



# Western Cape Forum for Intellectual Disability

WESKAAP FORUM VIR INTELLEKTUELE GESTREMDHEID — IQUMRHU LE NTSHONA KOLONI LOKHUBAZEKO NGENGOQONDO

— ADDING SKILLS • ADDING KNOWLEDGE • ADVANCING RIGHTS —

To	The Chairperson Portfolio Committee on Basic Education Ms KJ Maimela <a href="mailto:kmaimela@parliament.gov.za">kmaimela@parliament.gov.za</a>
CC	The Secretary Portfolio Committee on Basic Education Mr Llewellyn Brown <a href="mailto:lbrown@parliament.gov.za">lbrown@parliament.gov.za</a>
CC	Chairperson's Secretary Rowena Nourse <a href="mailto:rnourse@parliament.gov.za">rnourse@parliament.gov.za</a>
CC	Gail Davids Director Western Cape Forum for Intellectual Disability (WCFID/The Forum) <a href="mailto:director@wcfid.co.za">director@wcfid.co.za</a>
Contact person	Vanessa Japtha Advocacy Manager Western Cape Forum for Intellectual Disability (WCFID/The Forum) <a href="mailto:advocacy@wcfid.co.za">advocacy@wcfid.co.za</a>

## SUBMISSION TO THE PORTFOLIO COMMITTEE ON BASIC EDUCATION

BY

WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY

ON

THE CONCURRENT FUNCTION AS IT APPLIES TO [Case18678/2007](#)

Department of Basic Education and the Western Cape Education Department

A SUPPORT NETWORK FOR TRAINING - ADVOCACY - RESOURCES



021 510 4686



[www.wcfid.co.za](http://www.wcfid.co.za)



[www.facebook.com/wcfid](https://www.facebook.com/wcfid)



[https://x.com/WCFID\\_ZA](https://x.com/WCFID_ZA)

ASAT HOUSE, Alexandra Hospital, 8 Annex Road, Maitland 7405 PO Box 142, Maitland 7404

Reg. No: 000-888 NPO PBO No: 18/11/13/2392 VAT No: 4100 211772

est. 1971



NATIONAL LOTTERIES COMMISSION  
LOTTO FUNDED

## The concurrent function as it applies to [Case18678/2007](#) (Department of Basic Education and the Western Cape Education Department)

### Background

1. The Western Cape Forum for Intellectual Disability (WCFID/the Forum) is a provincial membership-based non-governmental organization (NGO) based in Cape Town, Western Cape. [www.wcfid.co.za](http://www.wcfid.co.za)
2. WCFID provides a support network for the intellectual disability community via its programmes: education and resource development, community engagement and advocacy.
3. The high court awarded WCFID (the applicant) a structural order. The National Government of the Republic of South Africa and the Government of the Western Cape Province were the respondents ([Case18678/2007](#) 2010). The case addressed the ongoing systemic exclusion of children with severe to profound intellectual disability (SPID) from basic education. These children therefore attend NGOs termed 'special care centres' (SCCs/Centres).
4. **The purpose of this submission is to clarify the roles and obligations of the national and Western Cape education departments in the implementation of [Case18678/2007](#) given their concurrent functions.**

### Legal obligations of the DBE and WCED in [Case18678/2007](#)

5. The court ordered the national and provincial governments to provide **basic education** and provide **funding and resources** to these centres for the education of children with SPID, including:
  - Funds for facilities, staff, transport
  - Training, accreditation (qualifications) and appropriate remuneration (salaries).
  - Training teachers for children with SPID.<sup>1</sup>
6. WCED and DBE argue that they are unable to provide direct funding to centres.
7. WCED argues that the department is unable to fund centres directly as the law prohibits it and the responsibility for amending laws rests with the DBE.
8. **DBE argues that they do not have the enabling legislation to provide direct funding to centres.**
9. The current situation leaves children with SPID and the staff at centres in an invidious situation where their education is undermined due to under-funding and resourcing, failure to provide learner transport for all learners with SPID, exclusion from the National School Nutrition Programme (NSNP), qualified teachers, adequate facilities and adequate staff to ensure their equitable access to quality basic education.
10. The DBE has provided an **inadequate response** to [Case18678/2007](#) through the conditional grant for the education of children with SPID. (Figure 1) as [articulated](#) by the Minister of Basic Education. The conditional grant is a panacea rather than the remedy the court ordered.

<p><b>GRANT FOR LEARNERS WITH SPID:</b> The Minister of Basic Education reported that the grant is a response to <a href="#">Case No 18678/2007</a> Inadequate response to the court order Disproportionate response to need of learners and staff at centres</p>	<p><b>Case No 18678/2007 Govt. of SA and WCG must provide NPOs with funds for:</b></p>	<p>DBE conditional grant for the education of children with SPID <a href="#">Division of Revenue Amendment Bill B2 – 2023</a></p>
	Infrastructure	0
	Staff remuneration (teaching and non-teaching staff)	0
	Learner transport	0
	<p>2) The respondents are directed forthwith to take reasonable measures [to give effect to the said rights of children with SPID]: 2.1 ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic</p>	<ul style="list-style-type: none"> <li>▪ 9 per cent for the training of caregivers</li> <li>▪ 17 per cent for assistive devices, storage containers and top-up learning and teaching support materials (LTSM), LTSM and classroom furniture and equipment for newly on-boarded special care centres and designated schools for the benefit of learners with severe to profound intellectual disabilities from special care centres.</li> <li>▪ 65 per cent for compensation of transversal itinerant outreach team members and provincial grant managers</li> <li>▪ 9 per cent for administration including travel, vehicles, accommodation and subsistence.</li> </ul>

Figure 1

11. The Western Cape Government (WCG) allocated funds for the building of classrooms (R243m over the MTEF: 2024/25 – 26/27), and the national Department of Social Development (DSD) approved a conditional grant for limited learner transport for the education of children with SPID at centres in the Western Cape. WCED is implementing a rapid build of classroom at public schools for children with SPID with funds allocated by the WCG.

#### Legislation for the direct funding of centres: A legal opinion<sup>1</sup>

12. The concept of **reasonableness** is the standard against which the Constitutional Court assesses Government’s compliance to meet its constitutional obligations in respect of qualified socio-economic rights.
13. Unlike other socio-economic rights, the right to basic education has no internal qualifiers, meaning it is not subject to progressive realisation. The right to basic education as enshrined in section 29(1)(a) of the Constitution is immediate realisation.
14. “Subject to reasonable legislative measures” as notion allows Government to argue that the reason it is unable to make a right accessible is because it lacks resources. When it comes to the right to basic education, the question of “availability of resources subject to reasonable legislative measures” cannot be entertained.
15. The standard of **reasonableness** is only applicable to qualified socio-economic rights such as the right to further education in section 29(1)(b) of the Constitution. The right to basic education is not subject to qualifications of reasonableness or progressive realisation.

<sup>1</sup> S. Malematja, Correspondence, 2023

16. In terms of section 3 read with schedule 3 of the Public Finance Management Act 1 of 1999 (PFMA) makes provision for institutions to which the Act applies and the NGOs are not included in that list.
17. Section 47 of the PFMA empowers the Minister of Finance “by notice in the national Government Gazette must amend Schedule 3 to include in the list all public entities that are not listed; and may make technical changes to the list.” This provision arguably implies that legislative measures may need to be taken to ensure the funding of special care centres by government.
18. The analysis of the above, coupled with DBE’s claim, undoubtedly subjects the right to basic education for children with disabilities to progressive realisation. This is not in harmony with section 29(1)(a) of the Constitution and court decisions on the nature and context of the constitutional right to basic education. Furthermore, the claim and/or defence by DBE constitutes unfair discrimination against children with disabilities in relation to access to basic education.
19. It is without a doubt that the claim by DBE and its subsequent reliance on the PFMA to exclude special care centres from funding violates the best interests of child as enshrined in section 28(2) of the Constitution.
20. In case of *Moko v Acting Principal of Malusi Secondary School and Others [2020] ZACC 30*, the Constitutional Court echoing the *Juma Masjid* judgment confirmed that the right to basic education is the only socio-economic right that is not subject to progressive realisation.
21. In conclusion, DBE is attempting to subject the right to basic education to progressive realisation subject to “reasonable legislative measures” in claiming that they are unable to fund special care centres. This is contrary to how the right to basic education is contextually and constitutionally framed.
22. **WCFID has shared this legal advice with DBE and WCED (February 2025).**

#### **Admission of children with SPID at public schools**

23. WCFID acknowledges that both the DBE, WCED and other provinces have initiated a commendable process to place children with SPID in public schools.
24. The reality is most children with SPID in the Western Cape attend special care centres (NGOs). They do not benefit from direct funding from DBE and WCED limiting their equitable access to basic education. This inaction undermines the structural order of the court ( [Case18678/2007](#)) and the Constitution (29.1a).
25. Although WCFID strives for inclusive education, the matter under discussion is the **immediate, positive right to basic education** which is not limited by 'reasonable legislative measures' or 'available resources'<sup>3</sup>.
26. Furthermore, the courts have clarified that DBE has the legal mandate to provide basic education, including:
  - 26.1. [infrastructure](#),
  - 26.2. [learner transport](#)
  - 26.3. [remuneration of teaching and non-teaching staff](#)
  - 26.4. Access to the [National School Nutrition Programme](#) (Case Number: 22588/2020)

## Recommendations

### WCFID recommends that:

27. The Committee interrogates the DBE and WCED legal mandates within their concurrent functions as it relates to the implementation of the WCFID [Case18678/2007](#)
28. The Committee directs DBE and WCED to provide an implementation plan (with timelines and quality performance indicators) for the court order for the right to equitable access to quality basic education for children with SPID.

WCFID expresses its appreciation for considering this submission on the concurrent functions of the DBE and WCED as it relates to access to quality education for children with SPID at special care centres.

---

1. <sup>i</sup> The High Court made the following findings:

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

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

- 1.1 a basic education
- 1.2 protection from neglect or degradation
- 1.3 equality
- 1.4 human dignity

2. The High Court of the Western Cape made the following order:

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

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

- 
- 2.1 ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic education of an adequate quality;
  - 2.2 providing adequate funds to organizations which provide education for severely and profoundly intellectually disabled children in the Western Cape at special care centres, such as to enable them to:
    - 2.2.1 have the use of adequate facilities for this purpose;
    - 2.2.2 hire adequate staff for this purpose;
  - 2.3 providing appropriate transport for the children to and from such special care centres;
  - 2.4 enabling the staff of such special care centres to receive proper accreditation, training and remuneration; and
  - 2.5 making provision for the training of persons to provide education for children who are severely and profoundly intellectually disabled.