



# Western Cape Forum for Intellectual Disability

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

— ADDING SKILLS • ADDING KNOWLEDGE • ADVANCING RIGHTS —

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A SUPPORT NETWORK FOR TRAINING - ADVOCACY - RESOURCES



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**SUBMISSION**  
**ON**  
**DEPARTMENT OF BASIC EDUCATION**  
**NOTICE 3415 OF 2025**  
**SOUTH AFRICAN SCHOOLS ACT, 1996**  
**ADMISSION OF LEARNERS TO PUBLIC SCHOOLS REGULATIONS**  
**BY**  
**WESTERN CAPE FORUM FOR INTELLCTUAL DISABILITY**

**Background**

1. The Western Cape Forum for Intellectual Disability ('WCFID'/'The Forum') is an NGO that provides a support network for its members in the field of intellectual disability (ID) via its programmes, viz., training, resource development and advocacy.
2. WCFID is not a lawyering organisation and submits these comments on behalf of its diverse membership that supports children and adults with intellectual disability and their lived experiences of multiple and intersecting levels of discrimination.
3. WCFID's interest in the **Admission of Learners to Public Schools Regulations** ('Admissions Regulations') is therefore focused mainly on the right to education of children with severe to profound intellectual disability who are systemically excluded from public schools. Many are supported by NGOs called special care centres in the absence of systemic school admissions or placements.
4. WCFID has successfully litigated ([Case18678/2007](#)) on the right to education of children with severe to profound intellectual disability (SPID) who attend special care centres because they are systemically excluded from public schools and direct funding from the Department

of Basic Education (DBE). (Western Cape Forum for intellectual Disability v Government of the Republic of South Africa and Another (2011 (5) SA 87 (WCC)) [2010] ZAWCHC 544; 18678/2007 (11 November 2010).)

5. The court made the following findings and order:

[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 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.

6. Currently, the Department of Basic Education (DBE) and the Western Cape Education Department (WCED)<sup>1</sup> are admitting learners with severe to profound intellectual disability (SPID) at public ordinary schools. WCED is building 25 classrooms for children with SPID at public schools, including public ordinary schools (2025/26). Unless children with disabilities are given systemic, equitable, immediate access (e.g., through the same admissions process as other learners), the exclusion of children with disabilities will persist in violation of the Constitution (29.1).
7. Children with SPID have multiple and complex disabilities, e.g., cerebral palsy and epilepsy:

Intellectual disability affects the development of a child, starting before the age of 18 years and continuing throughout life. It affects the brain and can affect physical abilities too. Intellectual disability results in children developing and learning slower than typical children of their age in two main areas:

*Intellectual functioning:*

Their ability to think, learn, solve problems, reason and make sense of the world at the same level as others of their age, and

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<sup>1</sup> National Task Team Meeting on the Placement of Out-of-School Children with Disabilities in Schools, 17 -19 February 2025  
Right to Education Meeting of the Western Cape Government and the WCFID and DBE, 20 February and 8 May 2025

*Adaptive functioning*

Their ability to learn behaviours and skills which help them adapt to the needs of everyday living on the same level as others of their age.

	<b>Mild intellectual disability</b>	<b>Moderate intellectual disability</b>	<b>Severe intellectual disability</b>	<b>Profound intellectual disability</b>
<b>Population with intellectual disability</b>	85% of people with intellectual disability	10%. of people with intellectual disability	3 – 4%. of people with intellectual disability	1-2 % of people with intellectual disability
<b>Cognitive functioning</b>	IQ 50 – 69.	IQ between 35 – 49.	IQ between 20 – 34.	IQ Less than 20.
<b>Adaptive functioning</b>	Slow and delayed developmental milestones. Communicates reasonably well Can learn basic job-related skills. Can learn to read and master computer skills similar to 9-11 year old.	Developmental milestones delayed. Communicates in simple sentences, hold simple conversation. Significant difficulty learning and thinking logically. May learn to recognise and write a few words.	Noticeable delay in all developmental areas. Speech difficulties and limited vocabulary. Learns basic self-help skills with practise over time. Best functional abilities of a 3-to 5 year old.	Cannot take care of themselves independently and may have little or no verbal language. Emotional expression may be poorly understood. Seizures, physical disabilities and lower lifespan are common. Best functional abilities of under 3 years old.
<b>Support needed</b>	Able to learn and work but may need regular support.	May need different degrees of support to live and work.	Will need support in activities of daily living.	Needs support in all areas of daily living.

*Prof S Kleintjes, Professor in the Vera Grover Chair, Division of Intellectual Disability, UCT*

## General comments

### *Discrimination against children with disabilities in relation to their right to education*

8. The Regulations, in its current form, perpetuate and entrench the practice of progressive access to basic education for children with disabilities, rather than the immediate, positive right enshrined in the Constitution. The regulations create loopholes for schools, departments of education and respective Members of the Executive Council to exclude learners with disabilities from admission to public schools. The immediate and positive Constitutional right to basic education has no internal limitations. The courts have further clarified that the right to basic education is not subject to 'available resources' or 'reasonable legislative measures'.<sup>2</sup>
9. The Regulations conceal the systemic policy and legal gaps and practice of refusing children with disabilities admission at public schools (or placing them on waiting lists). The Basic Education Laws Amendment Act<sup>3</sup>, although directed at parents/caregivers, etc., place reciprocal obligations on the Minister and education officials. The Act exposes the Minister and education officials to criminal charges for preventing a learner from attending school:

Any other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending[a] school[,] is guilty of an offence and liable, on conviction, to a fine or to imprisonment for a period not exceeding 12months,or to both a fine and such imprisonment, alternatively a court may impose a sentence within the court's discretion as contemplated in terms of the Criminal Procedure Act.”;

10. The Regulations compound the gaps in the BELA. The Basic Education Laws Amendment Act is silent on the systemic exclusion of learners with disabilities from public schools, and particularly those who attend special care centres for learners with disabilities. They are systemically excluded from schools because of their disabilities, in contravention of the Constitution of South Africa and the South African Schools Act. This silence undermines the rights of these learners to care, protection, dignity, equality, non-discrimination and education.<sup>4</sup>

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<sup>2</sup> Retrieved from <https://www.saflii.org/za/cases/ZACC/2011/13.html>

<sup>3</sup> Retrieved from [https://www.gov.za/sites/default/files/gcis\\_document/202409/51258basiceducationlawsamendmentact32of2024.pdf](https://www.gov.za/sites/default/files/gcis_document/202409/51258basiceducationlawsamendmentact32of2024.pdf)

<sup>4</sup> Retrieved from: <http://www.saflii.info/za/cases/ZAWCHC/2010/544.html>

11. The Regulations are silent about the relief ordered by the court (Case18678/2007) more than 14 years ago on 11 November 2010. The order was brought in terms of, inter alia, Section 29 of the Constitution of South Africa (the right to education), against the Government of South Africa and the Government of the Western Cape.
12. Children with severe to profound intellectual disability are systemically excluded from public schools in violation of:
  - 12.1. the Constitution of South Africa<sup>3</sup>[Section 29] ('the Constitution');
    - Education
      29. (1) Everyone has the right—
        - (a) to a basic education, including adult basic education; and
  - 12.2. the South African Schools Act<sup>4</sup>[Chapter 2] ('SASA')
    - Compulsory attendance
      - 3 (2) The Minister must, by notice in the Government Gazette, determine the ages of compulsory attendance at school for learners with special education needs.
      - (3) Every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2).
    - Admission to public schools
      - 5 (1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way
  - 12.3. The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>5</sup>[Chapter 2] ('PEPUDA'), etc.
    - Prevention, Prohibition and Elimination of Unfair Discrimination, Hate Speech and Harassment Prohibition of Unfair Discrimination on Ground of Disability
      9. Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—
        - (a) Denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society; ...
        - (c) Failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

<sup>1</sup><http://www.saflii.info/za/cases/ZAWCHC/2010/544.html>

<sup>2</sup><https://static.pmg.org.za/160308overview.pdf>

### Specific comments

Section	Clause	Comment	Recommendation
<b>Coordination and Administration 4. (10)</b>	No eligible learner may be denied access to a public school unless it is in accordance with the Act or these regulations.	This clause is not aligned with the Constitution of the Republic of South Africa 29.1 that enshrines the positive and immediate right to basic education that is not subject to available resources or reasonable legislative measures. <sup>5</sup> It provides a loophole for the school and the department to exclude children with disabilities or postpone their admission. <sup>i</sup>	Delete 'eligible' and 'unless it is in accordance with the Act or these regulations'.
<b>Admission policies of public schools</b>	<b>5.(1)</b> When drafting or amending an admission policy, the governing body must ensure that the policy is rational, fair and takes into account the following: {b)The demographics. And education needs of the surrounding community, including	This exception is unconstitutional. It provides a loophole for the school and the department to exclude CWD or postpone their admission. The regulation could perpetuate the exclusion of children with disabilities.	Insert: Children with disabilities in the community must be prioritized.

<sup>5</sup> Retrieved from <https://www.saflii.org/za/cases/ZACC/2011/13.html>

	language preferences and the number of compulsory school age learners.	The prevalence rate of children with disabilities will always be lower in communities. The need for CWD to attend school outside of their communities requires costly learner transport that, in some cases, has to be customized.	
	(d) The resources and infrastructure available at the school.	This section is not compatible with the immediate right to basic education. It provides a gap for the exclusion of children with disabilities.	Insert a clause that: <ul style="list-style-type: none"> <li>- demands that the Department make all schools accessible and amend the Personnel Administrative Measures to address the needs of children with disabilities.</li> <li>- All new schools must be built according to Universal Design principles.</li> </ul>
	5 (3) A public school's admission policy must be made available to parents and to the Department on request.		Delete 'upon request. This should be compulsory - the parent's right.
<b>Authority to admit learners by HOD</b>	6 (1) 2 Before exercising the authority ... and provide a reasonable opportunity for the governing body to respond.		Stipulate the period.

	<p>6 (4) (a) In making a final admission decision the HOD must consider - the best interest and specific needs of the learner, including the learner's age and education support needs</p>	<p>This regulation excludes an alternative pathway for children with disabilities (CWD) It creates a loophole for schools/the Department to exclude them. This is not compatible with the letter and spirit of the Policy on Screening, Identification, Assessment and Support (SIAS).</p>	<p>Insert a regulation that clearly obligates the school and Department:</p> <ul style="list-style-type: none"> <li>- to admit the learner immediately and accelerate the SIAS process to place the CWD at a school that can support their needs.</li> <li>- Make the school physically and pedagogically accessible for the learners with disabilities.</li> </ul>
	<p>6 (4) (b) The resources available at the public school and within the Department to accommodate the learner.</p>	<p>This regulation excludes an alternative pathway for CWD. It creates a loophole for schools/dept. See the SIAS policy.</p>	<p>Insert a regulation that clearly obligates the school and the Department to place the CWD at a school that can support their needs immediately.</p>
	<p>6 (5) (b) the school can meet the learner's education needs</p>	<p>This regulation excludes an alternative pathway for CWD. It creates a loophole for schools/dept. See SIAS policy. obligates the school and dept to seek to place the CWD at a school that can support their needs.</p>	<p>Insert a regulation that clearly obliges the school and the Department to place the CWD at a school that can support their needs immediately.</p>

<p><b>Refusal of learner admission</b></p>	<p>9 A learner may not be refused admission on grounds that constitute unfair discrimination, including grounds such as race, ethnic or social origin, nationality, colour, gender, sex, age, disability, sexual orientation, religion, conscience, belief, culture, language, pregnancy, HIV and AIDS status or any other illness</p>	<p>The regulations do not make provision for CWD with moderate to high support needs There is an internal contradiction in the Regulations: Admission policies of public schools 5(1) (b) and (d) create premises for the exclusion of learners.</p>	<p>Address the contradictions. Align the regulations with the immediate, positive right to basic education.</p>
<p><b>Mandatory admission of learners to public schools</b></p>	<p>10 A learner must be admitted to the total school programme on or after admission and may not be suspended from classes, denied access to cultural, sporting or social activities of the school, denied the right to write examinations, denied a school report or transfer certificate, or otherwise discriminated against on the grounds that his or her parent –</p> <p>(a) is unable to pay school fees or not paid required school fees or has been exempted from payment of school fees in terms of Regulations Relating to the</p>		<p>Insert 'OR (d) the learner has a disability.'</p>

	<p>Exemption of Parents from Payment of School Fees in Public Schools.</p> <p>(b) does not subscribe to the mission statement of the school on or after admission due to cultural beliefs, religious observances, medical circumstances, or any other reasonable grounds submitted to the learner or parents of the learner</p> <p>(c) has refused to enter into a contract in terms of which the learner waives any claim for damages arising out of the education of the learner.</p>		
<p><b>Removal of learner from register of admissions</b></p>	<p>12(e) The name of the learner must be removed from the school register of admissions when the learner –</p> <p>(a) Is continuously absent as contemplated in the Policy of Learner Attendance published in General Notice No. 361 in Government Gazette No. 33150 of 4 May 2010.</p>	<p>This could be problematic. What are the steps the school should take to get the learner back into the school system?</p> <p>The statistics on school ‘drop-out’ will not be ameliorated by pushing children out due to social or family circumstances, inaccessible pedagogy, chronic illness, or disability.</p>	<p>Insert a clause that obligates the school and Department to implement the SIAS protocols.</p>

<b>Documents required for admission of learner</b>	13(6) Valid proof of the parents' residential or work address ...	This section does not address learners who live in informal housing	Insert a clause that addresses the needs of these learners and/or parents, e.g. affidavit.
<b>School communication with parent</b>	15(2) If an application for admission of a learner is refused, the public school must inform the parent of the learner in writing or in a manner determined by the HOD within 14 days. (a) Of the reasons for such a refusal (b) of the right to appeal against the refusal.	Currently some schools do not provide letters for CWD who are refused admission, denying the parent the proof of refusal to enable her/him/them to pursue the matter.	Delete 'in a manner'.
<b>Learners with special education needs</b>	18(1) An ordinary public school must admit learners with special physical education needs where this is reasonably practical.	The right to basic education is an immediate and positive right. This section is too vague. Currently about 1500 CWID attend special care centres (SCCs) because they are not admitted at public school in the Western Cape. What does 'reasonably practicable' mean?	Delete: 'reasonably practical'. Stipulate provisions for CWD with time frames.
	(4) Before the HOD seeks admission of the learner in a suitable public school in the province as contemplated in Sub	This clause is too broad. It is time for specific regulations on inclusive education, incl., for CWD. These regulations are	Stipulate a time frame.

	<p>regulation 3 the HOD or a person duly authorised by him or her, must arrange for consultation with the parents of the learner, school management team and appropriate educators of the ordinary public school that received an admission application for the learner and the relevant district officials to assess the learner's special education needs and identify appropriate education options for the learner.</p>	<p>overdue. For too long CWD have been relegated to obscure admissions processes that can last for years on waiting lists.</p>	
	<p>(5) The HOD must approve in writing the admission of a learner to a suitable public school in the relevant province after the assessment and consultation required in sub regulation 4 have been undertaken and the parents of the learner have agreed to the admission of the learner to the identified suitable public school.</p>	<p>This regulation could relegate the child to a boarding school where abuse and bullying is often rife. The CWD should be close to family and community.</p>	<p>Stipulate a time frame for the transformation of schools to inclusive schools. CWD should be accommodated in schools closest to their homes. Consider the cost of learner transport and modified vehicles.</p>
	<p>(6) The process referred to in Sub Regulations 3 to 5 must be handled as a matter of urgency to facilitate the admission of the learner as soon as reasonably possible, to ensure that the</p>	<p>Currently this can take up to 4/5 years.</p>	<p>Stipulate the time frame</p>

	learner is not prejudiced in receiving appropriate education.		
<b>Criteria for admission of learner to public school at age lower than admission age for Grade R</b>	<p>19 A learner may be admitted to a public school at an age lower than the admission age for Grade R if he or she, to the satisfaction of the HOD,</p> <p>(a) demonstrates cognitive, emotional, social and physical development appropriate for participation in Grade R, or as confirmed by formal assessment by the school and,</p> <p>(b) is supported in his or her development by -</p> <p>(i) parents understand and accept the implications of early admission to school and</p> <p>(ii) The educators and staff at the school to which the learner is to be admitted without detriment to the education of other learners.</p>	<p>The Minister of Education is yet to publish the compulsory school ages for learners with special education needs/disabilities as required by the South African Schools Act (SASA) 1996:</p> <p>CHAPTER 2 LEARNERS Compulsory attendance (3) The Minister must, by notice in the Government Gazette, determine the ages of compulsory attendance at school for learners with special education needs.<sup>6</sup></p>	<p>The Minister must, by notice in the Government Gazette, determine the ages of compulsory attendance at school for learners with special education needs.</p>

<sup>6</sup> [https://www.saflii.org/za/legis/consol\\_act/sasa1996228.pdf](https://www.saflii.org/za/legis/consol_act/sasa1996228.pdf)

<b>School zoning</b>	21(3)(e) whether the school has boarding facilities and, if so, they need to ensure the school is accessible to learners regarding placement in such facilities.	Accessibility comprises more elements than physical access.	Elaborate with examples, e.g., curriculum, support staff, therapeutic staff, etc.
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### Conclusion

13. The regulations perpetuate the systemic exclusion of children with disabilities from the immediate, positive right to basic education that may not be limited by ‘available resources’ or ‘reasonable legislative measures’.
14. They relegate children with disabilities to a protracted, progressive, and vague admissions process that violates the immediate right to basic education.
15. Their relative silence about the admissions process for children with disabilities contravenes domestic laws and jurisprudence (e.g., the Constitution, the Children’s Act, PEPUA) and international conventions that South Africa has ratified (e.g., United Nations Convention of the Rights of Persons with Disabilities, the United Nations Covenant on Economic, Social and Cultural Rights, and the African Disability Protocol).
16. The Western Cape Forum for Intellectual Disability (WCFID) urges the Minister to align the Regulations with domestic and international law. Children with disabilities deserve to have access to equitable, inclusive, and quality education. It is their human right.

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<sup>ii</sup> S. Malematja (Centre for Child Law): 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.

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 immediately realisable.

“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.

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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. (Correspondence)