available to them, towards the full realisation of these rights.¹⁶⁰ The fact that the achievement of these rights is subjected to progressive realisation should not be construed as easing the responsibilities of states parties to fulfil these rights. Any deliberate obstruction or retrogressive measure in realising these rights will have to be strictly justified.¹⁶¹

The principle of progressive realisation and the true purpose thereof are summarised by Chenwi, who notes that:

Progressive realisation thus goes beyond achieving the minimum essential levels of a right; and beyond ensuring access to goods and services to improvements in access over time.¹⁶²

General Comment 13 gives states parties guidance on the progressive realisation of the right to education. The *CESCR* affirms that the application of the term progressive realisation must not be interpreted as depriving states parties of the obligation to fully realise the content of the right to education, but instead as a specific obligation to continuously work towards the full realisation of the right.¹⁶³

The *CESCR* makes further mention that:

Progressive introduction of free education means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary education.¹⁶⁴

The *CESCR* elaborates on the principle of progressive realisation and the applicability thereof to the rights of children with disabilities.¹⁶⁵ The *CESCR* states that:

The obligation in the case is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This means that additional

¹⁶⁰ General Comment No 3 to the International Covenant on Economic, Social and Cultural Rights *The Nature of States Parties' obligations (article 2, para 1 of the Covenant)* (1990) UN Doc E/1999/23 (hereafter *General Comment 3*) para 9; also see Chenwi 2013 *De Jure* 744; Beeckman 2004 *The International Journal of Children's Rights* 76; De Beco 2010 *Human Rights & International Legal Discourse* 276.

¹⁶¹ *General Comment 3* para 9; also see Chenwi 2013 *De Jure* 744; Waddington and Toepke *Moving Towards Inclusive Education* 17-18.

¹⁶² Chenwi 2013 *De Jure* 744.

¹⁶³ *General Comment 13* para 44.

¹⁶⁴ *General Comment 13* para 14; also see Chenwi 2013 *De Jure* 744.

¹⁶⁵ *General Comment 5* para 9.

resources will need to be made available and that a wide range of specially tailored measures will be required.¹⁶⁶

States parties have several immediate obligations in implementing the right to education. Firstly, they must ensure that all children can at least enjoy a minimum essential level of education.¹⁶⁷ The right to free and compulsory primary education must be immediately realised by states parties.¹⁶⁸ All forms of discrimination which hinder the enjoyment of the right to education must immediately be eliminated by states parties.¹⁶⁹ States parties also have an immediate duty to take steps to allocate the maximum available resources to achieve the progressive realisation of the right to education.¹⁷⁰ Finally, there is an immediate obligation of states parties not to take retrogressive steps in realising the right to education.¹⁷¹ Waddington and Toepke appropriately argue that the combination of the progressive and immediate obligations in realising the right to education of all children creates a binding obligation on states parties to work towards the full implementation of the right to education.¹⁷²

The *ICESCR*, the *CRC* and the *ACRWC* place an explicit obligation on states parties to progressively realise the full extent of the right to education, whilst this obligation is read into the provisions of the *Banjul Charter*.¹⁷³ States parties therefore have no immediate obligation to realise the full extent of the right. While free and compulsory primary education must be provided immediately to all, states parties are for the rest expected to work expeditiously and effectively towards ensuring that

¹⁶⁶ *General Comment 5* para 9.

¹⁶⁷ *General Comment 3* para 10 refers to this as the minimum core; also see Waddington and Toepke *Moving Towards Inclusive Education* 16.

¹⁶⁸ *General Comment 13* para 15; "However, States which cannot immediately implement this, have to adopt an action plan within two years and specify the number of years needed for implementation of free compulsory primary education." Waddington and Toepke *Moving Towards Inclusive Education* 19.

¹⁶⁹ Waddington and Toepke *Moving Towards Inclusive Education* 19; also see *General Comment 13* para 10.

¹⁷⁰ Broderick and Quinlivan "The right to education" 297.

¹⁷¹ *General Comment 13* para 43; also see Waddington and Toepke *Moving Towards Inclusive Education* 19; Broderick and Quinlivan "The right to education" 296.

¹⁷² Waddington and Toepke *Moving Towards Inclusive Education* 19-20.

¹⁷³ Chenwi 2013 *De Jure* 746-747.

education beyond primary education is made progressively available, accessible, acceptable, and adaptable.

In addition to the progressive obligations of states parties, certain aspects of the right to education are thus immediately realisable. One of these is access to education without active discrimination. Measures against static discrimination may contain immediate aspects, but overall are usually progressive in nature. Equal access to education for children with disabilities on the same footing as enjoyed by children without disabilities may potentially be considered an instance where immediate positive measures are required.

3.6 Conclusion

The right to education is a fundamental human right that is guaranteed to all children through several global and regional legal instruments. The importance of the right to education is recognised in the main aim of this right, which states that education must be directed towards the full development of the human personality and towards ensuring that individuals can participate effectively in society.

The various global and regional legal instruments undoubtedly place an obligation on states parties to ensure that every child has the right to free and compulsory primary education. States parties must further progressively ensure that secondary education is free and accessible to all children. The legal instruments further instruct states parties to ensure that the main aim of education, which is adapted in accordance with the background and setting of each individual legal instrument, is applied and respected in the implementation of the right to education.

The education that is presented by states parties, regardless of the level of education, must be structured in accordance with the four essential elements that have been identified by the *CESCR*. Primary and secondary education must at all times be available, accessible, acceptable and adaptable. States parties must ensure that these four elements are applied throughout the provision of education.

The full extent of the right to education is subjected to the principle of progressive realisation but certain elements thereof are subject to immediate realisation. This means that states parties do not have an immediate obligation to realise the full extent of the right to education, but instead must work as expeditiously and effectively as possible towards the full realisation of the right to education. States parties must at a minimum immediately ensure the provision of free and compulsory primary education to all children, without any form of discrimination that would prohibit the enjoyment of this right. States parties must also refrain from deliberately obstructing progressive realisation of the right to education. The principle of progressive realisation is not limited to the right to education of abled children, but it has been extended to ensure that the right to education of children with disabilities is realised to the same extent. Equality here may potentially require immediate positive measures to ensure enjoyment of the right to education by persons with ID on an equal footing with those without ID. The right to education, as it appears in the global and regional legal instruments, is afforded to all children and children with disabilities are not excluded from the nature and scope thereof.

4 The right to inclusive education in international human rights law

4.1 Introduction

The right to education is most frequently denied to children with disabilities.¹⁷⁴ Historically, children with disabilities were either excluded from the education system, educated in segregated special schools, or subjected to integration and mainstreaming.¹⁷⁵

Exclusion occurs when children with disability are directly or indirectly denied or prevented from accessing education.¹⁷⁶ Segregation refers to the instance where children with disabilities are educated in separate environments, often referred to as special schools, that are designed and used to specifically cater for the educational needs that are caused by their impairments.¹⁷⁷ Integration refers to the process where children with disabilities are placed in mainstream institutions in the belief that they are able to adjust to the standard requirements of the school.¹⁷⁸ Mainstreaming refers to an approach that adapts existing systems to enable a wide variety a persons to participate in it.¹⁷⁹ These methods of education are different from inclusive education which, according to Waddington and Toepke:

...does not just allow diverse students to be in a classroom with their peers. Instead, an inclusive education welcomes and accommodates all students, knowing that each student has different talents, needs, abilities, and ways of learning.¹⁸⁰

The *CRPD* adapted the human rights standards on the right to education to specifically protect the rights of children with disabilities. Article 24 of the *CRPD* is provides extensive provisions on the right to inclusive education of children with

¹⁷⁴ Combrinck "The Hidden Ones" 302, 304.

¹⁷⁵ Swart and Pettipher "A Framework for Understanding Inclusion" 5, 7-8; also see Combrinck "The Hidden Ones" 304.

¹⁷⁶ *General Comment 4* para 11;

¹⁷⁷ *General Comment 4* para 4; also see In1School Moving Towards Inclusive Education 22.

¹⁷⁸ *General Comment 4* para 4; also see Waddington and Toepke *Moving Towards Inclusive Education* 56.

¹⁷⁹ White Paper on the Rights of Persons with Disabilities in GG 39792 of 9 March 2016 (hereafter *WPRPD*) 45-46.

¹⁸⁰ Waddington and Toepke *Moving Towards Inclusive Education* 56.

disabilities.¹⁸¹ The *Disability Rights Protocol* follows the example of the *CRPD* and specifically protects the rights of children with disabilities, including the right to inclusive education, on the African continent. The *Disability Rights Protocol* will enter into force, however, only once it has been ratified by at least 15 African states.¹⁸²

The purpose of this chapter is to provide an overview of the nature of the right to inclusive education as it is entrenched in or derived from the provisions of the *ICESCR*, the *CRC*, the *CRPD*, the *ACRWC* and the *Disability Rights Protocol*. The provisions of article 24 of the *CRPD*, as the binding global standard on the right to inclusive education, will be discussed in detail. This discussion will reflect on the specific nature of the right to inclusive education, the obligations of states parties to realise this right, the applicability of the principle of progressive realisation, reasonable accommodation as an element of the right to inclusive education, the four essential features of the right to inclusive education, and the obligation of states parties to adopt legislative and policy frameworks to realise the right to inclusive education.

4.2 The meaning of inclusive education

In 1994 the Salamanca Conference addressed the right to inclusive education and explored the need for policy shifts to advance the objectives of education as a human right and to adopt an inclusive education framework.¹⁸³ According to Chataika *et al* the *Salamanca Statement* adopted by the Conference played an essential role in "positioning inclusive education as the most effective way of ensuring the educational rights of disabled people."¹⁸⁴ The Salamanca Statement

¹⁸¹ De Beco 2018 *International Journal of Law in Context* 399; see also Byrne 2013 *Disability & Society* 239; also see Broderick 2014 *The Irish Yearbook of International Law* 26; In1School *Moving Towards Inclusive Education* 45.

¹⁸² Article 38 of the *Disability Rights Protocol*; also see Centre for Human Rights University of Pretoria 2018 <https://www.chr.up.ac.za/dru-news/482-press-statement-centre-for-human-rights-calls-on-african-states-to-ratify-newly-adopted-african-disability-rights-treaty>.

¹⁸³ UNESCO *The Salamanca Statement and Framework for Action on Special Needs Education* (hereafter *Salamanca Statement*) 6, 11-12; the *Salamanca Statement* was the first international human rights document to explicitly mention the right to inclusive education for all children; also see Swart and Pettipher "A Framework for Understanding Inclusion" 8; Waddington and Toepke *Moving Towards Inclusive Education* 26.

¹⁸⁴ Chataika *et al* 2010 *Disability & Society* 387.

proposes the adoption of an inclusive education system which ensures that mainstream schools:

...accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions ... recognise and respond to the diverse needs of their students, accommodating both different styles and rates of learning and ensuring quality education to all through appropriate curricula, organisational arrangements, teaching strategies, resource use and partnerships with their communities. There should be a continuum of support and services to match the continuum of special needs encountered in every school.¹⁸⁵

Swart and Pettipher further recognise that:

Inclusive education shifts the focus from the learners having to adjust to 'fit into' the systems to the schools transforming themselves to be capable of accommodating and addressing the diverse needs of all learners so that each individual learner receives a learning experience that 'fits'.¹⁸⁶

The above description of inclusive education is supported by Combrinck, who notes that:

The basic principles of inclusive education entail that all children have a right to attend their local community school – this does not depend on the characteristics of the child or the preferences of the teacher. The system should be changed to fit the child, not vice versa.¹⁸⁷

Inclusion is generally recognised as a term to describe a system that eliminates barriers and adapts in accordance with the needs of all its members to ensure access, active participation and success to all.¹⁸⁸ Inclusive education is an approach to education that aims to accommodate the educational needs of all children in one system by eliminating the barriers preventing access. Inclusive education further aims to create an educational environment that is free from any form of discrimination and is based on the principle of equal participation.¹⁸⁹

¹⁸⁵ *Salamanca Statement* 6, 11-12; also see Swart and Pettipher "A Framework for Understanding Inclusion" 8.

¹⁸⁶ Swart and Pettipher "A Framework for Understanding Inclusion" 9.

¹⁸⁷ Combrinck "The Hidden Ones: Children with Disabilities in Africa and the Right to Education" 305.

¹⁸⁸ *General Comment 4* para 11; also see Swart and Pettipher "A Framework for Understanding Inclusion" 4.

¹⁸⁹ Article 2 of the *CRPD*; also see *World Report on Disability 2009*; also see Murungi 2015 *PELJ* 3168.

4.3 The global standard

4.3.1 ICESCR

The provisions of the *ICESCR* do not specifically recognise a right to inclusive education.¹⁹⁰ Articles 13 and 14 govern the obligation of states parties to ensure that all children, including children with disabilities, enjoy the right to education. Article 2(2) of the *ICESCR* further places an obligation on states parties to ensure that the rights envisaged in the provisions of the *ICESCR* must be exercised without any form of discrimination.¹⁹¹

With the adoption of *General Comment 5*, the CESCR explicitly included children with disabilities in the scope of application of the right to education.¹⁹² *General Comment 5* further recognises that "children with disabilities can best be educated within the general education system."¹⁹³ It is therefore implicit that the CESCR intended to possibly give recognition to the advancement of the equal education. In this way, the general obligations placed on states parties with regard to the realisation of the right to education is adapted by the CESCR to ensure that children with disabilities can access equal educational opportunities in an inclusive educational environment.¹⁹⁴

4.3.2 CRC

The *CRC* does not guarantee the right to inclusive education, but it provides that the right to education that must be afforded to all children on the basis of equality and non-discrimination.¹⁹⁵ The In1School authors argue that the content of article

¹⁹⁰ Byrne 2013 *Disability & Society* 235; also see De Beco 2018 *International Journal of Law in Context* 398; Kayess and French 2008 *Human Rights Law Review* 12; Kanter, Damiani and Ferri 2014 *Journal of International Special Needs Education* 22.

¹⁹¹ Article 2(2) of the *ICESCR*; it is noted that article 2(2) does not make reference to disability as a prohibited ground of discrimination, disability is inferred in the category of "other status" *General Comment 5* para 5.

¹⁹² *General Comment 5* para 5.

¹⁹³ *General Comment 5* para 35.

¹⁹⁴ *General Comment 5* para 35.

¹⁹⁵ De Beco 2018 *International Journal of Law in Context* 398; also see Byrne 2013 *Disability & Society* 235; Kayess and French 2008 *Human Rights Law Review* 12; In1School *Moving Towards Inclusive Education* 21.

29 of the *CRC* promotes the adoption of inclusive education.¹⁹⁶ They based this argument is on their belief that "education should support children of all different abilities – aiming to help each child reach their fullest potential."¹⁹⁷

In addition to the prohibition of discrimination against children with disabilities included in the *CRC*, article 23 of this instrument addresses the rights of children with disabilities.¹⁹⁸ Article 23(3) enjoins states parties to ensure that children with disabilities can effectively access and receive education. It is also adds that the form of education must be presented to children with disabilities in a manner "conducive to the child's achieving the fullest possible social integration and individual development".¹⁹⁹ States parties have an obligation to provide assistance to children with disabilities to ensure that they are educated in an effective manner.²⁰⁰ Article 23(2) does place a limitation on the rights of children with disabilities, however, in that the realisation thereof is made subject to the resources available to states parties.²⁰¹

In 2007 the Committee on the Rights of the Child, the body of independent experts supervising implementation of the *CRC*, adopted *General Comment 9* to provide commentary and guidelines on the implementation of the rights of children with disabilities.²⁰² The Committee recognises that the education of children with disabilities must strengthen the child's positive self-awareness and ensure that they are respected by their peers as equal human beings regardless of their disabilities.²⁰³ It adds that children with disabilities must be able to experience this form of respect and be afforded the opportunity to exercise their rights and freedoms.²⁰⁴

¹⁹⁶ In1School *Moving Towards Inclusive Education* 25.

¹⁹⁷ In1School *Moving Towards Inclusive Education* 25.

¹⁹⁸ Article 23 of the *CRC*; also see Byrne 2013 *Disability & Society* 235; Kayess and French 2008 *Human Rights Law Review* 12-13.

¹⁹⁹ Article 23(3) of the *CRC*.

²⁰⁰ Article 23(2) of the *CRC*; Byrne 2013 *Disability & Society* 235.

²⁰¹ Article 23(2) of the *CRC*; also see Byrne 2013 *Disability & Society* 235; Kayess and French 2008 *Human Rights Law Review* 13.

²⁰² *General Comment 9* para 6.

²⁰³ *General Comment 9* para 64.

²⁰⁴ *General Comment 9* para 64.

The Committee is of the opinion that these goals can be achieved by means of inclusive education.²⁰⁵ The Committee unfortunately does not provide great detail to guide states parties on the manner in which inclusive education must be implemented.²⁰⁶ Inclusive education is not exclusively recommended to states parties, but instead the Committee allows states parties to continue to utilise alternative means of education, including segregated education, when inclusive education cannot be feasibly realised.²⁰⁷

4.3.3 CRPD

4.3.3.1 Background

The *CRPD*, is directed by the following principles:

Respect for inherent dignity, individual autonomy, independence of persons, non-discrimination, full and effective participation, inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, equality of opportunity, accessibility, respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.²⁰⁸

The significance of these principles is that they must inform the interpretation of the rights entrenched in the *CRPD*.²⁰⁹

Article 4, read with article 24, of the *CRPD* imposes several general obligations on States Parties that play an important role in the realisation of the right to inclusive education. Amongst other obligations, States Parties must ensure and promote the full realisation of the right to inclusive education for all children with disabilities,²¹⁰ progressively realise the full extent of the right to inclusive education,²¹¹ and develop

²⁰⁵ *General Comment 9* para 64, 66; also see In1School *Moving Towards Inclusive Education* 29.

²⁰⁶ *General Comment 9* para 64, 66-67.

²⁰⁷ *General Comment 9* para 64, 66-67; also see Waddington and Toepke *Moving Towards Inclusive Education* 29; this topic dominated the *CRPD* negotiations; Broderick and Quinlivan "The right to education" 299.

²⁰⁸ Article 3(a)-(h) of the *CRPD*; also see Waddington and Toepke *Moving Towards Inclusive Education* 45-46.

²⁰⁹ Waddington and Toepke *Moving Towards Inclusive Education* 45-46.

²¹⁰ Article 4(1) read with article 24(1) of the *CRPD*.

²¹¹ Article 4(2) read with article 24(1) of the *CRPD*.

and implement legislation and policies to implement the right to inclusive education.²¹² Waddington and Toepke recognise that:

The insertion of a reference to 'inclusive education' within Article 24 was a revolutionary move towards achieving accessibility and equality in education for children with disabilities.²¹³

This section of the chapter will discuss the content of the right to inclusive education as it appears in article 24 of the *CRPD*. An analysis will be made of the nature of the right to inclusive education and the obligations of states parties to realise this right, the applicability of progressive realisation to this right, the principle of progressive realisation, the use of segregated schools, the four essential features of the right to inclusive education and the duty of states parties to adopt legislative and policy frameworks.

4.3.3.2 The nature of the right to inclusive education and the obligations of states parties

Article 24(1) guarantees not only a right to education, but a right to inclusive education "without discrimination and on the basis of equal opportunity" that must be realised by states parties at all educational levels.²¹⁴ Article 24(1) further embodies an extended version of the main aim of education as referred to above.²¹⁵ The wording of the main aim of education is modified in the text of article 24(1)(a) to state that inclusive education develops the abilities of children with disabilities and to ultimately ensure that they are able to effectively participate in society.²¹⁶

De Beco notes that the *CRPD* does not provide a definition for inclusive education, but instead offers a framework that must be utilised by states parties to realise an

²¹² Article 4(1)(a) read with article 24(1) of the *CRPD*; also see Waddington and Toepke *Moving Towards Inclusive Education* 43.

²¹³ Waddington and Toepke *Moving Towards Inclusive Education* 44.

²¹⁴ Article 24(1) of the *CRPD*; also see In1School *Moving Towards Inclusive Education* 48.

²¹⁵ Article 24(1)(a)-(c) of the *CRPD*; also see Byrne 2013 *Disability & Society* 239-240; also see Murungi 2015 *PELJ* 3181.

²¹⁶ Article 24(1)(a)-(c) of the *CRPD*; also see Byrne 2013 *Disability & Society* 239-240; also see In1School *Moving Towards Inclusive Education as a Human Right* 48; also see Murungi 2015 *PELJ* 3181.

inclusive education system.²¹⁷ The framework established by the content of the provisions of article 24(2) provides a clear indication of what inclusive education does not entail.²¹⁸ Schulze describes article 24(2) as the "cornerstone" of the right that entrenches the true purpose of inclusive education "by ensuring that persons with disabilities are not excluded from mainstream education."²¹⁹

Murungi records that the content of article 24(2) contains guiding principles to assist states parties in realising their obligation to implement inclusive education in accordance with a standard that meets the aims as envisaged in article 24(1).²²⁰ Article 24(2)(a) places an obligation on states parties to ensure that disability is not used as a justification to exclude children with disabilities from the general education system, from compulsory and free primary education, and from secondary education.²²¹ Article 24(2)(b) places a positive obligation on states parties to ensure that children with disabilities must be able to access inclusive, quality and free primary and secondary education on an equal basis with their abled peers.²²²

Ngwena confirms the nature of the aforementioned obligations and adds that the significance of article 24 lies in the recognition of a right to inclusive education that imposes positive and negative obligations on states parties.²²³ Ngwena states that:

Article 24 is as much an obligation of restraint that requires the state to desist from invidious discrimination based on disability as it is a positive obligation which requires the state to take certain steps to fulfil the right to education of disabled learners.²²⁴

²¹⁷ De Beco 2016 *Nordic Journal of Human Rights* 45; also see De Beco 2018 *International Journal of Law in Context* 401; the definition of inclusive education is provided in *General Comment 4* para 10.

²¹⁸ De Beco 2016 *Nordic Journal of Human Rights* 45-46; also see De Beco 2018 *International Journal of Law in Context* 401-402.

²¹⁹ Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities* 135.

²²⁰ Murungi 2015 *PELJ* 3181.

²²¹ Article 24(2)(a) of the *CRPD*.

²²² Article 24(2)(b) of the *CRPD*.

²²³ Article 24(2) of the *CRPD*; also see Ngwena 2013 *ADRY* 142.

²²⁴ Ngwena 2013 *ADRY* 142.

The positive obligations require that children with disabilities are allowed to attend mainstream schools whilst the negative obligations forbid states parties to deny children with disabilities their right to education.²²⁵

The duty to ensure that children with disabilities can access inclusive and quality free primary education requires the elimination of barriers to access, and enabling the exercise of a choice of an education system for children with disabilities. The duty to ensure quality is a safeguard for the standards of education given to children with disabilities...²²⁶

Murungi's statement aligns with the obligation entrenched in article 24(2)(c), which requires states parties to reasonably accommodate the individual needs of children with disabilities in the mainstream education system.²²⁷ Article 24(2)(d) and (e) provide a framework for measures that can be adopted by states parties to reasonably accommodate the individual needs of children with disabilities and therefore fully include them in mainstream schools.²²⁸ These provisions place an obligation on states parties to ensure that children with disabilities receive the general and individualised support that they require to facilitate their inclusion in mainstream schools.²²⁹ The obligations that are laid down in article 24(2) are specifically aimed at ensuring that each child receives the necessary support to access and actively participate in an inclusive education.²³⁰

The nature of the right to inclusive education is rooted in article 24(2)(b). States parties are obliged to ensure that all children with disabilities receive inclusive, quality, and free primary and secondary education on an equal basis with all other children. The realisation of the full right to inclusive education, when read in conjunction with article 4(2), is subjected to progressive realisation, however there are certain elements of the right that are immediately realisable.²³¹

²²⁵ Article 24(2)(a) and (b) of the *CRPD*; also see De Beco 2018 *International Journal of Law in Context* 400.

²²⁶ Murungi 2015 *PELJ* 3181.

²²⁷ Article 24(2)(c) of the *CRPD*.

²²⁸ Articles 24(2)(d) and (e) of the *CRPD*; also see De Beco 2016 *Nordic Journal of Human Rights* 43.

²²⁹ Articles 24(2)(d) and (e) of the *CRPD*; also see article 24(4) of the *CRPD*; In1School *Moving Towards Inclusive Education* 54-55.

²³⁰ Waddington and Toepke *Moving Towards Inclusive Education* 47.

²³¹ Broderick and Quinlivan "The right to education" 301.

4.3.3.3 Progressive realisation

The obligation of states parties to realise the right to inclusive education is subject to progressive realisation, with the exception of the elements of the right that are immediately realisable. Article 4(2) of the *CRPD* read in conjunction with article 24(2) provides that a State Parties must "take measures to the maximum of its available resources" with a view to progressively achieving the full realisation of free and quality inclusive primary and secondary education.²³² De Beco notes that states parties may choose how they wish to fully realise the right to inclusive education with the resources available to them.²³³

As with the right to education, the basic principles of progressive realisation, as set out in *General Comment 3*, also apply to the realisation of the right to inclusive education in terms of the *CRPD*. States parties must not unjustifiably delay the realisation of the right to inclusive education. States parties are under the obligation to take the necessary steps as expeditiously and effectively as possible towards the full realisation of the right within a specific period of time.²³⁴ The fact that the achievement of the full scope of the right to inclusive education is subject to progressive realisation does not ease the responsibility of states parties to realise this right. De Beco states that:

The progressive realisation of the right to education of persons with disabilities does not mean, therefore, that inclusive education can just be postponed. States Parties must show that they have a strategy for the achievement of inclusive education.²³⁵

Any deliberate and unjustified retrogressive measures taken by states parties to avoid the responsibility to realise the right to inclusive education will accordingly also be a violation of this right.²³⁶

²³² Article 4(2) read with article 24(2) of the *CRPD*.

²³³ This argument is based on the fact that the application of human rights standards is context-specific and will differ among states parties; De Beco 2016 *Nordic Journal of Human Rights* 45, 48-49.

²³⁴ De Beco 2014 *NQHR* 275.

²³⁵ De Beco 2014 *NQHR* 275-276.

²³⁶ Waddington and Toepke *Moving Towards Inclusive Education* 19; Broderick and Quinlivan "The right to education" 296.

In addition to the elements of the right to education that are subjected to progressive realisation, the Committee on the Rights of Persons with Disabilities in its *General Comment 4* identified three elements that are subject to immediate realisation.²³⁷ Firstly, states parties must guarantee non-discrimination in all of the aspects of education, ensuring that children with disabilities are not excluded from the education system and eliminating barriers that hinder effective participation and equality.²³⁸ Secondly, the principle of reasonable accommodation as an element of the right to inclusive education is not subjected to progressive realisation.²³⁹ The denial of measures of reasonable accommodation constitutes discrimination against children with disabilities.²⁴⁰ The Committee further states that the obligation to expeditiously and effectively work towards the full realisation of the right to inclusive education cannot be achieved if the education system promotes the utilisation of both mainstream schools and segregated special schools.²⁴¹ Finally, *General Comment 4* places an immediate obligation on states parties to fulfil a minimum standard of free and compulsory inclusive primary education for all children with disabilities.²⁴² The full realisation of the right to secondary inclusive education of children with disabilities, as it appears in the provisions of the *CRPD*, is subjected to the principle of progressive realisation. States Parties are expected to work expeditiously and effectively towards fully realising this right to ensure that children with disabilities can access quality, free and inclusive primary and secondary education in mainstream schools.

²³⁷ *General Comment 4* para 41.

²³⁸ *General Comment 4* para 1(a).

²³⁹ *General Comment 4* para 31.

²⁴⁰ Article 2 (definition of disability-based discrimination) and article 5(3) (duty to provide reasonable accommodation) of the *CRPD*; also see *General Comment 4* paras 31, 41(b); also see In1School *Moving Toward Inclusive Education as a Human Right* 54; De Beco 2016 *Nordic Journal of Human Rights* 43; Lord and Brown "The Role of Reasonable Accommodation" 280.

²⁴¹ *General Comment 4* para 40.

²⁴² *General Comment 4* para 41(c); also see *General Comment 3* para 10; De Beco 2016 *Nordic Journal of Human Rights* 44.

4.3.3.4 Reasonable accommodation

Another innovation in the *CRPD* is the principle of reasonable accommodation.²⁴³

Reasonable accommodation is defined in article 2 of the *CRPD* as follows:

...means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.²⁴⁴

The principle of reasonable accommodation therefore requires states parties to take positive action to ensure the inclusion and participation of children with disabilities.²⁴⁵ Lord and Brown confirm that:

Reasonable accommodation requires positive measures to address the unique needs of persons with disabilities in order to ensure the equal right to education...²⁴⁶

Article 24(2)(c) states that the reasonable accommodation of individual needs of children with disabilities must be provided.²⁴⁷ States parties must adopt measures such as the use of assistive and support measures in classrooms, curricula, other educational materials and the school environment itself that are accessible and adaptable to reasonably accommodate the individual needs of children with disabilities in the mainstream education system.²⁴⁸ De Beco states that reasonable accommodation refers to "an individualised measure that enables disabled children to be educated in mainstream schools."²⁴⁹ These measures are implemented with the purpose of accommodating children with disabilities in mainstream schools and not to alter the general education system.²⁵⁰ It is recognised that the denial of

²⁴³ Lord and Brown "The Role of Reasonable Accommodation" 273.

²⁴⁴ Article 2 of the *CRPD*.

²⁴⁵ Lord and Brown "The Role of Reasonable Accommodation" 277.

²⁴⁶ Lord and Brown "The Role of Reasonable Accommodation" 277.

²⁴⁷ Article 24(2)(c) of the *CRPD*.

²⁴⁸ In1School *Moving Towards Inclusive Education* 54.

²⁴⁹ De Beco 2016 *Nordic Journal of Human Rights* 43.

²⁵⁰ De Beco 2016 *Nordic Journal of Human Rights* 43.

reasonable accommodation constitutes discrimination against children with disabilities.²⁵¹

The principle of reasonable accommodation is a fundamental feature of the right to inclusive education. This principle places a strict positive obligation on States Parties to ensure that the individual needs of children with disabilities are promoted and accommodated in a reasonable manner. The purpose of reasonable accommodation is to ensure the effective and equal participation of children with disabilities in mainstream schools.

4.3.3.5 Segregated schools

During the negotiation sessions of the *CRPD* the delegates could not decide whether segregated schools should be explicitly prohibited by the convention.²⁵² The textual interpretation of article 24 promotes that children with disabilities must be educated in an inclusive education system.²⁵³ In *General Comment 4* the Committee on the Rights of Persons with Disabilities disapproves of the use of segregated schools to achieve inclusive education.²⁵⁴

The provisions of the *CRPD* demonstrates that certain practices do not form part of inclusive education as understood in article 24. Inclusive education does not encourage the use of segregated special schools in which to educate children with disabilities.²⁵⁵ Nor does inclusive education advance the use of integration in its different forms to ensure that children with disabilities can access mainstream schools without addressing the individual needs of each child.²⁵⁶ The provisions of

²⁵¹ *General Comment 4* para 31; also see In1School *Moving Towards Inclusive Education* 54; De Beco 2016 *Nordic Journal of Human Rights* 43; Lord and Brown "The Role of Reasonable Accommodation" 280; Waddington and Toepke *Moving Towards Inclusive Education* 52.

²⁵² Broderick and Quinlivan "The right to education" 299.

²⁵³ During the debating of the initial draft of the *CRPD* the delegates could not agree to whether the use of segregated schools should be explicitly excluded in the provisions of article 24; Broderick and Quinlivan "The right to education" 299.

²⁵⁴ *General Comment 4* paras 11, 13, 40.

²⁵⁵ "In the absence of a specific reservation to Article 24, it can be assumed that a segregated schooling system for children with disabilities is not acceptable under the *CRPD*..." Waddington and Toepke *Moving Towards Inclusive Education* 48.

²⁵⁶ De Beco 2016 *Nordic Journal of Human Rights* 45-46; also see De Beco 2018 *International Journal of Law in Context* 401-402.

the *CRPD* have to be applied in a manner which ensures that mainstream schools are adapted in accordance with the diverse range of needs of children with disabilities.

4.3.3.6 The four essential features of the right to inclusive education

In *General Comment 4*, the Committee on the Rights of Persons with Disabilities reiterates the four essential features of the right to education.²⁵⁷ The Committee on the Rights of Persons with Disabilities draws on the interpretation of the CESCR that the right, in this instance to inclusive education, must feature the characteristics of availability, accessibility, acceptability and adaptability.

Availability refers to the schools and programmes at which inclusive education is presented to children with disabilities. States parties must "guarantee a broad availability of educational places for learners with disabilities."²⁵⁸ Schools and educational programmes must be accessible to all children with disabilities without any form of discrimination. The environment in which children with disabilities are educated must safeguard inclusion and guarantee equality.²⁵⁹ Accessibility further entails that education must be affordable to all children with disabilities and the implementation of accommodative measures must not demand additional payments from the guardians of the children.²⁶⁰ The Committee further adds that:

The entire education system must be accessible, including buildings, information and communications tools (comprising ambient or frequency modulation assistive systems), the curriculum, educational materials, teaching methods, assessments and language and support services.²⁶¹

Acceptability refers to the obligation of states parties to ensure that the form and content of inclusive education must be acceptable to all. The Committee recognises

²⁵⁷ *General Comment 4* para 20.

²⁵⁸ *General Comment 4* para 21.

²⁵⁹ *General Comment 4* para 22.

²⁶⁰ *General Comment 4* para 24.

²⁶¹ *General Comment 4* para 22.

that quality and inclusion are synonymous as "an inclusive approach can make a significant contribution to the quality of education."²⁶²

States parties are required to recognise the individual learning needs of every child. The means through which education is presented to children with disabilities must be adapted in accordance with the needs of each child.²⁶³ Adaptability as an essential feature of the right to education confronts the need to progress towards utilising inclusive education as an effective alternative route of learning.²⁶⁴

4.3.3.7 The obligation to adopt legislative and policy frameworks

Articles 4(1)(a) and 4(2)(c) read in conjunction with article 24 of the *CRPD* impose a further obligation on states parties, namely to adopt legislative and other appropriate measures to implement the full scope of the right to inclusive education. These legislative and other appropriate measures must:

...modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities and that are in violation of article 24.²⁶⁵

The Committee on the Rights of Persons with Disabilities places great emphasis on the obligation of states parties to adopt a national legislative and policy framework to regulate the implementation and realisation of the right to inclusive education.²⁶⁶

The Committee recognises that:

A comprehensive and coordinated legislative and policy framework for inclusive education must be introduced, together with a clear and adequate time frame for implementation and sanctions for violations. Such a framework must address issues of flexibility, diversity and equality in all educational institutions for all learners and identify responsibilities at all levels of government.²⁶⁷

According to the Committee, this legislative and policy framework must address the flexibility, diversity and equality of inclusive education at all levels.²⁶⁸ The Committee

²⁶² *General Comment 4* para 25.

²⁶³ *General Comment 4* para 26.

²⁶⁴ *General Comment 4* para 26.

²⁶⁵ *General Comment 4* para 19, 39, 63.

²⁶⁶ *General Comment 4* para 42, 62.

²⁶⁷ *General Comment 4* para 63.

²⁶⁸ *General Comment 4* para 63.

accordingly observes that the legislative and policy framework must provide a detailed plan of action according to which the inclusive education system will be implemented. This plan should establish a time frame for implementation and measurable goals for the realisation of the right to inclusive education. The plan must also be supplemented by an analysis of the current state of inclusive education that shows, amongst other things, the current budgetary allocations towards the education of all children, the number of children with disabilities that are currently left out of the schooling system, challenges and barriers in realising inclusive education, and existing laws and policies on the right to education.²⁶⁹

4.4 The regional standard

4.4.1 ACRWC

The *ACRWC* does not explicitly recognise a right to inclusive education. The framework provided in the *ACRWC* on the right to education is also rather ambiguous and insufficient with regard to the right to education of children with disabilities.²⁷⁰

In addition to the aforementioned lack of provisions that govern the right to education of children with disabilities, the *ACRWC* further fails to clearly recognise disability as a prohibited ground of discrimination.²⁷¹ Disability is merely covered implicitly through the general non-discrimination clause.²⁷² Djoyou Kamga notes that unfortunately the *ACRWC* "fails to ensure the visibility of the rights of children with disabilities."²⁷³

Article 13 of the *ACRWC* recognises the rights of children with disabilities. Article 13(2) places an obligation on states parties to provide:

²⁶⁹ *General Comment 4* para 63.

²⁷⁰ Combrinck "The Hidden Ones" 310-312; also see Hansungule and Boezaart 2017 *ADRY* 55-56.

²⁷¹ Article 3 of the *ACRWC*; also see Combrinck "The Hidden Ones" 310; Hansungule and Boezaart 2017 *ADRY* 47.

²⁷² Article 3 of the *ACRWC*; also see Djoyou Kamga 2013 *African Journal of International and Comparative Law* 240; Combrinck "The Hidden Ones" 310; Hansungule and Boezaart 2017 *ADRY* 47.

²⁷³ Djoyou Kamga 2013 *African Journal of International and Comparative Law* 240.

...assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training...²⁷⁴

Article 13(3) states that states parties must ensure that children with disabilities are guaranteed access to public buildings to which they rightfully seek access.²⁷⁵ Schools and educational services are, however, not explicitly included in the list of public buildings and services that children with disabilities may have access to.²⁷⁶

The provisions on the right to education are laid down in article 11 of the *ACRWC*. Article 11 does not explicitly recognise the right to education of children with disabilities, nor does it make reference to inclusive education. Article 11(1) places an obligation on states parties to ensure that all children have the right to education.²⁷⁷ Further, article 11(3)(e) states that special measures must be taken by states parties to ensure that gifted and disadvantaged children can access free and compulsory basic education on a footing equal with their peers.²⁷⁸

With the adoption of *Resolution 364*, as discussed in chapter 3, the failure by the *ACRWC* to address the right to inclusive education of children with disabilities was remedied to ensure that children with disabilities receive "high quality and appropriate educational programmes".²⁷⁹ *Resolution 364* further safeguards:

The provision of reasonable accommodation measures for children with disabilities..., to ensure inclusive quality education on an equal basis with other members of their communities consistent with the goal of full inclusion.²⁸⁰

The failure of the *ACRWC* to appropriately and sufficiently protect the right to education of children with disabilities may to some extent be addressed by the recently adopted *Disability Rights Protocol*.

²⁷⁴ Article 13(2) of the *ACRWC*.

²⁷⁵ Article 13(3) of the *ACRWC*.

²⁷⁶ Combrinck "The Hidden Ones" 310; also see Djoyou Kamga 2013 *African Journal of International and Comparative Law* 240.

²⁷⁷ Article 11(1) of the *ACRWC*.

²⁷⁸ Article 11(3)(e) of the *ACRWC*; also see Hansungule and Boezaart 2017 *ADRY* 54.

²⁷⁹ *Resolution 364* para I.

²⁸⁰ *Resolution 364* para i.

4.4.2 *Disability Rights Protocol*

Like the other existing African human rights instruments, the *ACRWC* does not sufficiently protect the rights to education of children with disabilities in Africa.²⁸¹ The need existed for the introduction of a regional legal instrument to specifically address the rights of persons with disabilities, including children, adopting an African perspective.²⁸² Appiagyei-Atua argues that the rationale behind the adoption of the *Disability Rights Protocol* was:

...to enable Africa to capture and incorporate some peculiar concerns that persons with disabilities in Africa face, and thereby provide context to disability rights in Africa.²⁸³

The *Disability Rights Protocol* provides an open-ended description of persons (which would include children) with disabilities as follows:

...those who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with other...²⁸⁴

Similar to the *CRPD*, the *Disability Rights Protocol* also obliges states parties to adopt measures including policy, legislation and other administrative measures to ensure that the rights of children with disabilities are protected on the basis of non-discrimination and equality with persons who do not have disabilities.²⁸⁵ The *Disability Rights Protocol* further aims to ensure the full and effective participation and inclusion of children with disabilities in society.²⁸⁶

²⁸¹ Paragraph 4.4.1 above.

²⁸² Djoyou Kamga 2013 *African Journal of International and Comparative Law* 240; also see Appiagyei-Atua 2017 *Law Democracy & Development* 159; Oyaró 2015 *American University International Law Review* 360, 368; Mute and Kalekye 2016 *East African Law Journal* 84.

²⁸³ Appiagyei-Atua 2017 *Law Democracy & Development* 159.

²⁸⁴ Article 1 of the *Disability Rights Protocol*; also see Mute and Kalekye 2016 *East African Law Journal* 85.

²⁸⁵ Article 4 of the *Disability Rights Protocol*; also see Mute and Kalekye 2016 *East African Law Journal* 85.

²⁸⁶ Article 3(c) of the *Disability Rights Protocol*.

Article 15(1) of the *Disability Rights Protocol* obliges states parties to ensure that children with disabilities can access physical environments, which includes schools and the facilities related to schooling,²⁸⁷ without having to overcome any barriers.²⁸⁸

The *Disability Rights Protocol* further specifically addresses the right to education of children with disabilities.²⁸⁹ Article 16 provides all children with disabilities with a right to inclusive education that must be afforded to them by states parties on an equal basis with other children.²⁹⁰ States parties have an obligation to ensure that children with disabilities enjoy quality inclusive education which includes a right to free, quality and compulsory basic and secondary education.²⁹¹ The *Disability Rights Protocol* reiterates the omnipresent main aim of education and adds that education must be directed towards the "preservation and strengthening of positive African values".²⁹²

The *Disability Rights Protocol* also fails to provide a conclusive definition for inclusive education. Instead, several obligations are placed on states parties to assist with the implementation and realisation of this right. The obligations that are placed on states parties to successfully realise the right to inclusive education include the duty to reasonably accommodate the needs of children with disabilities and provide supportive measures to meet the individual needs of each child, and to ensure that they are effectively educated in mainstream schools.²⁹³

The *Disability Protocol* also different version of the principle of reasonable accommodation as found in the global counterpart. Article 1 of the *Disability Protocol* defines reasonable accommodation as:

²⁸⁷ Article 15(2)(b) of the *Disability Rights Protocol*.

²⁸⁸ Article 15(1) of the *Disability Rights Protocol*.

²⁸⁹ Article 16 of the *Disability Rights Protocol*.

²⁹⁰ Article 16(a) and (2) of the *Disability Rights Protocol*.

²⁹¹ Article 16(3)(a) of the *Disability Rights Protocol*.

²⁹² Article 4 of the *Disability Rights Protocol*.

²⁹³ Article 16(3)(c) of the *Disability Rights Protocol*.

...necessary and appropriate modifications and adjustments where needed in a particular case to ensure persons with disabilities the enjoyment or exercise on an equal basis with other of all human and people's rights.²⁹⁴

Article 16(3)(c) of the *Disability Rights Protocol* obliges states parties to ensure that the individual requirements of children with disabilities are accommodated. States parties must further guarantee that children with disabilities receive the required support measures to facilitate their effective education. The implementation of effective individual support measures at schools is, however, subject to progressive realisation.²⁹⁵

States parties must adopt multi-disciplinary assessments to identify the individual support and accommodative measures required to ensure the inclusion and effective participation of children with disabilities in mainstream schools.²⁹⁶ States parties must further ensure that schools are equipped with the necessary "teaching-aids, materials and equipment" to support the education and meet the specific needs of children with disabilities.²⁹⁷ Teachers and other staff that are responsible for education and support in mainstream schools must be trained in how to educate, interact with and support children with disabilities.²⁹⁸

Regardless of the comprehensive framework on the implementation and realisation of the right to inclusive education that is provided for in the provisions of the *Disability Rights Protocol*, article 16(3)(e) takes a step back from the dream of full inclusion. Article 16(3)(e) provides that states parties must ensure that "appropriate schooling choices are available" to children with disabilities who do not want to be educated in an inclusive environment.²⁹⁹

²⁹⁴ Article 1 of the *Disability Rights Protocol*.

²⁹⁵ Article 16(3)(c) read with article 16(3)(d) of the *Disability Rights Protocol*; The *Disability Protocol* does not explicitly state that the realisation of the right to inclusive basic education is subjected to progressive realisation. Article 16(3)(d), however, provides that the implementation of individualised support measures must be progressively implemented. It is inferred for the purpose of this study that the *Disability Protocol* follows the trend of the *Banjul Charter* and effectively subjects the right to inclusive basic education to progressive realisation.

²⁹⁶ Article 16(3)(d), (f) and (g) of the *Disability Rights Protocol*.

²⁹⁷ Article 16(3)(d) of the *Disability Rights Protocol*.

²⁹⁸ Article 16(3)(i) of the *Disability Rights Protocol*.

²⁹⁹ Article 16(3)(e) of the *Disability Rights Protocol*.

The *Disability Rights Protocol* has the potential to fill certain of the large gaps in the field of disability rights that exists in the African human rights law regime. The *Disability Rights Protocol* affords children with disabilities a right to be educated in an inclusive environment along with their peers. The content of the right to inclusive education as it appears in this regional legal instrument provides ample support to ensure that the education of children with disabilities on the African continent will possibly not be neglected or be subjected to inequality.

4.5 Conclusion

The right to inclusive education of children with disabilities is an innovative right that was recognised for the first time as an enforceable right with the adoption of the *CRPD*. Inclusive education is an unconventional approach to education, which ensures that children with disabilities can access education in mainstream schools and participate with their fully abled peers on an equal basis.

Inclusive education is recognised as a newly adopted method of education that aims to accommodate the diverse range of educational needs of all children in one system by eliminating the barriers that prevent them from accessing it. Inclusive education therefore enables children with disabilities to be educated in the same environment as, and receive education at a standard equal to that of their fully abled peers.

The *ICESCR*, the *CRC* and the *ACRWC* do not explicitly recognise the right to inclusive education, but an inference can be drawn from the provisions on the right to education that children with disabilities must be afforded an equal right to education.

The *CRPD* is the first binding international legal instrument that guarantees children with disabilities a right to inclusive education. The *CRPD* does not provide a formal definition for inclusive education. Instead, it provides a framework for the realisation of the right to inclusive education and it clearly portrays what inclusive education must not be interpreted to be.

Article 24 of the *CRPD* affords all children with disabilities a right to inclusive education that must be made available without discrimination and on the basis of equal opportunity. The full realisation of the right to inclusive education is subjected to the principle of progressive realisation. However, the obligations to ensure primary inclusive education, non-discrimination and reasonable accommodation are not subjected to progressive realisation. States parties are expected to work expeditiously and effectively towards fully realising this right to ensure that children with disabilities can access quality, free and inclusive primary and secondary education in mainstream schools. Article 24 does not encourage the use of segregated schools to educate children with disabilities. The Committee on the Rights of Persons with Disabilities condemned the use of segregated schools and promotes the use of mainstream schools which must be inclusive to the needs of children with disabilities.

One of the essential features of the right to inclusive education is the implementation of measures that reasonably accommodate the needs of children with disabilities in the mainstream education system. Reasonable accommodation refers to the modifications and adjustments in the system that will ensure that children with disabilities can enjoy or exercise their right to education on an equal basis with their abled peers. States parties are under the obligation to immediately provide such measures. The denial of these measures would result in a form of discrimination against children with disabilities.

In order to ensure that states parties realise the right to inclusive education, article 24 of the *CRPD* makes it obligatory to adopt national legislative and policy frameworks that govern the implementation of this right. These legislative and policy frameworks must provide a comprehensive plan of action that gives a time frame for the implementation of the right and measurable goals for the realisation of this right.

The *Disability Protocol* echoes the provisions of article 24 and guarantees children with disabilities a right to inclusive, free, quality and compulsory basic and secondary education. The duty of State Parties to ensure that the educational needs

of children with disabilities are reasonably accommodated in mainstream schools is also guaranteed by the *Disability Protocol*. The *Disability Protocol* does, however, afford children with disabilities the opportunity to choose in which type of school they want to be educated.

The global and regional legal instruments that guarantee a right to inclusive education provide a comprehensive framework on the realisation of this right. The overall theme of these instruments guarantees children with mild and moderate ID a right to inclusive, compulsory and free primary and secondary education that must be afforded to them on the basis of equality and without discrimination. The educational needs of children with mild and moderate ID must be reasonably accommodated to ensure that they are educated in mainstream schools.

5 The South African position

5.1 Introduction

The right to basic education is enshrined in section 29(1)(a) of the *Constitution*. Section 29(1)(a) guarantees everyone a right to basic education, without explicitly recognising a right to the inclusive education of children with disabilities.

South Africa has signed and/or ratified the international legal instruments discussed in Chapter 4. The ratification of these legal instruments binds the South African government to the provision of the rights that are protected therein. The international legal instruments and the *Constitution* impose a duty on the South African government and the courts to adopt and interpret the provisions thereof in existing national legislation.³⁰⁰

The *SASA* was enacted to regulate the implementation of the right to basic education in South Africa.³⁰¹ The *SASA* governs the right to education of all children, including children with disabilities and it ensures the responsibility of public schools to admit children with disabilities and accommodate their needs.³⁰² Neither the *Constitution* nor *the SASA* explicitly recognises the right to the inclusive education of children with disabilities.

In 2001 the Department of Education adopted the *White Paper 6* policy on special needs education that specifically concerns the right to inclusive education. The policy provides the framework for the realisation of the right to inclusive education in South Africa

The *WPRPD* was adopted in 2016 to update the existing policy regarding the rights of persons with disabilities, including children with disabilities, since the previous

³⁰⁰ Sections 39(1)(b) of the *Constitution* provides that courts must interpret international law and section 231(4) states that international law must be adopted into national legislation; also see article 4(1)(a) of the *CRPD*; *S v Makwanyane* 1995 6 BCLR 656 (CC) para 35; "both binding and non-binding international instruments might be referred to when interpreting the provisions of the Bill of Rights." Bekink and Bekink 2005 *Stellenbosch Law Review* 127.

³⁰¹ Section 2(1) of the *SASA*.

³⁰² Section 12(3) of the *SASA*.

policy was outdated and accepted before *CRPD*.³⁰³ The *WPRPD* does not comment on the right to inclusive education, but instead it addresses the failing state of inclusiveness in South African schools.

The purpose of this chapter is to provide an overview of the applicable legislative and policy framework on the right to basic education and inclusive education in South Africa. Thereafter, the content of *White Paper 6* will be analysed to determine whether the South African position on the right to inclusive education is in line with the international standards set out above.³⁰⁴ The following elements of *White Paper 6* will be analysed and compared to the international standard: the types of schools that will form part of the inclusive education system, reasonable accommodation and the applicability of progressive realisation. The role of the *WPRPD* in realising the right to inclusive education in South Africa will also be addressed. Finally, a discussion will follow on the current *status quo* of the realisation of the right to inclusive education in South Africa and especially as to the extent to which children with mild and moderate ID receive inclusive education.

5.2 Constitution

5.2.1 The right to basic education

Section 29(1)(a) of the *Constitution* guarantees every child a right to basic education.³⁰⁵ The South African courts have also recognised the right to basic education as an empowerment right and a prerequisite for the enjoyment and exercise of all other human rights.³⁰⁶ Skelton recognises that "it is axiomatic that children who cannot access at least basic education do not reach their full potential."³⁰⁷ The right to basic education must accordingly be realised and directed

³⁰³ *WPRPD* 7.

³⁰⁴ Chapters 4.3.3.3-4.3.3.5.

³⁰⁵ Boezaart 2012 *SAPL* 456; also see Bekink and Bekink 2005 *Stellenbosch Law Review* 133; McConnachie and McConnachie 2012 *SALJ* 561.

³⁰⁶ *Juma Masjid* case para 41; *Equal Education v Minister of Basic Education* 2018 3 All SA 705 (ECB) (hereafter *Equal Education* case) para 41; also see Veriava "Realising the right to basic education in South Africa" 81; Veriava and Coomans "The Right to Education" 60.

³⁰⁷ Skelton *Strategic Litigation Impacts Equal Access to Quality Education* 22; also see Djoyou Kamga "The Right to a Basic Education" 517; Arendse 2011 *PELJ* 115.

towards the full development of the child's potential and personality, and meaningful participation in society.

Section 29(1)(a) of the *Constitution* bestows specific entitlements on the right holders and at the same time places several obligations on the government that must be complied with.³⁰⁸ All children are entitled to receive a basic education. In the process of realising the right to basic education, the government has a negative duty not to interfere in the enjoyment of the right and a positive obligation to take steps to ensure that basic education is provided to all children.³⁰⁹ The scope of the positive duty of the government in the realisation of the right to basic education can be expanded to ensure that basic education is available, accessible, acceptable and adaptable.³¹⁰

Dalton, Mckenzie and Kahonde recognise that the *Constitution* was the first legal instrument in the new democratic era to acknowledge the right to education of children with disabilities.³¹¹ The *Constitution* has played a fundamental role in the development of an inclusive education policy in South Africa.³¹² The *Constitution* does not contain an explicit provision on the right to inclusive education, but this right can be deduced to some extent when the provisions of section 9, the equality clause, and section 29, the right to education, are read in conjunction with one another. The right to basic education, as it appears in section 29(1)(a) of the *Constitution*, ensures that every child, including children with disabilities, has the right to enjoy a basic education. The government has the obligation to ensure that this right is realised and may not to interfere with the enjoyment of this right. Berger correctly states that the South African education system:

³⁰⁸ Section 7(2) of the *Constitution* imposes a duty on the government to respect, protect, promote and fulfil the rights in the Bill of Rights; also see Veriava and Coomans "The Right to Education" 59; also see Veriava "Realising the right to basic education in South Africa" 89.

³⁰⁹ Veriava and Coomans "The Right to Education" 59, 61; also see Veriava "Realising the right to basic education in South Africa" 98; Seleoane 2003 *Law, Democracy and Development* 140-141.

³¹⁰ Seleoane 2003 *Law, Democracy and Development* 142.

³¹¹ Dalton, Mckenzie and Kahonde 2012 *African Journal of Disability* 1.

³¹² Dalton, Mckenzie and Kahonde 2012 *African Journal of Disability* 1.

...must work to remedy the country's stark inequalities by providing all students the skills and experiences necessary to participate productively in such a society.³¹³

5.2.2 *The nature of the right to basic education*

A textual interpretation of the right to basic education makes it clear that the right is not subject to any internal conditions or qualifiers. The right to basic education is not subject to the availability of resources or progressive realisation and may be limited only in terms of the limitation clause that is contained in section 36 of the *Constitution*.³¹⁴

The nature of the right to basic education was clearly set out by the Constitutional Court in the *Juma Masjid* case.³¹⁵ In this judgement, the Court confirmed the following:

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."³¹⁶

The standard of review that is associated with the right to basic education differs from that for the other qualified socio-economic rights contained in the *Constitution*.³¹⁷ Because of the significance of the right to basic education, a more stringent standard of review is utilised by the Court to determine the extent of the government's obligation to realise the right.³¹⁸ This standard of review requires the government to "implement measures to give effect to the right as a matter of

³¹³ Berger 2003 *Colombia Law Review* 615.

³¹⁴ *Juma Masjid* case para 37; also see Seleoane 2003 *Law, Democracy and Development* 140; Essop *The State's duty to realise the Right to Education* 10.

³¹⁵ *Juma Masjid* case para 37; also see Veriava and Coomans "The Right to Education" 62; Veriava "Realising the right to basic education in South Africa" 89; McConnachie and McConnachie 2012 *SALJ* 561.

³¹⁶ *Juma Masjid* case para 37.

³¹⁷ In the case of *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) paras 38-44, the Constitutional Court adopted the reasonableness approach as the standard of review to determine the extent of the government's obligations in respect of qualified socio-economic rights.

³¹⁸ *Juma Masjid* case paras 41-43; also see Veriava and Coomans "The Right to Education" 62.

absolute priority" and immediately to realise the right to basic education of all children.³¹⁹

The nature of the right to basic education is therefore, to some extent, similar to the nature of the right to primary education as it appears in the international legal instruments. The government has a duty to immediately realise the right to basic education to enable all children to at least enjoy the minimum level of education.

5.2.3 The right to equality

The right to equality is enshrined in section 9 of the *Constitution*. Section 9(1) guarantees all persons, including children with disabilities, "the right to equal protection and benefit of the law".³²⁰ In addition, section 9(3) prohibits the government from unfairly discriminating against anyone on the basis of disability.³²¹ McConnachie and McConnachie correctly recognise that, when the right to basic education is interpreted in the light of the equality clause, it creates a right to equal education for all children. In realising this right, the government is prohibited from "unfairly discriminating in the provision of educational opportunities" and is obliged to take positive steps to redress the inequalities in the education system.³²²

5.2.4 Interpretation and incorporation of international law

In terms of section 231(4) of the *Constitution*, international law must be enacted into national legislation before it will become law in South Africa.³²³ International agreements, including the stated instruments that protect the rights of children with disabilities, bind the Republic in so far as they have been ratified. These instruments

³¹⁹ Veriava and Coomans "The Right to Education" 62; this standard of review was also recognised in the cases of *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA) paras 36, 44; *Equal Education* case paras 172, 174, 180.

³²⁰ Section 9(1) of the *Constitution*.

³²¹ Section 9(3) of the *Constitution*; section 9(4) prohibits unfair discrimination and the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 has been enacted to put this into effect.

³²² McConnachie and McConnachie 2012 *SALJ* 571; also see Essop *The State's duty to realise the Right to Education* 16.

³²³ Section 231(4) of the *Constitution*.

will, however, only be applicable as part of national law if legislation incorporates the them.

The *Constitution* further imposes a duty on the courts to consider international law when interpreting the rights of the Bill of Rights, including socio-economic rights. This duty is imposed in terms of Section 39(1)(b) of the *Constitution*.³²⁴ In interpreting the right to basic education, regard must be had to applicable international law, which will include the stated instruments that protect the rights of children with disabilities. The courts therefore have a duty to consider the content of article 24 of the *CRPD* when interpreting the right to education of children with disabilities in South Africa.³²⁵

The relevant provisions of the *CRPD* has to some extent been made part of national legislation, but the remainder thereof is in many ways not part of South African law. The relevant provisions of the *CRPD* must influence the interpretation of section 29(1)(b) via section 39(1)(b). However, these provisions are not "binding" *per se* but mere interpretative tools.

5.3 SASA

The *SASA* establishes the legal framework that regulates the provision of education in South Africa through uniform norms and standards.³²⁶ The *SASA* was promulgated to give effect to and ensure the full realisation of the right to basic education in South Africa.³²⁷

5.3.1 Compulsory attendance

he *SASA* does not define basic education, but instead prescribes a period of compulsory schooling that the government must afford to all children.³²⁸ Seleane

³²⁴ Section 39(1)(b) of the *Constitution*.

³²⁵ The provisions of article 24 of the *CRPD* was considered in the *WCFID* case para 23.

³²⁶ Preamble of the *SASA*; also see Mnguni *From Inclusive Education Policy to Implementation* 26.

³²⁷ Rapatsa and Matloga 2014 *Mediterranean Journal of Social Sciences* 1122.

³²⁸ Section 3 of the *SASA*.

holds that one could possibly make the inference that basic education can be described by reference to the period of compulsory schooling.³²⁹

Section 3(1) of the *SASA* provides the standard in terms of which compulsory school attendance is defined. Compulsory schooling that starts at the beginning of the year during which a child reaches the age of 7 years or starts to attend school in grade 1. It terminates at the end of the year that the child reaches the age of 15 years or completes grade 9 in school, whichever event occurs first.³³⁰

Section 3(2) of the *SASA* further obliges the Minister of Education to determine the ages of compulsory school attendance for learners with disabilities.³³¹ To date, the Minister has failed to determine the ages of compulsory schooling of children with disabilities.³³² This position makes it impossible to compare the period of compulsory schooling in international law to the South African position.

It is essential to note that in the *Juma Masjid* case the Court recognised that basic education consists of more than just a period of compulsory schooling. The Court averred that basic education is of extreme importance "for individual and societal development" and that "educational segregation" will have a long-lasting negative effect on society as a whole.³³³ *McConnachie and McConnachie* reflect on the Court's interpretation and add that:

...the statutorily-determined period of compulsory schooling is only contingently related to a basic education; the mere fact that a learner attends school for this period is no guarantee that he or she will have had the opportunity to receive such an education.³³⁴

³²⁹ Seleoane 2003 *Law, Democracy and Development* 144.

³³⁰ Section 3(1) of the *SASA*; also see the *Juma Masjid* case para 38; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 3 BCLR 177 (CC) paras 45-47; *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA) para 37.

³³¹ Section 3(2) of the *SASA*.

³³² Human Rights Watch "*Complicit in Exclusion*" 36; also see Committee on the Rights of Persons with Disabilities *Consideration of reports submitted by States parties under article 35 of the Convention: South Africa* CRPD/C/ZAF/1 1 (hereafter *Country Report*) para 199.

³³³ *Juma Masjid* case para 37.

³³⁴ *McConnachie and McConnachie* 2012 *SALJ* 566.

Simbo further suggests that if basic education is defined by reference to the period of compulsory schooling, no child will be entitled to "demand a certain quality of education".³³⁵

The author of this study is in agreement with the position which holds that basic education is more than just a period of compulsory education. However, for the purpose of this dissertation the period of compulsory schooling is used as a means to describe basic education in South Africa.

5.3.2 Non-discrimination

The *SASA* makes provision for a right to equal basic education that is inferred from the interpretation of sections 9(3) and 29(1)(a) of the *Constitution*. Section 5(1) of the *SASA* states that public schools must admit learners and serve their educational needs without any form of unfair discrimination.³³⁶ Mnguni recognises that one of the significant features of the *SASA* is "the assertion of equal rights to access basic quality education for all learners without being discriminated in any form."³³⁷

5.3.3 Children with disabilities

The *SASA* does not explicitly guarantee a right to inclusive education of children with disabilities, but instead, according to Murungi, promotes a system that integrates children with disabilities in mainstream education.³³⁸ Murungi argues that:

The Act states that education for learners with disabilities ought to be provided in ordinary public schools, and that support is to be provided to the learners within the regular schools.³³⁹

Section 12(4) states that, where it is reasonably practicable, children with disabilities must be educated in ordinary public schools and the required educational support services must be provided to them there.³⁴⁰ The inference can be drawn that

³³⁵ Simbo 2012 *Law Democracy and Development* 173.

³³⁶ Section 5(1) of the *SASA*; also see Bridge *Disabilities in Education and Inclusive Education* 3.

³³⁷ Mnguni *From Inclusive Education Policy to Implementation* 26.

³³⁸ Murungi 2015 *PELJ* 3172.

³³⁹ Murungi 2015 *PELJ* 3172.

³⁴⁰ Section 12(4) of the *SASA*; also see Bridge *Disabilities in Education and Inclusive Education* 3.

sections 12(4) read in conjunction with section 5(1) promotes the inclusion of children with disabilities in mainstream schools.

Section 12(5) of the *SASA* states that reasonable measures must be in place to ensure that appropriate physical facilities are accessible to children with (physical) disabilities.³⁴¹ Section 12(5) would not be applicable to children with intellectual disabilities, and the *SASA* does not contain a similar provision that specifically guarantees that the needs of children with intellectual disabilities must be met.

Section 3(3) obliges the MEC to ensure that there are enough schools to accommodate all children who are of compulsory schooling age, which currently excludes children with disabilities due to the lack of a compulsory schooling age that has been determined by the Minister.³⁴² When the admission of children with disabilities in a public school is determined, the rights and wishes of these children and their parents must be taken into consideration.³⁴³ According to Murungi, the *SASA* paved the way for the adoption of an inclusive education policy in South Africa by addressing the right to education of children with disabilities.³⁴⁴

5.4 White Paper 6

The dawn of the constitutional democracy in South Africa heralded a transformation of the existing education policies towards an education policy that focusses solely on inclusive education.³⁴⁵ *White Paper 6* was adopted in 2001 in an attempt to create educational opportunities for children who cannot access the existing education system due to the system's inability to accommodate their different learning needs.³⁴⁶ *White Paper 6* aims to:

³⁴¹ Section 12(5) of the *SASA*; also see Bridge *Disabilities in Education and Inclusive Education* 3.

³⁴² Section 3(3) of the *SASA*.

³⁴³ Human Rights Watch *"Complicit in Exclusion"* 12.

³⁴⁴ Mnguni *From Inclusive Education Policy to Implementation* 26; also see Engelbrecht *et al* 2016 *International Journal of Inclusive Education* 521; Khumalo and Fish Hodgson "The Right to Basic Education" 116.

³⁴⁵ Wood *et al* "Access to Education for Children with Severe to Profound Intellectual Disability in South Africa" 136.

³⁴⁶ *White Paper 6*; also see Chataika *et al* 2010 *Disability & Society* 388; Murungi 2015 *PELJ* 3173; it must be noted that the *White Paper 6* is a policy document that outlines the Government's plans to establish certain laws and it is therefore not legally enforceable. Community Organisers

...enable all learners to participate actively in the education process so that they could develop and extend their potential and participate as equal members of society.³⁴⁷

White Paper 6 takes the stance that the barriers that children with disabilities face in accessing education do not arise from the disability itself, but instead from the failure of the system to adequately recognise and accommodate children with disability.³⁴⁸ *White Paper 6* recognises that all children can learn and it outlines steps that must be taken to ensure that all children are afforded the opportunity to learn.³⁴⁹

The constitutional values of human dignity, the achievement of equality and the furtherance of all fundamental human rights and freedoms are the driving force which led to the adoption of *White Paper 6*. It aims to give effect to the fundamental right to basic education in South Africa and to ensure that all children, including children with disabilities, are afforded the opportunity to develop and fully utilise their learning potential.³⁵⁰ The policy aims to eliminate the barriers that exist in the current provision of education that hinder the equal participation of children with disabilities in education. It establishes an inclusive education system that will accommodate the wide spectrum of educational needs of all children with disabilities.

Toolbox Education and Training Unit date unknown <https://www.etu.org.za/toolbox/docs/govern/policy.html>.

³⁴⁷ *White Paper 6* 5; also see Mbhele *The Education of Children with Impairments in South Africa: A Capability Approach* 39.

³⁴⁸ *White Paper 6* 11; also see Du Plessis 2013 *Law, Democracy and Development* 215; "The policy reiterates again and again that that disability does not lie with the individual, but rather is systematic, structural and organisational." Soudien and Baxen "Disability and schooling in South Africa" 160.

³⁴⁹ Human Rights Watch *"Complicit in Exclusion"* 13-14; also see Khumalo and Fish Hodgson "The Right to Basic Education" 106.

³⁵⁰ *White Paper 6* 11; also see Soudien and Baxen "Disability and schooling in South Africa" 159; see also Du Plessis 2013 *Law, Democracy and Development* 217.

5.4.1 Defining inclusive education

The practice of inclusive education and the definition thereof, as proposed in *White Paper 6*, comprise six different components.³⁵¹ It is defined as:

Acknowledging that all children and youth can learn and that all children and youth need support; enabling education structures, systems and learning methodologies to meet the needs of all learners; acknowledging and respecting differences in learners...; broader than formal schooling and acknowledging that learning also occurs in the home and community, and within formal and informal settings and structures; changing attitudes, behaviour, teaching methods, curricula and environment to meet the needs of all learners; maximising the participation of all learners in the culture and the curriculum of educational institutions and uncovering and minimising barriers to learning.³⁵²

Murungi notes that *White Paper 6* adopts an understanding of inclusive education which entails that it must be recognised that all children have some sort of learning need and the diversity of learning needs must be respected by the education system. Most importantly, Murungi notes that *White Paper 6* acknowledges the fact that all children have the ability to learn if they receive the necessary support.³⁵³

According to Soudien and Baxon, *White Paper 6* adopts a two-fold approach towards educating children with disabilities, which consists of mainstreaming or integration and inclusion. The authors recognise that:

The objective of 'mainstreaming' is to integrate learners into the existing system and to support them so that they can fit, while inclusion is essentially recognising and respecting the differences among learners and building on their similarities.³⁵⁴

White Paper 6 underlines the notion that the existing segregated education system must be transformed into one that accommodates the learning needs of all children

³⁵¹ Maguvhe 2015 *African Journal of Disability* 1; also see Bridge *Disabilities in Education and Inclusive Education* 4; Murungi 2015 *PELJ* 3171; Soudien and Baxen "Disability and schooling in South Africa" 152.

³⁵² *White Paper 6* 6-7, 16.

³⁵³ Murungi 2015 *PELJ* 3171.

³⁵⁴ Soudien and Baxen "Disability and schooling in South Africa" 152; also see Du Plessis 2013 *Law, Democracy and Development* 204.

with disabilities and eliminates the barriers that prevent them from being educated in the mainstream setting.³⁵⁵

The overall theme of *White Paper 6* is the inclusion of children with disabilities, where possible, into the mainstream education setting. Mbhele's interpretation of inclusive education as it is envisaged in *White Paper 6* is that it will:

... include all but the most severely impaired learners in mainstream schools, use the resources and expertise of professionals based in special schools to help learners with mild or moderate impairments complete schooling at ordinary or full-service schools, and improve the learning experience of all children with impairments.³⁵⁶

Contrary to the overall theme and the international legal standard, the policy makes provision for the utilisation of three different types of schools that will each cater for the specific educational needs of children with different severities of disabilities.³⁵⁷ The purpose of utilising three different types of schools is based on the premise that various levels of support are required to educate children with disabilities who have different levels of educational needs.³⁵⁸ Human Rights Watch recognises that regardless of the overall inclusive theme of *White Paper 6*, the policy still focusses strongly on providing special education in segregated environments.³⁵⁹

5.4.2 Special schools, full-service schools and mainstream schools

White Paper 6 proposes that children with disabilities will be educated in three different kinds of school. The placement of children with disabilities in the specific school will depend on the level of severity of the disability that the child is diagnosed with. The three types of school that are proposed in *White Paper 6* are special schools, full-service schools and mainstream schools.³⁶⁰

³⁵⁵ *White Paper 6* 11, 18; also see Engelbrecht *et al* 2016 *International Journal of Inclusive Education* 522; Murungi 2015 *PELJ* 3171; Maguvhe 2015 *African Journal of Disability* 1.

³⁵⁶ Mbhele *The Education of Children with Impairments in South Africa: A Capability Approach* 39-40.

³⁵⁷ *White Paper 6* 21-23.

³⁵⁸ *White Paper 6* 16.

³⁵⁹ Human Rights Watch *"Complicit in Exclusion"* 14.

³⁶⁰ *White Paper 6* 8, 15.

Children with severe and profound ID who require intense levels of support will be educated in special schools.³⁶¹ Special schools will also provide support and expert services in curriculum, assessment and instruction, to full-service schools.³⁶² Special schools existed prior to the adoption of *White Paper 6* and will continue to play a role in the education system. The inclusion of special schools in the inclusive education framework does not promote the goal of inclusive education. But it can be said that the role of special schools as resource centres in the inclusive education system will to some extent assist the development of inclusive education.³⁶³

According to *White Paper 6*, full-service schools will be "equipped and supported to provide for the full range of learning needs of all learners."³⁶⁴ Human Rights Watch interprets the above description of full-service schools as:

...a new form of 'neighbourhood' mainstream schools, promoted as schools that would be adapted or built to accommodate children with disabilities and provide children with specialised services and attention in a mainstream environment.³⁶⁵

Full-service schools will be equipped and supported to provide for the range of learning needs of children with disabilities who require mild and moderate levels of support.³⁶⁶ Children with mild and moderate levels of ID can be adequately accommodated in mainstream schools with the necessary measures of support.³⁶⁷ Mainstream schools will primarily focus on providing "multi-level classroom instruction to respond to individual learner needs."³⁶⁸

Full-service and mainstream schools will be assisted by and receive support from special schools that will function as resource centres.³⁶⁹ *White Paper 6* proposes that only 500 primary schools will be converted into full-service schools over the 20-year

³⁶¹ *White Paper 6* 3, 15, 21; also see Human Rights Watch "*Complicit in Exclusion*" 15.

³⁶² *White Paper 6* 21; also see Human Rights Watch "*Complicit in Exclusion*" 16.

³⁶³ Khumalo and Fish Hodgson "The Right to Basic Education" 109.

³⁶⁴ *White Paper 6* 22.

³⁶⁵ Human Rights Watch "*Complicit in Exclusion*" 15.

³⁶⁶ *White Paper 6* 15, 22; also see Khumalo and Fish Hodgson "The Right to Basic Education" 109, 111.

³⁶⁷ *White Paper 6* 15, 23; also see Du Plessis 2013 *Law, Democracy and Development* 204; Human Rights Watch "*Complicit in Exclusion*" 14-15.

³⁶⁸ *White Paper 6* 18; see also Human Rights Watch "*Complicit in Exclusion*" 14.

³⁶⁹ *White Paper 6* 22-23.

implementation period of the policy.³⁷⁰ The proposed framework on inclusive education that is portrayed in *White Paper 6* ultimately aims to achieve the following:

To accommodate these children and youth of school-going age, we will, in collaboration with the provincial departments of education, designate and then convert, as a first step, primary schools to full-service schools, beginning in those school districts that form part of the national schools district development programme. Eventually, we expect to designate and convert to a full-service school at least one primary school within each of our school districts, taking into account the location of the special schools/resource centres. These full-service schools will be provided with the necessary physical and material resources and the staff and professional development that are essential to accommodate the full range of learning needs. In this manner, we will expand provision and access to disabled learners within neighbourhood schools alongside their non-disabled peers.³⁷¹

The inclusive education system that is envisaged by *White Paper 6* therefore proposes that almost all children, except for children with severe and profound ID, will be educated in the mainstream setting, which will consist of either full-service or mainstream schools. Special schools will provide the necessary resources and skills to full-service and mainstream schools to accommodate children with mild and moderate disabilities and to ensure that all of their learning needs are met in the mainstream system. *White Paper 6* fails, however, to meet the standard of inclusive education of all children with disabilities that is envisaged by the *CRPD*. The policy fails to include all children with disabilities in mainstream schools, but instead promotes the education of children with severe and profound ID in a segregated environment. However, for children with mild and moderate ID *White Paper 6* makes sufficient provision to educate them in an inclusive environment in mainstream and full-service schools where their educational needs will be accommodated.

5.4.3 Accessibility and reasonable accommodation

One of the fundamental aims of the *White Paper 6* policy is the commitment of the government to the:

³⁷⁰ *White Paper 6* 23.

³⁷¹ *White Paper 6* 30.

...provision of educational opportunities in particular for those learners who experience or have experienced barriers to learning and development or who have dropped out of learning because of the inability of the education and training system to accommodate their learning needs.³⁷²

To realise the right to inclusive education of children with disabilities, *White Paper 6* acknowledges that the existing barriers that prevent these children from accessing the mainstream education system must be addressed and eliminated.³⁷³ The policy further recognises that the education system has to change to create an inclusive education environment that accommodates the needs of all children.³⁷⁴ *White Paper 6* states that:

Establishing an inclusive education and training system will require changes to mainstream education so that learners experiencing barriers to learning can be identified early and appropriate support provided. It will also require changes to special schools and specialised 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 including special schools and specialised settings.³⁷⁵

White Paper 6 does not formally recognise the principle of reasonable accommodation, but the policy makes reference to the responsibility to eliminate the barriers in the education system that hinder children with disabilities from gaining access to inclusive education.³⁷⁶ The barriers that exclude children from the education system must be identified in the full range of education services. These services include the national and provincial departments of basic education, schools, education support services, curriculum and assessment, education managers and educators, and parents and communities.³⁷⁷

³⁷² *White Paper 6* 6, 11.

³⁷³ *White Paper 6* 24, 26.

³⁷⁴ *White Paper 6* 11, 24.

³⁷⁵ *White Paper 6* 24.

³⁷⁶ It has to be noted that *White Paper 6* was drafted before the adoption of the *CRPD* and the omission of any specific reference to the term reasonable accommodation is not a concern.

³⁷⁷ *White Paper 6* 24, 26; General Comment No 2 to the Convention on the Rights of Persons with Disabilities *Article 9: Accessibility* (2014) UN Doc CRPD/C/GC/2 para 25-26 differentiates between accessibility and reasonable accommodation and describes accessibility as the duty of states parties "to provide accessibility before receiving an individual request to enter or use a place or service." Reasonable accommodation is described as "...a means of ensuring accessibility for an individual with a disability in a particular situation."

White Paper 6 recognises the importance of the early identification of each child's individual learning needs and the implementation of support measures to accommodate these children in mainstream and full-service schools.³⁷⁸ It is proposed that the key to reducing the existing barriers in the mainstream education system lies in strengthening the support services that are available to the mainstream and full-service schools.³⁷⁹ These support services will include teaching, learning and management services that aim to build the capacity of mainstream and full-service schools, address the existing learning needs, and eliminate the barriers in the school environment.³⁸⁰

The lack of a flexible and accommodative curriculum is the most significant barrier that children with disabilities face in the education system.³⁸¹

These barriers to learning arise from within the various interlocking parts of the curriculum, such as the content of learning programmes, the language and medium of learning and teaching, the management and organisation of classrooms, teaching style and pace, time frames for completion of curricula, the materials and equipment that are available, and assessment methods and techniques.³⁸²

White Paper 6 recognises the need to adopt a flexible curriculum and assessment policy that all learners can access, regardless of the severity of their learning needs.³⁸³ A flexible and accommodative curriculum is an essential feature of the right to inclusive education.³⁸⁴ The inclusive education system that is proposed by *White Paper 6* aims to ensure that:

...all government schools would offer children the same curriculum, while guaranteeing individual learners adequate assessments and support to ensure their 'maximum participation in the education system as a whole'.³⁸⁵

³⁷⁸ *White Paper 6* 24.

³⁷⁹ *White Paper 6* 28-29.

³⁸⁰ *White Paper 6* 28; also see Khumalo and Fish Hodgson "The Right to Basic Education" 109.

³⁸¹ *White Paper 6* 31.

³⁸² *White Paper 6* 32.

³⁸³ *White Paper 6* 20.

³⁸⁴ *White Paper 6* 20.

³⁸⁵ Human Rights Watch "*Complicit in Exclusion*" 14.

It is proposed that the existing curriculum must be adapted to ensure that children with mild and moderate ID are easily facilitated in mainstream schools.³⁸⁶ Special schools will also fulfil a supportive role in ensuring that professional curriculum, assessment and instruction is made available to mainstream and full-service schools.³⁸⁷ *White Paper 6* therefore aims to ensure that children with disabilities can access inclusive education instead of specifically focussing on reasonably accommodating the individual needs of children with disabilities in an accessible inclusive education system. It is essential to bear in mind that the government has a duty to reasonably accommodate the individual learning needs of children with disabilities and a denial thereof would constitute disability-based discrimination in terms of article 2 of the *CRPD*.

5.4.4 Progressive realisation

White Paper 6 explicitly outlines the duty to progressively raise the standard of education within the limits of the available resources, to ensure that all children can access an inclusive education system.³⁸⁸ *White Paper 6* proposes a time frame of 20 years during which the right to inclusive education in South Africa is to be implemented and realised. The policy drafters break the 20-year period down into three phases and establish short-, medium- and long-term steps that must be taken and goals to be achieved in the process of realising the right to inclusive education.³⁸⁹

White Paper 6 classifies the short-term steps as immediate steps that must have been taken in the initial phase to establish the foundation of the framework for inclusive education in South Africa. These steps aim to raise awareness of what inclusive education entails, to establish the position and circumstances of special schools, to implement a programme to improve the efficiency and quality of education, to identify and convert special schools and mainstream schools into

³⁸⁶ *White Paper 6* 25.

³⁸⁷ *White Paper 6* 29.

³⁸⁸ *White Paper 6* 11, 33, 37-38; see also Murungi 2015 *PELJ* 3175.

³⁸⁹ *White Paper 6* 42-43, 45; see also Murungi 2015 *PELJ* 3175; also see Mbhele *The Education of Children with Impairments in South Africa: A Capability Approach* 40.

resources centres and full-service schools, and progressively to introduce inclusive education to the stake-holders and role-players in schools.³⁹⁰ The medium-term steps identified by the policy drafters are referred to as the major steps in realising the right to inclusive education. These steps aim mainly to make education available to children with disabilities who are left out of the education system and to expand the number of schools that are converted into resources centres and full-service schools. Taking these steps is subject to the availability of resources, however.³⁹¹

The short- and medium-terms goals that must be achieved in the first 7 years of the existence of *White Paper 6* seek to address the shortfalls and barriers in the existing education system. They further aim to expand the accessibility and provision of the right to education to children with disabilities of compulsory school-going age who are not currently accommodated by the education system. *White Paper 6* identifies these goals as the foundation for the inclusive education system that it hopes to realise in the 20-year timeframe.³⁹²

Finally, the long-term steps are recognised as the final steps that must be taken to realise the full enjoyment of the right to inclusive education. These steps aim to establish at least 380 special resource centres and 500 full-service schools, and to ensure that all children with disabilities are included in the education system.³⁹³ The long-term goal that *White Paper 6* aims to achieve is the realisation of an inclusive education system that will "uncover and address barriers to learning, and recognise and accommodate the diverse range of learning needs."³⁹⁴ *White Paper 6* fails to guarantee the immediate realisation of basic inclusive education, non-discrimination and reasonable accommodation as no obligation is placed on the government to immediately realise these elements of the right to inclusive education.

³⁹⁰ *White Paper 6* 42-43; these steps must have been taken within a period of two years from 2001-2003.

³⁹¹ *White Paper 6* 43; these steps must have been taken within a period of five years from 2004-2008.

³⁹² *White Paper 6* 45.

³⁹³ *White Paper 6* 43; these steps must be taken within a period of thirteen years from 2009-2021.

³⁹⁴ *White Paper 6* 45.

The full implementation of *White Paper 6* is projected for 2021. This policy has not been realised. The *WPRPD* was drafted to remind the people of South Africa of the importance of recognising the rights of children with disabilities and the role that inclusion fulfils in society. The *WPRPD* addresses the current inability of achieving inclusion in schools.

5.5 *White Paper on the Rights of Persons with Disabilities*

The *WPRPD* was adopted in an attempt *inter alia* to promote the rights of children with disabilities and to ensure their "socio-economic inclusion".³⁹⁵ It addresses several social, economic, political and cultural rights of children with disabilities and proposes a framework for the realisation of these rights in South Africa.³⁹⁶

The vision that the *WPRPD* aims to achieve is to make South Africa "a free and just society inclusive of all persons with disabilities as equal citizens."³⁹⁷ The proposed outcomes of the implementation of the *WPRPD* seek to ensure amongst other things that children with disabilities are "accorded and enjoy their full political, human, social and economic rights on a par with all other people in South Africa" and that they can "participate fully and equally in mainstream social life."³⁹⁸ The *WPRPD* does not explicitly guarantee a right to the inclusive education of children with disabilities, but instead promotes the importance of ensuring that children with disabilities are educated in an inclusive environment.³⁹⁹

The *WPRPD* acknowledge that when children with disabilities are excluded from the education system it "reflects a complex, progressive and sustained social process of 'being excluded'".⁴⁰⁰ The *WPRPD* indicates that the lack of inclusive policies in schools can be regarded as one of the main reasons why children with disabilities

³⁹⁵ *WPRPD* 7.

³⁹⁶ *WPRPD* 31-36, 38; it must be noted that the *WPRPD* is a policy document that outlines the Government's plans to establish certain laws and it is therefore not legally enforceable; Community Organisers Toolbox Education and Training Unit date unknown <https://www.etu.org.za/toolbox/docs/govern/policy.html>.

³⁹⁷ *WPRPD* 42.

³⁹⁸ *WPRPD* 42.

³⁹⁹ *WPRPD* 82-85.

⁴⁰⁰ *WPRPD* 83.

are excluded from the education system. It is further acknowledged that children with disabilities must be able to access inclusive education in a barrier-free environment where they can be educated with their abled peers. The *WPRPD* advises that the realisation of the right to inclusive education is dependent on the implementation of measures that reasonably accommodate the individual educational needs of children with disabilities and general measures of support that must be in place to facilitate effective education, and the development of opportunities that enable children with disabilities to learn life and social skills that will facilitate their full, equal and effective participation in education.⁴⁰¹

The *WPRPD* provides and describes further directives that must be followed in the process of realising the right to inclusive education. The first directive that is provided states that the educational facilities at all existing schools and schools that will be developed in the future must be accessible to children with disabilities. Secondly, it states that adequate support measures as well as reasonable accommodation measures must be available to children with disabilities in the schools in which they are enrolled. Finally, the *WPRPD* addresses the need to enforce the enrolment of children with disabilities who are of compulsory school-going age.⁴⁰²

The *WPRPD* fails to adequately recognise the right to inclusive education of children with disabilities, but it does function to some extent as a reminder of how important the role of inclusive education of children with disabilities is. Further, the fact that the *WPRPD* mentions that children with disabilities who are between the ages of 7 and 15 years must be enrolled in school is also a significant step towards ensuring that children with disabilities can at least enjoy the right to basic education.

5.6 The implementation of White Paper 6

The realisation in South Africa of the right to inclusive education of children with disabilities, including children with mild and moderate ID has been rather irresolute.

⁴⁰¹ *WPRPD* 83.

⁴⁰² *WPRPD* 84.

Not a lot of progress has been made in achieving the full realisation of this right that is envisaged in *White Paper 6*.

Khumalo and Fish Hodgson are of the opinion that the implementation of *White Paper 6* "has been too slow" and that limited progress has been made in the implementation of an inclusive education system.⁴⁰³ Human Rights Watch also finds that the progress in the realisation of the right to inclusive education provided in *White Paper 6* "has not translated into equal opportunities" for children with disabilities.⁴⁰⁴

Barriers and discrimination still prohibit children with disabilities from enjoying their right to basic education as well as the opportunity to receive inclusive education. Regardless of the different education options that are proposed by *White Paper 6*, the reality is that some schools still decide whether they are "willing or able" to admit and accommodate these children.⁴⁰⁵ Schools are not able to accommodate their educational needs or provide the measures of support that they require to learn on an equal basis.⁴⁰⁶ The education system's failure to accommodate the needs of children with disabilities in mainstream schools forces the system to rely heavily on segregated special schools to educate these children.⁴⁰⁷ This practice is in clear contradiction of the purpose of inclusive education at international, regional and national level, which aims to ensure that children with disabilities can access mainstream schools whilst being guaranteed that they will receive the required support.⁴⁰⁸

In 2017 Khumalo and Fish Hodgson reported that in South Africa there were nearly 600 000 children with disabilities who are not in school. This high number is described as "a crisis in the provision of basic education for children with disabilities."⁴⁰⁹ The Department of Basic Education issued a progress report on the

⁴⁰³ Khumalo and Fish Hodgson "The Right to Basic Education" 112.

⁴⁰⁴ Human Rights Watch *"Complicit in Exclusion"* 2.

⁴⁰⁵ Human Rights Watch *"Complicit in Exclusion"* 2-3, 36-37.

⁴⁰⁶ Human Rights Watch *"Complicit in Exclusion"* 36.

⁴⁰⁷ Khumalo and Fish Hodgson "The Right to Basic Education" 112.

⁴⁰⁸ Human Rights Watch *"Complicit in Exclusion"* 38, 48-49.

⁴⁰⁹ Khumalo and Fish Hodgson "The Right to Basic Education" 106.

implementation of *White Paper 6* in 2015, which found that 31 594 children with mild and moderate ID were being educated in special schools, as opposed to the 20 609 children who are enrolled in mainstream schools.⁴¹⁰ These numbers are in clear contradiction of the aim of *White Paper 6* to enrol children with mild and moderate ID in mainstream schools.

Human Rights Watch emphasises that:

...failing to include children with disabilities in mainstream settings in the early years of education, and referring those who are already in mainstream schools to special schools — often compromises the experiences of children with disabilities, and their lifelong education opportunities.⁴¹¹

One of the issues that Human Rights Watch identified for the failing state of inclusive education in South Africa is the inadequate funding of mainstream schools.⁴¹²

Human Rights Watch has established that:

...the budget for special schools in the 2014-2015 academic year was 12 times larger than the budget for inclusive education...⁴¹³

In addition to the unequal budget allocations, Human Rights Watch also states that in 2014, 5 out of the 9 provinces in South Africa had not allocated a budget to expand inclusive education. This had caused "serious backlogs in the implementation of the policy."⁴¹⁴ Donohue and Bornman also state that the poor implementation of *White Paper 6* can be attributed to the:

...inadequate funding provided by the South African Department of Education to the provincial education departments...⁴¹⁵

Khumalo and Fish Hodgson found that in the instances where budgets were allocated to full-service schools, the funds that were made available were

⁴¹⁰ It must be noted that the number of children with mild and moderate ID enrolled in special schools is greater than the number of children with severe and profound ID enrolled in special schools; Department of Basic Education *Report on the Implementation of Education White Paper 6 on Inclusive Education* 12,14; also see Mbhele *The Education of Children with Impairments in South Africa: A Capability Approach* 47.

⁴¹¹ Human Rights Watch *"Complicit in Exclusion"* 37.

⁴¹² Human Rights Watch *"Complicit in Exclusion"* 82-85

⁴¹³ Human Rights Watch *"Complicit in Exclusion"* 82.

⁴¹⁴ Human Rights Watch *"Complicit in Exclusion"* 84.

⁴¹⁵ Donohue and Bornman 2014 *SAJE* 3.

insufficient.⁴¹⁶ Further issues that still hinder the implementation of inclusive education as identified by Khumalo and Fish Hodgson include a lack of trained and qualified teachers, an inflexible curriculum, and the inaccessibility of mainstream and full-service schools.⁴¹⁷ All of these issues that hinder the accessibility of inclusive education are theoretically addressed in *White Paper 6*.⁴¹⁸

5.7 South Africa country report to the Committee on the Rights of Persons with Disabilities and concluding observations

5.7.1 South Africa country report

In 2014 the South African government submitted the *Country Report* to the Committee on the Rights of Persons with Disabilities commenting on the realisation of disability rights in South Africa under the *CRPD*.

The *Country Report* comments on the implementation of *White Paper 6* and recognises that a large number of children with disabilities are excluded from compulsory education or cannot access special or mainstream schools.⁴¹⁹

The *Country Report* further recognises that the progressive realisation of the right to inclusive education is failing. The urgency of the realisation of the right to education under section 29 of the *Constitution* is not reflected through the progressive realisation of the right to inclusive education, in contradiction of the provisions of the *Constitution*.⁴²⁰

The *Country Report* also comments on the maladministration of budgets that are allocated to the development and improvement of inclusive education.⁴²¹ This prevents children with disabilities from accessing full-service schools.⁴²² The report does not comment on the specific realisation of the right to inclusive education of

⁴¹⁶ Khumalo and Fish Hodgson "The Right to Basic Education" 119.

⁴¹⁷ Khumalo and Fish Hodgson "The Right to Basic Education" 119-122.

⁴¹⁸ *White Paper 6* 32.

⁴¹⁹ *Country Report* para 215.

⁴²⁰ *Country Report* paras 219-221.

⁴²¹ *Country Report* paras 227-236.

⁴²² *Country Report* paras 232-236.

children with ID. The report recognises "the need to place inclusive education at the centre of education reform in South Africa", but the current progress on the realisation of the right to inclusive education does not align with this recognition.⁴²³

5.7.2 Committee on the Rights of Persons with Disabilities' concluding observations

In 2018 the Committee on the Rights of Persons with Disabilities observed in their Concluding Observations that South African education law and policy still fail to respect and promote the rights of children with disabilities.⁴²⁴ The Committee found that there is a lack of adequate legislation to give "full effect to the right to inclusive education" of children with disabilities.⁴²⁵

The Committee also recognised that the principle of reasonable accommodation is inadequately applied in the realisation of the rights of children with disabilities, and especially children with ID.⁴²⁶ As a result thereof a large number of children with ID still remain out of the education system or are educated in segregated environments.⁴²⁷ The use of segregation of children with disabilities through special education and in special schools is promoted and preferred to inclusive education.⁴²⁸ In some instances mainstream schools do not admit children with ID because of a lack of "teachers trained in inclusive education, accessible curricula and negative societal attitudes against the attendance of children with disabilities at mainstream schools."⁴²⁹

The Committee recommends that efforts must be intensified to allocate the required resources to ensure that reasonable accommodation measures are available in schools to ensure that children with ID receive inclusive quality education.⁴³⁰ Finally, the Committee recommended that inclusive education, as the principle guiding the

⁴²³ *Country Report* para 60.

⁴²⁴ *Concluding Observations* para 4.

⁴²⁵ *Concluding Observations* para 12.

⁴²⁶ *Concluding Observations* para 8, 40.

⁴²⁷ *Concluding Observations* para 40.

⁴²⁸ *Concluding Observations* para 40.

⁴²⁹ *Concluding Observations* para 40.

⁴³⁰ *Concluding Observations* para 41.

provision of education in South Africa, must be adopted, implemented and overseen.⁴³¹

5.8 Conclusion

The right to basic education that is guaranteed to all children in South Africa is enshrined in section 29(1)(a) of the *Constitution*. The right to equal basic education of children with disabilities is also inferred from a textual interpretation of section 29(1)(a). The *Constitution* does not contain any provisions on the right to inclusive education.

The *SASA* fulfils a fundamental role in the process of implementing the right to basic education. Not only does it prescribe the duty to realise the right to basic education of children without disabilities, but it places an obligation on the government to ensure that children with disabilities are educated in ordinary public schools where reasonably possible. The *SASA* does not explicitly govern the right to inclusive education, but it may be argued that the *SASA* has played an important part in the adoption of *White Paper 6* on the right to inclusive education in South Africa.

White Paper 6 is the first policy document in the South African legal framework that addresses the right to inclusive education of children with disabilities. It describes inclusive education by reference to the presumption that all children can be educated, and that the education system must be adapted to accommodate the needs of all children in order to enable their equal participation. The stated overall theme of ensuring that all children with ID enjoy inclusive education is contradicted by the suggestion that special schools will be utilised to educate children with severe and profound ID. *White Paper 6* still advances the use of segregated schools in its proposed model for inclusive education. This is clearly in contradiction to the provisions of article 24 of the *CRPD* and to the commentary of the Committee on the Rights of Persons with Disabilities which condemns the use of segregated schools in inclusive education. *White Paper 6* does however propose that children with mild and moderate ID will be educated in mainstream and full-service schools.

⁴³¹ *Concluding Observations* para 41.

The suggestion that children with mild and moderate ID must be educated in mainstream schools is in line with the provisions of article 24 of the *CRPD*.

White Paper 6 does not specifically refer to the notion of reasonable accommodation, but instead promotes the accessibility of education of children with disabilities. The identification and elimination of barriers that exclude children with disabilities from the education system is at the centre of the aim to achieve inclusive education in South Africa. *White Paper 6* suggests that early identification of ID, the use of special schools as resource centres to support full-service and mainstream schools, and the adoption of a flexible and accommodative curriculum are all measures to accommodate the needs of children with disabilities in the education system. It fails to identify the nature of measures that must be adopted to reasonably accommodate the individual educational needs of children with mild and moderate ID. It is important to bear in mind that the denial of reasonable accommodation constitutes discrimination. The approach to reasonable accommodation that is adopted by *White Paper 6* is not in line with the standard that is set in article 24(2)(c) of the *CRPD*.

The implementation and full realisation of *White Paper 6* is subject to progressive realisation and the availability of resources. The policy has a 20-year implementation period that has been divided into three stages with each stage aiming to achieve a specific goal. *White Paper 6* does not make any reference to the immediate obligations of basic inclusive education, non-discrimination and reasonable accommodation that have been identified by the Committee on the Rights of Persons with Disabilities. The progressive nature of the full realisation of the right to inclusive education that is envisaged by *White Paper 6* does not meet the standard that is set by the *CRPD*.

6 Conclusion

The aim of this dissertation has been to evaluate the South African legal position on the realisation of the right to inclusive education of children with mild and moderate ID against the international human rights standards, and to determine to what extent the South African position complies with the global and regional human rights standards.

It is recognised that children with ID have limited intellectual functioning and adaptive behaviour. These limitations are usually diagnosed during the developmental phase, and they are present in the conceptual, social and practical domains of the child. Because of their limitations, children with ID are often isolated from children without disabilities and forced to grow and develop in segregated environments. This was evident in the *WCFID* case, where the government argued that children with severe and profound ID are uneducable and that it would be wasteful to allocate financial resources to their educational needs.

Children who are diagnosed with mild and moderate ID have the least severe levels of impairment, higher levels of functioning and require less severe measures of support when compared to children with severe and profound ID. Children with mild ID require the lowest intensity of support in the classroom. However, they still require support to ensure that they can meet the usual age-related academic expectations. Children with moderate ID require an increased intensity of ongoing support to enhance their academic achievement.

Children with mild and moderate ID have the capacity to be educated in mainstream schools if the necessary support measures are in place to assist their academic achievement. The deficiencies and inabilities that they have must not result in the denial of their right to education, nor must they be forced to receive their education in a segregated environment. The right to education, and more importantly the right to inclusive education, for children with mild and moderate ID must therefore be promoted to ensure their effective and equal participation in society.

The right to education is a fundamental human right that must be afforded to all children without any form of discrimination. Education provides children with the ability to uplift themselves in society and it presents them with the opportunity to realise their other human rights. The realisation of the right to education must be directed towards the full development of the human personality.

The right to primary and secondary education is well established in the global and regional instruments that have been discussed in this dissertation. Articles 13 and 14 of the *ICESCR* lay the foundation for the right to education at global level. These provisions guided the adoption of articles 28 and 29 of the *CRC*, article 17 of the *Banjul Charter* and article 11 of the *ACRWC*. The overall nature of the right to primary education entails that all children must enjoy free and compulsory primary education. This right must be realised on an immediate basis. The right to free and compulsory secondary education must be progressively made available to all children. No child may be denied the right to receive compulsory primary or secondary education. This education must also be of adequate quality and relevant to each specific child. The principles of equality and non-discrimination are of paramount importance in the realisation of the right to education at global and regional level. These principles must be applied to the accessibility and standard and quality of education and the conditions in which it is enjoyed. Children with mild and moderate ID are, like fully abled children, guaranteed the right to education, regardless of the fact that these global and regional legal instruments do not explicitly guarantee the right to education of children with disabilities.

Inclusive education is an approach to education that was adopted expressly to apply to children with disabilities. It aims to reasonably accommodate the educational needs of children with disabilities in mainstream schools by eliminating the barriers that prevent their accessing the existing education system. The aim is to allow children with disabilities to be educated with and participate in the same environment as children without disabilities, on an equal basis and free from discrimination.

The *CRPD* is the first binding international legal instrument to guarantee the right to inclusive education of children with disabilities. This right is enshrined in article 24 of the *CRPD*, the adoption of which was inspired by the provision on the right to education in the *ICESCR* and the *CRC*, but the content of article 24 was adapted and extended to apply specifically to children with disabilities.

The nature of the right to inclusive education is described in article 24(1), which guarantees the realisation of this right that must be free from discrimination and be implemented on the basis of equal opportunity. Article 24(2) obliges states parties to make inclusive education available to all children. The interpretation of article 24 imposes positive and negative duties on states parties, the first being the duty to realise the right of all children to inclusive education and the second being the duty not to prohibit any child from enjoying this right.

Article 24 does not provide a clear and concise definition of inclusive education, but instead provides guidelines that suggest what inclusive education is not. Inclusive education does not encourage segregation and the use of segregated or special schools to educate children with disabilities, and inclusive education does not advance the mere integration of children with disabilities in mainstream schools. The Committee on the Rights of Persons with Disabilities has expressed its concerns about the use of segregated schools. In *General Comment 4* the Committee states that the full realisation of inclusive education can be achieved only if children with disabilities are educated in mainstream schools. Inclusive education eliminates the existing barriers that prevent the enjoyment of education in mainstream schools and reasonably accommodates the individual needs of children with disabilities in the same classroom as that in which children without disabilities are taught.

The realisation of the right to inclusive education under article 24 must be interpreted in the light of article 4(2), which provides that the right to inclusive education is subject to progressive realisation and the availability of resources. However, primary inclusive education, non-discrimination and reasonable accommodation are elements of the right to inclusive education that are not subjected to progressive realisation and must be realised immediately. States

parties must take the necessary steps to effectively and expeditiously work towards the full realisation of the right to inclusive education. States parties are also prohibited from taking retrogressive steps in an attempt to avoid the realisation of the right.

One of the central features of article 24 is the provision that it makes for reasonable accommodation. Reasonable accommodation is defined in article 2 as necessary and appropriate modifications and adjustments that are made to ensure that children with disabilities can exercise and enjoy their rights on an equal basis with children without disabilities. Article 24(2)(c) confers the duty on states parties to reasonably accommodate the individual needs of children with disabilities in mainstream schools. States parties must ensure that reasonable accommodation is realised, because the denial thereof is disability-based discrimination.

Article 4(1) of the *CRPD* imposes a further obligation on states parties, namely to adopt policies and legislative measures to implement the right to inclusive education. These measures must set out a detailed plan of action to govern the realisation of the right to inclusive education. The plan of action must contain certain elements such as a definition of inclusion and specific objectives that must be met, such as a guarantee that all children with disabilities will receive inclusive education in mainstream schools with the required support measures available to them. The plan of action must also provide for reasonable accommodation to support the inclusion of children with disabilities in mainstream schools and impose sanctions for non-adherence thereto. It must also identify a time frame for the implementation of the right to inclusive education and contain measurable goals that have to be met. Finally, it must adhere to the standards of international human rights.

The South African interpretation of the right to education is enshrined in section 29 of the *Constitution*. Section 29(1)(a) affords everyone the right to basic education. The right to basic education of children with disabilities is also implied in the scope of section 29(1)(a). This section imposes a positive duty on the government to ensure that this right is realised and a negative duty not to interfere with the enjoyment thereof. The right to basic education must be interpreted in accordance

with section 9(3) of the *Constitution*. This interpretation ensures that children with disabilities will not be discriminated against in the enjoyment of the right to basic education. The Constitutional Court amplified the right to basic education as a priority right that is not subject to any internal qualifiers. The realisation of the right is immediate in nature and not dependant on the availability of resources.

The right to basic education of all children in South Africa is regulated by the *SASA*. The *SASA* makes provision for non-discrimination and provides that public schools must admit children with disabilities and serve their educational needs. The *SASA* further promotes the integration of children with disabilities in mainstream schools. Section 12(4) states that children with disabilities must, where reasonably possible, be educated in ordinary public schools and the necessary measures of support must be in place. The *SASA* does not explicitly mention the support measures that must be in place to assist children with intellectual disabilities, but it makes provision for physical facilities that must be in place to make schools more accessible. Neither the *Constitution* nor the *SASA* guarantees a right to inclusive education. The *White Paper 6* policy was adopted in 2001 to initiate the process of realising the right to inclusive education.

White Paper 6 interprets inclusive education on the understanding that all children have different learning needs that must be respected and supported by the education system. The latter must be accessible to all children. Inclusive education aims to promote the view that all children have the ability to learn if they receive the necessary support.

White Paper 6 proposes that the segregated education system must be transformed into one that accommodates the learning needs of all children with disabilities and eliminates the barriers that prevent them from being educated in the mainstream setting. However, this position is adopted only for children with mild and moderate disabilities as *White Paper 6* promotes the utilisation of segregated schools to educate children with severe and profound disabilities. It acknowledges that children with mild and moderate ID can be educated in mainstream and full-service schools. It further confirms that the required support services must be available at full-

service and mainstream schools to accommodate children with mild and moderate ID and to respond to their individual learning needs. The measures of support that must be available to children with mild and moderate ID are not specified. The position that it adopts on the right to the inclusive education of children with mild and moderate ID – that they must be educated in mainstream or full-service schools – is in line with the standard set by the *CRPD*.

White Paper 6 does not expressly refer to reasonable accommodation. It proposes that the education system must be accessible to accommodate children with disabilities. It requires the elimination of all existing barriers that hinder the realisation of the right to education of all children. Several existing barriers are identified and addressed in *White Paper 6*, but provision is not made for a plan of action to accommodate the individual needs of children with mild and moderate ID in mainstream and full-service schools. *White Paper 6* emphasises that children with disabilities must be able to access inclusive education, instead of ensuring that the individual needs of children with disabilities are reasonably accommodated in inclusive education system. Taking into consideration that *White Paper 6* was adopted before the *CRPD* this is an element of the right to inclusive education that the government must address, because the denial of reasonable accommodation amounts to disability-based discrimination.

The full realisation of the right to inclusive education as contemplated in *White Paper 6* is subjected to progressive realisation and the availability of resources. The implementation of the policy was to take place over a period of 20 years, and several stages of the implementation are identified in this 20-year time frame. It identifies the duty to progressively raise the standard of education to ensure that all children can access an inclusive education system. The final implementation date for the programme was set at 2021. *White Paper 6* fails to guarantee the immediate realisation basic inclusive education, non-discrimination in inclusive education and reasonable accommodation as identified by the *CRPD*.

The South African position on the right to the inclusive education of children with mild and moderate ID, except for the use of mainstream schools as the platform to

educate children with mild and moderate ID does not meet the standard that is set in the international human rights instruments. It is worth noting that currently a large number of children with mild and moderate ID do not enjoy the right to inclusive education in mainstream schools. As identified in the *WCFID* case, education for children with disabilities in general is not adequately provided in South Africa. The Committee on the Rights of Persons with Disabilities, in its Concluding Observations on the *Country Report* of South Africa of 2018, states that there is a lack of adequate legislative measures to realise the full extent of the right to inclusive education. The Committee proposes that better efforts must be made by the government to allocate the required resources to the development of inclusive education. The government must also ensure that reasonable accommodation is available to children with disabilities at mainstream schools. Finally, the Committee states that inclusive education must be adopted as the guiding provision of education in South Africa.

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