

Failed Implementation

Lesotho's Inclusive Education Policy and
the continued exclusion of children with
disabilities

A briefing paper
April 2023

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EXECUTIVE SUMMARY

The Kingdom of Lesotho (Lesotho) has assumed international legal obligations to ensure access to quality, inclusive education for children with disabilities, by acceding to treaties including: the Convention on the Rights of Persons with Disabilities (CRPD); the International Convention on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Rights of the Child (CRC); the African Charter on Human and People's Rights; and the African Charter on the Rights and Welfare of the Child.

Lesotho is bound to submit periodic reports on its compliance with the provisions of these treaties, upon which the bodies responsible for monitoring their implementation provide concluding observations and recommendations. The concluding observations may include concrete, focused and implementable guidance on realizing the right to inclusive education. In serial breach of its reporting obligations, Lesotho has only submitted a periodic report to the Committee on the Rights of the Child, which has expressed concern on the limited access to education for children with disabilities.

According to an unofficial list of special and inclusive schools provided to the ICJ in late 2022, there are six (6) special schools (including one resource centre), and fifteen (15) inclusive schools operating in Lesotho. It is therefore likely that many children with disabilities remain out of school, or in schools that cannot appropriately accommodate their educational needs. Given the limited number of these schools, and their lack of capacity to accommodate learners with all types of disabilities, the majority of children with disabilities are not able to attend them.

Although parents and guardians often struggle to get their children into schools, and ensure that they stay in school, the research conducted by the ICJ also reveals that the quality of education received by children with disabilities at both inclusive and special schools, whether public or private, falls below the requirements under international law and standards, as well as Lesotho's domestic laws.

In terms of domestic law, the Constitution of Lesotho provides for the equality of, and prohibits discrimination against, persons with disabilities. The Constitution also includes "provision of education" as a "Principle of State Policy". To give effect to constitutional provisions and Lesotho's international law obligations, the Lesotho legislature has enacted a variety of laws including: the Disability Equity Act; the Education Act; and the Children's Protection and Welfare Act. The ICJ's research suggests that a full review of legislation is necessary to ensure compliance with international law and domestic constitutional law.

The government of Lesotho has also adopted an Inclusive Education Policy, designed to ensure that it fully encompasses children with disabilities. While sparse official information is available on the implementation of this policy, little progress has been made, partly due to the absence of an implementation framework. Interviews with staff of the Special Education Unit, reveal that the unit is severely understaffed and more generally under-resourced. As a result, the reality

faced by principals, teachers and learners at the school level is far removed from Lesotho's legal and policy commitments.

The ICJ has been able to draw the following conclusions:

Failure to ensure an inclusive education system for all. Given that fewer than 20 of the approximately 4000 schools (pre-primary, primary and post-primary schools) in Lesotho can accommodate learners with disabilities, children with disabilities are effectively excluded from the vast majority of schools in the country. As such, it is highly likely that a large number of children with disabilities do not go to school.

Stigma and social exclusion. Stigma and social exclusion continue to be rife both within schools and in the society. Government officials, school staff, parents and others are ill-informed about disability rights, inclusive education and sometimes consider children with disabilities ineducable. As a result, children with disabilities are kept at home, subjected to bullying, or otherwise maligned by staff and other learners when they attend regular schools.

Financial Constraints: Funding and Fees. While a significant percentage of the government's budget is allocated to education in general, little of this budget is allocated for – or spent on – inclusive education. Staff at schools indicate that the main regular funding public schools receive from the government is through the payment of teachers' salaries. Even inconsistent support sometimes historically provided to schools in the form of a subvention has not materialized in recent years. Government allocations for special and inclusive schools do not account for the costs associated with providing the education support required for children with disabilities. Schools commonly attempt to fundraise from external donors and/or supplement their budgets by dedicating time to potentially income generating activities to bridge this funding gap. Private and public schools sometimes ask for contributions from parents which may amount indirectly to school fees. As a result, some learners are reported to drop out of schools – or decide not to enrol in them in the first place – because of they lack the resources to attend.

Inadequate implementation of policy. The government has struggled to coordinate concerned stakeholders, including relevant government ministries, in an integrated and cooperative manner to implement policy on the rights of children with disabilities. Delays in the development and regular review of strategies undermines the government's ability to effectively implement policy in a targeted manner. The Special Education Unit remains significantly understaffed and under-resourced to perform vital functions. The continued delay in the adoption of an implementation framework for the inclusive education policy further frustrates the Special Education Unit's ability to implement the policy.

Inadequate capacity to monitor implementation. MoET officials expressed reservations about their ability to effectively monitor the quality of education provided to children with disabilities in Lesotho. Only some districts employ locally located staff tasked with supporting schools in delivering inclusive education. Staffing in the Special Education Unit is inadequate, and its central office, which is in Maseru, is a substantial distance from many of the schools. MoET officials

report lacking basic resources for transport and other supports required to visit schools regularly. The MoET itself also lacks the expertise to perform some of its functions, such as screening, identification, and assessment.

Legislative inconsistencies and gaps. The education system, and the laws governing it have not been subject to a comprehensive review to ensure compliance with the Constitution and international legal obligations. Shortcomings in this respect are manifest. The Education Act, for instance, permits a learner's non-enrolment in school or discontinuation of their attendance at school on the basis of their disability. There is need to amend existing legislation to require regulation of special and inclusive school hostels/boarding facilities, and private actor involvement in the provision of education.

Inadequate Infrastructure and Limited Access to Learning Materials. While government and government partners (such as UNICEF) provide assistive devices to schools on an ad hoc basis, special and inclusive schools still report inadequate access for children with disabilities to basic assistive devices, such as glasses or other magnification devices, hearing aids and wheelchairs. Limited learning materials are provided to the schools, and the current curriculum has not been fully adapted to ensure its accessibility for children with disabilities. As a result, children with disabilities tend to repeat grades more than those without disabilities. Infrastructure is often inadequate to ensure accessibility and infrastructure at special and inclusive schools is often dilapidated and unsafe.

Inadequate training of teachers. Teacher skills training and professional development on inclusive education are still highly inadequate in Lesotho, which causes gaps in the effective adaptation and modification of the teaching and learning environment for learners with disabilities. Without proper pre-service training on inclusive education, teachers are unable to provide children with disabilities with the support and accommodations they may require. Many teachers are also placed at special and inclusive schools without even a basic understanding of disability and inclusive education. In-service training is rare and ad hoc, and schools are not equipped to identify and screen learners for disabilities.

Lesotho has largely failed to comply with its domestic law and international legal obligations. The ICJ recommends that the authorities take necessary steps to:

- a. Implement more effective awareness-raising programs on disability rights and inclusive education;
- b. Provide adequate resources to ensure access to inclusive education for children with disabilities;
- c. Invest in and carry out regular pre- and continuous in-service training for teachers on inclusive education;
- d. Scale up the Special Education Unit's capacity to monitor the quality of inclusive education in Lesotho, including by making regular visits to special and inclusive schools;
- e. Conduct a review of all legislation applicable to education for children with disabilities to ensure compliance with human rights law and standards;

- f. Accelerate the development and adoption process for the implementation framework to facilitate the implementation of the Inclusive Education Policy;
- g. Ensure the justiciability of all human rights, including the right to inclusive education for learners with disabilities;
- h. Ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities;
- i. Ratify the Optional Protocols to the CRPD and ICESCR;
- j. Ensure that Lesotho submits all outstanding reports to the United Nations Treaty Bodies; and
- k. Continue working cooperatively with civil society and intergovernmental partners to give effect to the right to inclusive education.

“Just like every other person, we need to work, we need to study and go to school. We also have our dreams...We need to stand up ... People should see us before seeing our disabilities. People should see what we are capable of.”

- Mosa Kuape¹

“Even though there are some who have made it, but they are very few, it has come with a very long struggle. So it was not easy for those who have made it, and the lack of support which has been demonstrated throughout is [what has actually] contributed [to] others not making it. So it is not that those people that didn't were not actually willing to achieve in life, but it is just because of the system which was actually somehow exclusionary to them.”

- Nkhasi Sefuthi²

“We try all what we can, because we want the kids to be satisfied like other kids. We become frustrated and we are not all the same, some will have the heart to go further and others will not. Even though we are trying, we are helping, we are here.”

- Teacher, Special School

The Kingdom of Lesotho is a party to a number of international treaties which guarantee the right to education for children with disabilities.³ In 2000, the Lesotho's Ministry of Education and Training introduced its policy on universal free primary education, to foster access to quality education in the midst of high levels of poverty,⁴ and through the enactment of the Education Act of 2010, Parliament established free and compulsory primary education.⁵ However, the Lesotho National Federation of Organisations of the Disabled (LNFOD) has reported that despite Lesotho's international human rights obligations, as well as laws and

¹ IT consultant and disability rights advocate.

² Disability rights advocate and Lesotho National Federation of Organisations of the Disabled (LNFOD) Executive Director.

³ See, for example, Article 24 of the Convention on the Rights of Persons with Disabilities (2006), available at: <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>; See also Articles 2 and 13 of the International Covenant on Economic, Social and Cultural Rights (1966), Articles 2 and 28 of the Convention on the Rights of the Child (1989), Articles 2 and 13 of the African Charter on Human and People's Rights (1982) and Articles 11 and 13 of the African Charter on the Rights and Welfare of the Child (1990).

⁴ Pholoho Morojele, “Implementing Free Primary Education in Lesotho: Issues and Challenges”, in *Journal of Social Sciences*, Volume 32(1), 2012 p. 37; Lesotho Ministry of Education and Training, Education Sector Plan 2016 – 2026, available at: https://planipolis.iiep.unesco.org/sites/default/files/ressources/lesotho_education_sector_plan_2016-2026.pdf.

⁵ Section 3(a) of the Education Act No. 3 of 2010.

policies aimed at supporting the integration of persons with disabilities into regular schools and society in general, children with disabilities are not able to access education on an equal basis.⁶

The latest Population and Housing Census, which was conducted in 2016, reveals that an estimated 2.5 percent of persons in Lesotho are living with a disability.⁷ Statistics from the Ministry of Education and Training (MoET) further indicate that roughly 4.4 percent of learners enrolled in primary schools in 2019 had some form of disability.⁸ These are most likely significant underestimates given the predicted global rates of disability,⁹ and deficiencies in the screening and identification of children with disabilities at schools.

Lesotho legislation, complimented by the 2018 Inclusive Education Policy,¹⁰ provides, in principle, for an inclusive education system and the 2021 Persons with Disability Equity Act is aimed at incorporating into law the UN Convention on the Rights of Persons with Disabilities (CRPD).¹¹ The Inclusive Education Policy, the 2021 Act and several other laws and policies guarantee the rights of children with disabilities to access education in their local schools. In practice, however, implementation of inclusive education has been slow or non-existent due in part to a dearth of practical guidelines for implementing the legal framework on inclusive education.¹² The MoET has been working with UNICEF to develop this implementation framework. It will take the form of a roadmap that will guide relevant stakeholders on the specific functions they must carry out to fully operationalize the inclusive education system in Lesotho. The process of finalizing this implementation plan is still underway.

The education system in Lesotho has both formal and non-formal domains.¹³ The formal education system, which consists of five levels: pre-primary, primary, secondary (junior and senior secondary), post-secondary (vocational and

⁶ LNFOD “Disability Equity Act”, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_equity_act.pdf (accessed 2 August 2022).

⁷ Lesotho Bureau of Statistics, “Summary: Key Findings” (2016), available at: https://www.bos.gov.ls/2016_Summary_Key_Findings.pdf. Due to the general lack of updated statistics and inadequacies in the system for gathering such information, it is difficult to ascertain the exact numbers of persons living with disabilities in Lesotho.

⁸ Lesotho Bureau of Statistics, *2019 Education Statistics Report*, (2021), available at: <https://www.bos.gov.ls/publications.htm>; See also UNICEF, *MICS-EAGLE Lesotho Education Fact Sheets*, (2021).

⁹ See, for example, World Health Organization, “Fact Sheet: Disability and health”, 24 November 2021, available at: <https://www.who.int/news-room/fact-sheets/detail/disability-and-health>.

¹⁰ Inclusive Education Policy of 2018, available at: <https://planipolis.iiep.unesco.org/sites/default/files/ressources/approved-inclusive-education-policy-2018.pdf>.

¹¹ Persons with Disability Equity Act No. 2 of 2021.

¹² See Inclusive Education Policy, p. 11.

¹³ Inclusive Education Policy, p. 9; See Lesotho Bureau of Statistics, *2019 Education Statistics Report*, (2021), p. 58: which explains that “Non-Formal Education (NFE) may be defined as a type of education in which content is adapted to suit the unique needs of students to maximize their learning capacity. It is more learner-centred, as optional curriculum is emphasized unlike formal education where the prescribed sequential curriculum is used. NFE learning is facilitated typically through interest-based courses, workshops, community courses, projects and or seminars. Much like formal education, learning takes place in formal learning environments (learning centres) which do not however observe the usual formal school education conventions such as keeping roll, enforcing discipline and writing reports.”

technical schools) and higher learning education.¹⁴ Non-formal education (NFE) is aimed at providing access to primary and secondary school education or practical training to a wider range of learners, including out-of-school youth and adults, through specialized courses, workshops or seminars outside of a formal education environment.¹⁵

According to Lesotho's Education Sector Plan (2016-2026), the formal education sector includes 2,204 pre-primary schools; 1,478 primary schools; 341 post-primary schools; 26 technical and vocational schools; and 14 higher education institutions.¹⁶ The Education sector plan notes that of these schools, five were "special schools" and that there were a further "seven inclusive Lower Basic Education schools and four inclusive upper basic education and secondary schools nationwide which integrate LSEN into special-needs friendly standard schools".¹⁷ An unofficial list of special and inclusive schools provided to the ICJ in late 2022 suggests that to date there are currently six (6) special schools in the country (including one resource centre) and a total fifteen (15) inclusive schools.

Most primary schools in Lesotho are owned and run by churches,¹⁸ with support from the government in terms of improving infrastructure, paying teachers and creation of curricula.¹⁹ Schools run by churches have also partnered with government to operate as public schools,²⁰ and adopt minimal fees for secondary school education. Resources centres, schools and other institutions are owned by the government, a private entity or jointly by government and private companies, churches, or communities.²¹ The Education Statistics Report of 2019 indicates an increase in the number of schools owned privately (2% of schools countrywide) and by the government directly (11%).²² However, this is still less than the number owned by churches (79%).²³

¹⁴ Inclusive Education Policy, p. 9.

¹⁵ Lesotho Bureau of Statistics, *2019 Education Statistics Report*, (2021), p. 58-9; see also UNICEF, *Education Budget Brief Fiscal year 2020/21*, p. 4, available at: <https://www.unicef.org/esa/media/8726/file/UNICEF-Lesotho-Education-Budget-Brief-2020-21.pdf>. Institutions providing such instruction and training include the Lesotho Distance Teaching Centre, as well as other institutions and associations which may be affiliated with the LDTC in terms of providing teaching and learning materials and recognize NFE initiatives. These are the Lesotho Girl Guides Association, Lesotho Correctional Services and the Lesotho Association of Non-Formal Education.

¹⁶ Education Sector Plan 2016 – 2026 (August 2016), p 14. Though these numbers may have grown since.

¹⁷ Id, p 95.

¹⁸ These churches include the Anglican Church of Lesotho (ACL), Roman Catholic Missions (RCM) and Lesotho Evangelical Church (LEC) and the African Methodist Episcopal (AME) Church. Lesotho Bureau of Statistics, *2019 Education Statistics Report*, (2021), p. 26, available at: <https://www.bos.gov.ls/publications.htm>.

¹⁹ Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa to the African Commission (2017) para. 185; Lesotho Bureau of Statistics, *2019 Education Statistics Report*, (2021), p. 16 and 26, available at: <https://www.bos.gov.ls/publications.htm>. According to the *2019 Education Statistics Report*, 32.4% of learners in 2019 were enrolled in primary schools run by the Lesotho Evangelical Church at 32.4%, followed by 31.7% enrolled in the schools run by the Roman Catholic Missions. These were the highest percentages of enrolments for that year.

²⁰ Combined Second to Eighth Periodic State Party Report to the African Commission (2017) paras. 185 and 191.

²¹ Lesotho Bureau of Statistics, *2019 Education Statistics Report*, (2021), p. 3.

²² Lesotho Bureau of Statistics, *2019 Education Statistics Report*, (2021), p. 26.

²³ Ibid. Church schools - anglican

One of the most prominent barriers to children with disabilities having their right to education fulfilled is a lack of “regular schools” in Lesotho which are properly equipped to include them and cater to their needs.²⁴ Since there are very few “special schools” in Lesotho, and “regular schools” are often not equipped to support and accommodate the needs of children with disabilities, such children are seldom in schools at all.²⁵ In some instances, regular schools simply refuse to admit children with disabilities due to the prevalent social stigma surrounding disability, as well as the dearth of specialized teachers trained to teach children with disabilities, who are scarce in number and work primarily in urban areas.²⁶

Many of the challenges faced in accessing quality education in Lesotho apply to all children, not only children with disabilities. Recently published research by UNICEF, for example, records the fact that one in two children at a fourth and sixth grade level “lacked the essential reading and numeracy skills”.²⁷ Though this situation persisted before the COVID-19 pandemic, UNICEF notes that “access to education has been severely reduced by the pandemic”,²⁸ despite the fact that since 2020/21, the “highest share of the Government’s budget [has gone] to the education sector”.²⁹

This briefing paper will examine these and other challenges to the realization of the right to education for children with disabilities in Lesotho. It will outline Lesotho’s human rights obligations in terms of the right to inclusive education under international law and its domestic law related to this right and thereafter measure the experiences of children with disabilities in accessing education against these standards. The aim is to raise awareness about the nature and depth of the challenges faced by children with disabilities in accessing education, and to provide recommendations to the Lesotho authorities with a view to promoting substantial, serious, and expeditious measures by officials to overcome these challenges. A particular focus of this report will also be highlighting the objectives of the existing Inclusive Education Policy in Lesotho and indicating how these objectives conflict with the realities faced by children with disabilities in accessing opportunities to receive an education. It is hoped that this report will contribute to advancing the implementation of this Inclusive Education Policy and more generally realizing the right to education for children with disabilities in Lesotho.

²⁴ Education Sector Plan 2016 – 2026, p. 96.

²⁵ Education Sector Plan 2016 – 2026, p. 96.

²⁶ Mahlape Tseeke, “Teachers’ perceived self-efficacy in responding to the needs of learners with visual impairment in Lesotho”, in *South African Journal of Education*, Volume 41(2), 2021; Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2, 25 June 2018, para. 41. available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/189/70/PDF/G1818970.pdf?OpenElement>; UNICEF and LNFOD, *Quarterly Progress Report on Project: Inclusive Education for Learners with Disabilities in Lesotho* 12.

²⁷ UNICEF “Country Office Annual Report, Lesotho” (2022), available: <https://education-profiles.org/sub-saharan-africa/lesotho/~non-state-actors-in-education>.

²⁸ UNICEF Lesotho “Education Budget Brief Fiscal year 2020/21” (2022), available: <https://www.unicef.org/esa/media/8726/file/UNICEF-Lesotho-Education-Budget-Brief-2020-21.pdf>.

²⁹ *Id.*, p7.

This briefing paper is divided into four further sections. **Section 1** briefly summarizes findings from a focus group discussion held with caregivers of children with disabilities in an effort to understand their children’s experiences in accessing education. **Section 2** provides a summary of the international and regional human rights law and standards on the right to education and inclusive education. It also surveys the domestic legal framework on the realization of the right to education in Lesotho. **Section 3** explores the situation of children with disabilities as regards accessing education and considers the degree to which their experiences reflect compliance with Lesotho’s international and domestic human rights obligations. **Section 4**, the final section, concludes and provides a set of recommendations to the Lesotho authorities for overcoming the challenges faced in achieving the realization of the right to education for children with disabilities in Lesotho.

Methodology

The findings in this briefing paper are based on interviews with officials from the Lesotho Ministry of Education and Training (MoET) in Maseru;³⁰ a focus group with caregivers of children with disabilities in Maseru; interactions with LNFOD and UNICEF Lesotho; and interviews with principals of special and inclusive schools in various districts of Lesotho. The ICJ undertook additional research based on available sources of information.

The ICJ reached out to the MoET early on in the process of conducting the research and received a positive response in October 2022. The participants in the Focus Group attended after responding to a call put out by LNFOD. The interview at the MoET included members of the Special Education Unit, while the focus group discussion included nine parents of children with disabilities and one member who works with persons with disabilities. The majority of interviews were held in person, in Lesotho, with some being completed or supplemented with online calls.

Following the ICJ’s meeting in October 2022 with the officials from the MoET’s Special Education Unit, it was resolved that ICJ representatives could visit a sample of special and inclusive schools to interview teachers, principals and other staff members. These visits occurred between 30 January and 2 February 2023. ICJ was accompanied by staff of the Special Education Unit at all times. A list of the schools visited is provided at the end of this report.

In general, the names of persons interviewed and quoted in this briefing paper are not provided, as agreed with interviewees. In some instances names are included with the agreement of those identified.

³⁰ These officials are from the Special Education Unit of the MoET (which will officially become the Inclusive Education Department once the policy is fully implemented).

1. SUMMARY OF FOCUS GROUP FINDINGS

Background and focus group information

The focus group was conducted in person at LNFOD's offices in Maseru. Participants were informed of the purpose of the study, that their participation was entirely voluntary, and that they were free to discontinue the interview at any point.

LNFOD assisted the researchers in bringing this group of caregivers together for their discussion through LNFOD's member organizations. The 10 participants in the focus group consisted of nine parents of children between the ages of 6 and 19 years of age with various types of disabilities including physical, visual, intellectual, and hearing related disabilities. The one remaining participant is involved in advocacy for children with disabilities and engages in voter education initiatives for persons with disabilities, though not a parent. Out of the nine parents, seven of them said that their children were enrolled in school, four in special schools and three in regular schools. Another child had been in school earlier in the year but had since been pulled out due to insufficient care and one child had never been to school. Neither of the two children who were not enrolled in school had been accessing learning materials from home.

Summary of participants' responses

Overall, all participants felt that disability was still heavily stigmatized in their communities, sharing various examples of their children being subjected to bullying and teasing by other children and adults alike. In many instances the entire family, including the child's siblings were said to be subjected to the same discrimination and ostracism.

"My child was in a regular school and, one day, when the children were playing, one child threw the children's school shoes in the toilet. All the children blamed my child, who is non-verbal, saying she threw the shoes in the toilet, knowing that she cannot speak for herself. So, I was furious and took my child out of that school." – Parent of a child with autism.

"What I learnt is that persons with disabilities are not given a chance to join society or services. There is also a lack of [support] services for them, from those who raise them. So, their guardians, chiefs all contribute to their discrimination and them being shamed or embarrassed. The cause of stigma comes from the society, how people approach, handle and communicate with persons with disabilities – and it's countrywide." – Focus group participant who engages in disability rights advocacy.

Even within their own families, participants stated that children with disabilities tended to receive disfavoured treatment. Two parents in the focus group

mentioned that their spouses have rejected their children, one of whom has a hearing impairment and the other of whom has down syndrome.

"I don't have issues with the community, it's within the family. The father does not treat the child well, because he has not accepted the child's condition. Now he ill-treats the child, and the child lives in fear of his father." – Parent of child with down syndrome.

Virtually all participants mentioned that they are aware of the existence of special schools in Lesotho. They noted that they knew the schools to be located primarily in urban areas and to be quite expensive, referring to fees in some instances and/or associated costs such as for food, toiletries, and transport which the schools do not provide to learners.

Some participants noted that they had positive experiences while enrolling their children in regular schools and/or special schools. They stated that teachers mostly treated them and their children well. However, in one instance, a teacher requested the child be removed from the school because of his hyperactivity.

"My experience is, starting from the ECDE stage, they would admit my child, but later they would ask me to take my child away because they could not handle my child at all. This has been happening also at primary school. Sometimes I would want to take my child out myself, because of lack of care." – Parent of child with epilepsy.

"My child was well-accepted at her [regular] school. And, from what I heard, when she was due to progress, the current teacher would alert the teacher of the next grade to look out for her... For me, there hasn't been any challenges. Rather, by the time she was accepted in school, she didn't have that prosthetic leg, she was using crutches, and there was one of the teachers who was assigned to assist her at the bathrooms, and they would help her so that she does not fall. So, she has been taken care of." – Parent of child with a prosthetic leg.

When interacting with teachers and management staff at schools regarding their children's schooling, some participants expressed having mostly positive interactions with teachers, but said that teachers themselves often complained about school management or seemed to shift blame to management. One parent mentioned that teachers would neglect her child, and, upon her inquiry, would say they were releasing him to play or go to the bathroom. Another parent said, whenever she attempted to reach the school principal with a query, the principal never answered the phone and some caregivers at the school refused to share their contacts, for fear of the principal.

When sharing other negative experiences of registering or enrolling their children in school, most of the parents mentioned the high costs of the school fees as well as additional unexpected costs, such as groceries, toiletries, and transport to and from boarding school. They explained that parents often had to share costs because the schools may not have food and other supplies for the children. Some

noted that their children were not receiving proper care, including support with taking medicines or using their assistive devices.

“There is no proper care at boarding school. My child [uses] hearing aids, but he lost them while he was at school, and no one took responsibility. [Staff] don’t know what happened. But it seems that he exchanged them with another child... [the schools] are giving food in small portions...At Kananelo, we as parents buy food for the school, on a quarterly basis, so we really don’t what is happening. We are buying or paying for food.” – Parent of child with hearing impairment.

“My problem is that my child needs medication all the time, he is blind. But when, he is at school, the caregivers stop [administering] the medication because they say he is blind and cannot see again. As a result, when he is at school, he loses weight and has headaches – because he is supposed to take the medication. They are saying that other children do not take medication and he shouldn’t either. So, now I have to take him out of the school because the caregivers do not understand the situation.” – Parent of child with visual impairment who takes medication for his eyes.

One of the participants has a daughter who he described as having “wandering eyes”. Although his experience of having her attend a regular school has been mostly positive, he noted that the challenges relating to food access in special schools also existed in regular schools.

As far as access to learning materials is concerned, a few parents mentioned that they lacked the capacity to assist their children with learning due to the unavailability of appropriate learning materials at home and lack of skill to assist. One parent said that she had two children, but struggled to assist the one who uses Braille.

“My child doesn’t get any learning materials, because he is currently not at school, and I don’t have any idea what kind of materials he should get to learn.” – Parent of child with epilepsy.

“I have two children, one is normal the other has a disability. But I am only able to help the normal child because I have a pen, a book. But I do not have Braille materials, I do not know where I can get it and how.” – Parent of child with visual impairment.

Some parents indicated that Kananelo Centre for the Deaf provided sign language lessons to caregivers of children enrolled at the school.³¹ However, one parent

³¹ See schools listed in UNICEF and LNFOD, *Quarterly Progress Report on Project: Inclusive Education for Learners with Disabilities in Lesotho*, 26 January 2021, p. 14, available at http://www.infod.org.ls/uploads/1/2/2/5/12251792/Infod_unicef_narrative_report_2020_.pdf.

added that this training was insufficient because it was available only for one day in the year.

“[W]e were only given one day of training, and sign language is not easy. You cannot know it by one day. So, it is like we could have more trainings, because the last time we had it was in 2018. And this year new parents were called to attend training for sign language. So, it is still not enough for us.” – Parent of child with autism.

Teachers at the school were also said to be provided with a limited amount of learning aids, and therefore often reached out to parents for help. One parent stated that the learning aids provided at St. Bernadette’s Resource Centre for the Blind were insufficient to assist her child.³² Sometimes the MoET would refer children with disabilities to private schools, but those schools also lack resources to cater to their needs.

“Teachers are trying wherever they can to provide equipment for children; but that is also limited. And when there [are] some limitations, the teachers normally call us as parents to ask us to contribute maybe towards purchasing some equipment which can support the learning and teaching of our children because it is not all the time that the government is able to provide funding. So, teachers try as much as they can but still challenges exist here and there. And, where it is possible, we are able to afford as parents.” – Parent of child with a visual impairment.

“As a matter of fact, these schools which the government refers us to are not government schools. But they are rather private schools which are supported by the government, and most of them do not have the equipment to support these children. So, the government supports these school which are not theirs so as to enable these children to learn. But, basically, there is a huge gap in terms of provision of equipment in those schools. They [the government] are paying the fees, but equipment [is insufficient].” – Parent of child with epilepsy.

To improve access to education for children with disabilities, the participants felt that teacher training on disabilities was important to ensure they were able to teach effectively and to increase the pool of schools equipped to cater for children with disabilities so that children can attend close to where they live. They further expressed their wish that at least every district should have schools that cater to a range of disabilities. These included some forms of disability which they felt weren’t being supported well, such as dyslexia and autism.

“So, I think, first of all, government must set up institutions in the communities which can identify disabilities at an early stage, linked with nutrition screening. So that we are able to register these children from as early as possible and be able to refer them to the appropriate schools and interventions which they may need in accordance with their specific disabilities. I think that will help and we will

³² Id.

be able to deal with disability at an early stage.” – Parent of child with visual impairment.

Some participants also indicated that the Ministry of Social Development, management at schools and teachers needed greater sensitization on disability, the needs of children with disabilities, and the support services which parents and guardians require to adequately take care of their children’s educational and other needs. One parent stated that they were open to home schooling their child if they were to receive the necessary support from the relevant authorities.

The parents mentioned that financial constraints, linked to the issue of unemployment and other economic challenges in the country,³³ made it very difficult for them to support their children. Many expressed the view that government needed to make efforts to identify disabilities and nutritional needs at an early stage and across communities, so that children with disabilities could be supported efficiently and effectively. They also stated that more community mobilization led by organizations like LNFOD was necessary to address stigma and put pressure on the relevant government Ministries to improve facilities.

“We are complaining about money. That is the biggest challenge in our country. We don’t have jobs. If you don’t have a job you don’t have money. If you don’t have money life begins to be difficult... So, if we had jobs, we could buy learning materials, whatever aid which can help. There is a lot we could do to help; but the problem is that we do not have jobs in this country. This is one of the challenges. Now, when we run to the government, there is a barrier to access our government – social development and so on. So, that is the main biggest thing. If we do not [have the capacity to source these things on our own] then there will be a problem.” – Focus group participant who engages in disability rights advocacy.

“My kid is normal in every aspect, but she doesn’t have a leg. Her leg cost (sic) R150 000. I am a Mosotho woman and my government is not working... Some of the materials on her leg are now dilapidating and I need to replace the components that make up her leg. We need to be assisted by our government because we cannot afford to pay through our salaries for these things, even if you have one of the top jobs in our country.... For some of us we don’t have access, we are dealing with our disabled kids. It becomes a very heavy burden on you trying to balance everyone in the family. We should be able to see counsellors, even if it is

³³ See UNICEF & Lesotho Bureau of Statistics *Lesotho 2021 Multidimensional Child Poverty Report Highlights* (2021) available at : <https://www.unicef.org/esa/media/10551/file/UNICEF-Lesotho-Child-Poverty-Report-2021-Policy-Brief.pdf>; Victor Sulla; Precious Zikhali; Daniel Gerszon Mahler, *Lesotho Poverty Assessment : Progress and Challenges in Reducing Poverty*, World Bank Group, (2019), p. 15 available at : <https://www.worldbank.org/en/country/lesotho/publication/lesotho-poverty-assessment-poverty-and-inequality-remain-widespread-despite-decline>: According to the World Bank, the poverty rate in Lesotho fell from 56.6% to 49.7% between 2002 and 2017 but poverty is still a widespread problem across the country with more than 75% of the population being either poor or vulnerable to poverty.

once a month as support to us, even if we cannot afford it.” – Parent of child with a prosthetic leg.

2. APPLICABLE LEGAL FRAMEWORK

The laws, policies and practices of Lesotho regarding access to education for children with disabilities are not fully compliant with the international human rights law and standards applicable to the State. The section below provides a summary of the key law and standards applicable to Lesotho to provide the foundation for assessing what the Lesotho government needs to do in order to bring its laws, policies and practices in line with its obligations to realize the right to education for children with disabilities.

a. International law and standards applicable to Lesotho on the right to education for persons with disabilities

Under international human rights law, States have obligations to respect, protect and fulfil the human rights of all persons under their jurisdiction. The main obligations are set out in treaties established at the universal level (United Nations) and regional levels (mainly by the African Union, in the case of Lesotho). The treaties to which Lesotho is a party that are of greatest relevance to the issues under discussion in this paper include: the United Nations Convention on the Rights of Persons with Disabilities (CRPD); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Rights of the Child (CRC); the African Charter on Human and Peoples’ Rights; and the African Charter on the Rights and Welfare of the Child. While the universal UN human rights system, spearheaded by the UN treaties, is paramount and sets the baseline standards, regional treaties, to the extent that they apply additional protection areas, are also critical.

All the obligations contained in these treaties must be applied together, and none takes precedence over any other. The treaties engage the responsibility of all public authorities, whether from the executive, legislative or judicial branches of government. States have an obligation to ensure not only that they respect the rights under these treaties, but that they also protect persons from the conduct of non-State actors such as business enterprises, which could impair the enjoyment of such rights. States have an obligation to integrate these human rights obligations into their domestic laws, policies and practices at the national level.

i. The right to education under international human rights law

Lesotho acceded to the ICESCR on 9 September 1992.³⁴ Under ICESCR, States have an obligation to respect, protect and fulfil a range of rights, including the right to education.³⁵

ICESCR Article 13 concerning the right to education provides:

"1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject

³⁴ Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx.

³⁵ See ICESCR arts. 13 and 14.

always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

While there is no explicit reference to persons with disabilities in the ICESCR, article 13(1) expressly provides that the right applies to “everyone” and the CESCR has emphasized that persons with disabilities are entitled to the rights protected by the ICESCR without discrimination.³⁶ In particular, the CESCR has indicated that States Parties must ensure that “teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers”.³⁷

Furthermore, the CESCR importantly affirms that “prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination”.³⁸

Article 2 of the Convention on the Rights of the Child (CRC), which Lesotho ratified on 10 March 1992,³⁹ is very similar to article 2 of the ICESCR, but it is geared towards protecting children and explicitly mentions disability as a prohibited ground for discrimination.

In addition, it must be recognized that all provisions of the CRC must be construed together with the overarching principle, expressed in article 3(1), that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” This principle is applicable, of course, to schools and other educational institutions, and has special significance in respect of children with disabilities.

Article 28 of the CRC provides:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

³⁶ Committee on ESCR General Comment No. 5: Persons with Disabilities E/1995/22 (9 December 1994), para. 5.

³⁷ Committee on ESCR General Comment No. 5: Persons with Disabilities E/1995/22 (9 December 1994), para. 35.

³⁸ Committee on ESCR General Comment No. 13: The right to education (article 13 of the Covenant) E/C/.12/1999/10 (8 December 1999), para. 31.

³⁹ Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx.

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 of the CRC provides further that:

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Although Lesotho is Party to the CRPD, ICESCR, and CRC, it has only submitted two State reports to the Committee on the Rights of the Child.⁴⁰ It has failed to submit any reports to the CESCR or CRPD Committee, in serial breach of its obligations under those instruments.⁴¹ With respect to the CRC, the Committee,

⁴⁰ See:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=LSO&Lang=EN.

⁴¹ Id.

in its Concluding Observations of 2018, expressed its concern for the limited access to education for children with disabilities.⁴²

The African Charter on Human and Peoples' Rights (ACHPR) is the general human rights instrument for the African region and was ratified by Lesotho on 10 February 1992.⁴³ Article 2 of the African Charter on Human and Peoples' Rights (ACHPR) contains the non-discrimination clause, which is similar to the provision in the ICESCR. Article 17(1) provides that "every individual shall have the right to education."⁴⁴ In its interpretation of this provision, the Commission has written that education is "a fundamental right that affects the growth, development and welfare of human beings, particularly children and youth. As a human right, education is the primary vehicle by which economically and socially marginalised children and adults can lift themselves out of poverty and obtain the means to participate fully in their community."⁴⁵ Moreover, the ACHPR has noted that the right to education includes pre-school, primary, secondary, tertiary, and adult education as well as vocational training.⁴⁶

ii. The right to non-discrimination and equal protection under the law

While the right to education itself is protected under the ICESCR, the International Covenant on Civil and Political Rights (ICCPR) is also important for the legal protection of persons with disabilities and their right to education. This is particularly in respect of the question of non-discrimination, equality and equal protection. Article 26 of the ICCPR provides:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This is a particularly consequential provision. While the ICESCR, the CRPD and the CRC all prohibit discrimination in the enjoyment of the rights under their respective Conventions, this ICCPR article is a free-standing obligation to prohibit discrimination and ensure equal protection of the law generally, irrespective of any nexus with Convention rights.

⁴² UNCRH Concluding Observations on the Second Periodic Report of Lesotho CRC/C/LSO/CO/2 (25 June 2018), para. 53(f).

⁴³ Available at: <https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights>.

⁴⁴ Article 17(1) of the African Charter protects the right to education; however, unlike the ICESCR, it does not provide the content of the right to education. Furthermore, in its decision in the *Free Legal Assistance Group, Lawyers' Committee for Human Rights Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs Zaire* communication, the African Commission did little more than restate the provision of article 17(1) of the African Charter; thus, missed the opportunity to expand on or define the content of article 17(1). See: M Ssenyonjo "Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter" *Netherlands Quarterly of Human Rights* 29(3) (2011), pp. 363 & 367.

⁴⁵ African Commission on Human and Peoples' Rights "Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights", para. 69.

⁴⁶ *Id* at para 70.

While article 2(1) of the ICESCR requires that States act towards the “progressive realization” of rights, the Committee on Economic, Social and Cultural Rights (CESCR) has made it clear that some aspects of the rights are obligations of immediate effect, not subject to progressive realization.⁴⁷ The obligation of non-discrimination is one such aspect.⁴⁸

Article 2 of the ICESCR provides:

“1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to nonnationals.”

While article 2(2) evidently does not expressly include disability as a prohibited ground for discrimination, the CESCR, in common with other treaty bodies, has repeatedly made clear that discrimination based on disability is prohibited under the catch-all phrase “other status”.⁴⁹

The CESCR has also asserted:

“Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more “subtle” forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. For the purposes of the Covenant, “disability-based discrimination” may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights. Through neglect, ignorance, prejudice and false assumptions, as

⁴⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, available at: <https://www.refworld.org/docid/4538838e10.html> [accessed 11 April 2023], paras 1, 5.

⁴⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: <https://www.refworld.org/docid/4a60961f2.html> [accessed 11 April 2023], para 7.

⁴⁹ See: Committee on ESCR General Comment No. 5: Persons with Disabilities E/1995/22 (9 December 1994), para. 5 and Committee on ESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para.2, of the International Covenant on Economic, Social and Cultural rights) E/C.12/GC/20 (2 July 2009), paras. 27-28.

well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.”⁵⁰ (Emphasis added).

iii. The right of persons with disabilities to access education

Lesotho acceded to the UN Convention on the Rights of Persons with Disabilities (CRPD) on 2 December 2008.⁵¹ The CRPD requires States Parties to “undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability through...⁵² all appropriate legislative, administrative and other measures”.⁵³ It also requires States to go about “promoting the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.”⁵⁴

Article 24 of the CRPD provides:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

(a) The full development of human potential and sense of dignity and selfworth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

(b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

(c) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

⁵⁰ Committee on ESCR General Comment No. 5: Persons with Disabilities E/1995/22 (9 December 1994), para. 15.

⁵¹ Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx.

⁵² CRPD art. 4(1).

⁵³ Id at art. 4(1)(a).

⁵⁴ Id at art. 4(1)(i).

(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

(c) Reasonable accommodation of the individual's requirements is provided;

(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

(a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

(b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities."

The Committee on the Rights of Persons with Disabilities (CRPD Committee) provides the authoritative interpretation regarding the scope and nature of rights under the CRPD, including through a series of thematic General Comments. In its

General Comment No. 2 on Accessibility,⁵⁵ the CRPD Committee states that “the entire process of inclusive education... must be accessible”.⁵⁶ The Committee’s General Comment No. 4 addressing article 24 on the Right to Inclusive Education builds on this jurisprudence, focuses solely on access to quality education for persons with disabilities and sets out the scope of obligations in respect of “inclusive education”, especially *quality* inclusive education.⁵⁷ To be clear, in accordance with article 24, States must ensure that children with disabilities “are not excluded from the general education system on the basis of disability”⁵⁸ and can access education “in the communities in which they live”.⁵⁹

According to the CRPD Committee, “inclusive education”,⁶⁰ understood in this manner, is “[a] fundamental human right for all learners”,⁶¹ which includes those with disabilities. The Committee further notes that, despite notable progress, there remain some persistent challenges to ensuring access to education for persons with disabilities,⁶² and elaborates on the various barriers to education for persons with disabilities, including:

- failures to implement an inclusive human rights model for the right to education for persons with disabilities;
- discrimination, isolation, and prejudice against persons with disabilities;
- lack of knowledge regarding quality and inclusive education, and support for persons with disabilities;
- lack of or outdated disaggregated disability-specific data;
- inappropriate or inadequate funding and funding mechanisms; and
- insufficient tools and mechanisms to remedy violations of the rights of persons with disabilities.⁶³

The interviews conducted by the ICJ during this research project also indicate that Ministry of Education officials tasked with implementing Lesotho’s inclusive education policy understand inclusive education similarly, and as a right. Moreover, when asked about the meaning of inclusive education, one disability rights advocate gave the following explanation:

“Inclusive education is a system of education which takes into account the needs and the rights of all children, including children that are marginalized, such as

⁵⁵ CRPD Committee General Comment No. 2 (2014) Article 9: Accessibility CRPD/C/GC/2 (22 May 2014).

⁵⁶ CRPD Committee General Comment No. 2 at para. 39.

⁵⁷ CRPD Committee General Comment No. 4 at para 2.

⁵⁸ CRPD art. 24(2)(a).

⁵⁹ CRPD art. 24(2)(b).

⁶⁰ The CRPD Committee has defined the right to inclusive education as encompassing “a transformation in culture, policy and practice in all formal and informal educational environments to accommodate the differing requirements and identities of individual students, together with a commitment to remove the barriers that impede that possibility. It involves strengthening the capacity of the education system to reach out to all learners. It focuses on the full and effective participation, accessibility, attendance and achievement of all students, especially those who, for different reasons, are excluded or at risk of being marginalized.” See: CRPD Committee General Comment No. 4 at para. 9.

⁶¹ *Id* at para. 10.

⁶² *Id* at para. 3.

⁶³ *Id* at paras. 4(a) to (g).

children with disabilities... the importance of inclusive education is actually to realize the human rights of all children, because education is a right. So we need to make sure that the rights of every child are realized, including the rights of children who have been left behind for so long." – Nkhasi Sefuthi, disability rights advocate and LNFOD Executive Director.

A teacher at an inclusive school also emphasized that she considered that inclusive education was important because "it makes the disability students not to see that they are disabled". She continued:

"[They understand] that they are here with others. Some of the things they learn because they see others doing it. If they are closed off and without other ones it won't be easy for them to prosper... they see that they are humans too". – Teacher, Inclusive School

A teacher from another school agreed, explaining:

"I think inclusive education is a good idea. In my point of view, it works a lot because when the children are being separated, they are even socially separated. Now that we have combined them there is not much difference between them – it is building togetherness." - Teacher, Inclusive School

State Parties to the CRPD must prohibit all forms of discrimination, including in access to education.⁶⁴ Certainly, the inclusion of children with disabilities in general education requires reasonable accommodations.⁶⁵ The failure to provide reasonable accommodations is characterized by the CRPD as discrimination against persons with disabilities.⁶⁶

The CRPD Committee also details what is required under articles 2, 3(f), 4(2), 5(3) and 24(1), (2) and (4) of the Convention to ensure that education is available, affordable, accessible and adaptable for children with disabilities in particular. In summary:

- the standard of "**availability**" requires that educational institutions are available in quantity and quality;⁶⁷
- the standard of "**accessibility**" requires that all schools are accessible physically and for learning to all, without discrimination, are affordable, and that any other necessary provisions and accommodations are made;⁶⁸

⁶⁴ Id at para. 13.

⁶⁵ Id at paras. 4(a) to (c).

⁶⁶ Id at para. 13.

⁶⁷ Id at para. 20.

⁶⁸ Id at paras. 20 to 23.

- the standard of “**acceptability**” requires that all the needs, cultures, languages of learners with disabilities are considered when educational institutions are being designed;⁶⁹
- the standard of “**adaptability**” requires that the education system must be able to evolve with the evolving needs of learners with disabilities and continue to cater to their diverse needs.⁷⁰

Also of relevance is the Committee’s General Comment No. 6 (2018) on Equality and Non-Discrimination, which addresses obligations under articles 14, 19, and 27 of the CRPD. The Committee explains that pursuant to obligations under articles 5 and 24, the failure to provide learners with disabilities “with equal access to mainstream schools with inclusive and quality education is discriminatory”.⁷¹

Furthermore, in the UNCRC’s General Comment No. 1 concerning article 29, The Aims of Education,⁷² the Committee affirms that discriminatory practices “are in direct contradiction with the requirements of article 29(1)(a)” of the CRC.⁷³ In its General Comment No. 9 on the Rights of Children with Disabilities, the Committee addresses the plight of many children with disabilities, including difficulties in accessing services and exercising their protected rights, such as the right to education.⁷⁴

The Committee also recognizes children with disabilities as being in a particularly vulnerable situation and indicates that States have an obligation to protect them from discrimination by preventing and eliminating it in all of its forms.⁷⁵ Regarding the right to education, the Committee has affirmed that children with disabilities “have the same right to education as all other children and shall enjoy this right without any discrimination and on the basis of equal opportunity”.⁷⁶ Schools, in particular, should recognize the special needs of children with disabilities and ensure that they are accessible, that is, free of communicational and physical barriers which could impede children with disabilities from accessing education.⁷⁷ The education offered to children with disabilities should also be inclusive.⁷⁸

Finally, where private entities and individuals are involved in education, including through the administration of private schools, States must regulate their conduct to ensure compliance with international and domestic law and standards. Article 13(4) of ICESCR specifically provides that “the education given in such institutions shall conform to such minimum standards as may be laid down by the State”.⁷⁹

⁶⁹ Id at para. 24.

⁷⁰ Id at para. 25.

⁷¹ CRPD Committee General Comment No. 6 (2018) on Equality and Non-discrimination CRPD/C/GC/6 (26 April 2018) para 63.

⁷² UNCRC General Comment No. 1 (2001) Article 29(1): The Aims of Education CRC/GC/2001/1 (17 April 2001).

⁷³ Id at para. 10.

⁷⁴ Id at para. 1.

⁷⁵ Id at paras. 8 to 9.

⁷⁶ Id at para. 62.

⁷⁷ Id at para. 65.

⁷⁸ Id at para. 65.

⁷⁹ ICESCR, Article 13(4).

The CESCR Committee has made clear that the “failure to ensure private educational institutions conform to ‘minimum educational standards’ amounts to a violation of the right to education”.⁸⁰ Indeed, so important is such regulatory intervention, the Committee indicates that the obligation to set and ensure compliance with minimum educational standards is a “minimum core” obligation of immediate effect.⁸¹

The CRPD Committee has affirmed that States must ensure that “persons with disabilities are able to access education in both public and private academic institutions on an equal basis with others”.⁸² States must therefore ensure that private schools do not deny access to children with disabilities based on their disability.⁸³ The CRPD Committee, noting the “growth in many countries of private sector education” asserts that:

“States parties must recognize that the right to inclusive education extends to the provision of all education, not merely that provided by public authorities. States parties must adopt measures to protect against infringements of rights by third parties, including the business sector. Regarding the right to education, such measures must address the obligation to guarantee the provision of inclusive education, and as necessary, involve legislation and regulation, monitoring, oversight, and enforcement, and adoption of policies to frame how business enterprises can impact on the effective enjoyment and exercise of rights by persons with disabilities. Educational institutions, including private educational institutions and enterprises, should not charge additional fees for reasons of accessibility and/or reasonable accommodation.”⁸⁴

The UN Special Rapporteur on Extreme Poverty and Human Rights and the UN Rapporteur on the Right to Education have indicated that unregulated or underregulated private actor involvement in the delivery of public services, including education may lead substantial human rights harms.⁸⁵ Further clarification on nature and scope of State obligations regarding private actor involvement in education are contained the *Abidjan Principles*,⁸⁶ a set of expert principles adopted in 2019.

⁸⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, available at: <https://www.refworld.org/docid/4538838c22.html> [accessed 7 April 2023], para 59.

⁸¹ *Id.*, para 57.

⁸² General Comment 4, para 23.

⁸³ *Id.*, para 38.

⁸⁴ *Id.*, para 74.

⁸⁵ UN Special Rapporteur on Extreme Poverty and Human Rights A/73/396 (26 September 2018), available: <https://www.ohchr.org/en/documents/thematic-reports/a73396-report-special-rapporteur-extreme-poverty-and-human-rights>; UN Special Rapporteur on the Right to Education, A/HRC/44/39 (30 July 2020); available: [ohchr.org/en/calls-for-input/report-impact-covid-19-crisis-right-education](https://www.ohchr.org/en/calls-for-input/report-impact-covid-19-crisis-right-education); UN Special Rapporteur on the Right to Education A/69/402 (24 September 2014), available: <https://undocs.org/Home/Mobile?FinalSymbol=A%2F69%2F402&Language=E&DeviceType=Desktop&LangRequested=False>.

⁸⁶ Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education (13 February 2019) <https://www.abidjanprinciples.org/>.

The Abidjan Principles, indicate that States must “define and enforce” regulatory measures which are “designed and adopted” through participatory processes involving all stakeholders. At a minimum, such regulatory measures should cover:⁸⁷

“protection for learners against all forms of discrimination in the enjoyment of the right to education, to guarantee equality and inclusive education for all learners, including by ensuring that the conditions of enrolment, admission, and learning are not directly or indirectly discriminatory; and paying particular attention to their impacts on the rights to equality and non- discrimination of vulnerable, marginalised, or disadvantaged groups...”

The Principles also specify further that such regulation should also set the:

“minimum requirements regarding accessibility, including access for persons with disabilities in line with the obligation to guarantee reasonable accommodation, and ensuring that institutions do not directly or indirectly charge additional fees to any learner.”

Regulation should cover “school governance”; “staff training”; “curriculum, and pedagogical practices” and “infrastructure that is adapted for all learners, including ... learners with disabilities”; “protection from threatening, shaming, and bullying for learners or their families”; regulation of parent teacher ratios, fees and “any other standard necessary for the protection of human rights”.

iv. African Charter on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights has noted, both implicitly and explicitly, that article 17 of the African Charter imposes obligations on States Parties in relation to the realisation of the right to education for children with disabilities. For example, in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, the Commission notes that, as a minimum core obligation, States Parties must ensure that all children, including those who belong to vulnerable groups, enjoy their right to equal access free and compulsory primary education.⁸⁸

Furthermore, if need be, special measures must be taken in relation to realising this right for vulnerable children.⁸⁹ “Vulnerable children” is best read to include children with disabilities. The Commission has also noted that States Parties have an obligation to ensure that education is physically accessible to all.⁹⁰ Specifically in relation to children with disabilities, the Commission has written that States Parties must ensure that children with disabilities:

⁸⁷ Id, para 55(d).

⁸⁸ Id at para 71(a) & (p).

⁸⁹ Id at para 71(a).

⁹⁰ Id at para 71(c).

“are provided with inclusive quality and free primary education and access to inclusive quality secondary and tertiary education on an equal basis with other members of their communities. States should ensure that effective individualised support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.”⁹¹

In its Concluding Observations and Recommendations on the Kingdom of Lesotho’s Combined Second to Eighth Periodic Report, the Commission noted concern over the country’s delay in adopting the then Disability Equity Bill⁹² which has since been passed into law. The Commission also recommended that Lesotho increase the number of schools for children with disabilities in the country.⁹³

v. African Charter on the Rights and Welfare of the Child

The Kingdom of Lesotho ratified the African Charter on the Rights and Welfare of the Child (African Children’s Charter) on 27 September 1999.⁹⁴ The African Children’s Charter includes a protection of the right to education in article 11, which reads:

1. Every child shall have the right to education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples’ rights and international human rights declarations and conventions;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;
 - (e) the preservation of national independence and territorial integrity;
 - (f) the promotion and achievement of African Unity and Solidarity;

⁹¹ Id at para 71(f).

⁹² African Commission on Human & Peoples’ Rights “Concluding Observations and Recommendations on the Kingdom of Lesotho’s Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa” 68th Ordinary Session of the African Commission on Human & Peoples’ Rights)14 April to 4 May 2021), para. 52(i).

⁹³ African Commission on Human & Peoples’ Rights “Concluding Observations and Recommendations on the Kingdom of Lesotho’s Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa” 68th Ordinary Session of the African Commission on Human & Peoples’ Rights)14 April to 4 May 2021), para. 74(vi).

⁹⁴ Available at: <https://au.int/en/treaties/african-charter-rights-and-welfare-child>.

- (g) the development of respect for the environment and natural resources;
 - (h) the promotion of the child's understanding of primary health care.
3. State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
- (a) provide free and compulsory basic education;
 - (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;
 - (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;
 - (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
 - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
4. State Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians, to choose for their children schools other than those established by public authorities, which conform to such minimum standards as approved by the State, to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child.
5. State Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
6. State Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual ability.
7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in Paragraph I of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States.

Article 11(3)(e) mentions special measures to be taken in relation to three special groups of children, namely, "female, gifted and disadvantaged children", while children with disabilities are omitted from this list. Article 13 of the African Children's Charter is dedicated to children with disabilities, under a heading with the now disfavoured appellation "handicapped children". Article 13(2) provides that children with disabilities must have "effective access to training", upon application for assistance. This is the closest that the African Children's Charter gets to explicitly protecting the right to education for children with disabilities, if "training" is taken to be synonymous with, or include within in its ambit, education.

It is worth noting, however, that, in 2012, the African Children's Committee's theme for the Day of the African Child was "The Rights of Children with Disabilities:

The Duty to Protect, Respect, Promote and Fulfil.”⁹⁵ In the Concept Note, the Committee noted that children with disabilities remained the majority of children excluded from education.⁹⁶ Moreover, the Committee confirmed that articles 11 and 13 of the Charter “provide the essential basis for the duties resting on Member States to address ... barriers to education currently experienced by children with disabilities, and to respect, protect, promote and fulfil their right to access education on an equal basis.”⁹⁷

In its Concluding Observations on Lesotho’s Initial Report, the Committee noted its concern that children with disabilities still had trouble accessing education and recommended that Lesotho provides “disability friendly infrastructure and teaching materials in existing and new schools to ensure inclusive education”.⁹⁸

vi. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities (Protocol) currently only has three ratifications; thus, is yet to enter into force – as this requires 15 ratifications.⁹⁹ The African Commission has expressed its concern at Lesotho’s lack of ratification and called for the domestication of the Protocol.¹⁰⁰ Article 5(1) of the Protocol prohibits the discrimination. Article 6(a) provides that persons with disabilities are equal before the law, and that they are entitled to the equal protection of the law. Article 16 deals with the right to education for persons with disabilities in the following terms:

1. Every person with a disability has the right to education.
2. States Parties shall ensure to persons with disabilities the right to education on an equal basis with others.
3. States Parties shall take, reasonable, appropriate and effective measures to ensure that inclusive quality education and skills training for persons with disabilities is realised fully, including by:

⁹⁵ African Committee of Experts on the Rights and Welfare of the Child *Concept Note on the commemoration of the Day of the African Child on 16 June 2012 under the theme: “The Rights of Children with Disabilities: The duty to Protect, Respect, Promote and Fulfil”*.

⁹⁶ Id at para. 25.

⁹⁷ Id at para. 27.

⁹⁸ Concluding Observations And Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of Lesotho on its Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child (26th Ordinary Session, 16-19 November 2015), para. 39.

⁹⁹ The countries which have ratified the Protocol thus far are Kenya, Mali and Rwanda. See: [https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLESaEUtm RIGHTS ON THE RI. .pdf](https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%27%20RIGHTS%20ON%20THE%20RI...pdf).

¹⁰⁰ African Commission on Human & Peoples’ Rights “Concluding Observations and Recommendations on the Kingdom of Lesotho’s Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa” 68th Ordinary Session of the African Commission on Human & Peoples’ Rights)14 April to 4 May 2021), paras. 39(i) & 73(i).

- (a) Ensuring that persons with disabilities can access free, quality and compulsory basic and secondary education;
- (b) Ensuring that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others, including by ensuring the literacy of persons with disabilities above compulsory school age;
- (c) Ensuring reasonable accommodation of the individual's requirements is provided, and that persons with disabilities receive the support required to facilitate their effective education;
- (d) Providing reasonable, progressive and effective individualised support measures in environments that maximise academic and social development, consistent with the goal of full inclusion;
- (e) Ensuring appropriate schooling choices are available to persons with disabilities who may prefer to learn in particular environments;
- (f) Ensuring that persons with disabilities learn life and social development skills to facilitate their full and equal participation in education and as members of the community;
- (g) Ensuring that multi-disciplinary assessments are undertaken to determine appropriate reasonable accommodation and support measures for learners with disabilities, early intervention, regular assessments and certification for learners are undertaken regardless of their disabilities;
- (h) Ensuring educational institutions are equipped with the teaching aids, materials and equipment to support the education of students with disabilities and their specific needs; and
- (i) Training education professionals, including persons with disabilities, on how to educate and interact with children with specific learning needs; and
- (j) Facilitating respect, recognition, promotion, preservation and development of sign languages.

4. The education of persons with disabilities shall be directed to:

- (a) The full development of human potential, sense of dignity and self-worth;
- (b) The development by persons with disabilities of their personality, talents, skills, professionalism and creativity, as well as their mental and physical abilities, to their fullest potential;
- (c) Educating persons with disabilities in a manner that promotes their participation and inclusion in society; and
- (d) The preservation and strengthening of positive African values.

Article 16(3) provides that every person has the right to education, on an equal basis, and States Parties must take reasonable and appropriate measures to ensure inclusive education, including creating access to compulsory, free, quality basic and secondary education, reasonable accommodation at schools, installing supportive measures for learners, delivering all necessary schooling provisions,

and adequately training teachers and other staff. According to sub-article (4), the education of persons with disabilities shall be aimed at and facilitate their full development and participation in a democratic society.

Article 16 of the Protocol is largely consistent with Article 24 of the CRPD and appears to draw on it significantly.¹⁰¹

vii. ACHPR General Comment No:7: Human Rights and Private Actors

The ACHPR's Principles and Guidelines on the Implementation of Economic, Social and Cultural rights recalls that States have an obligation to take positive measures to preventing infringements of ESCR by "non-state actors such as multi-national corporations, local companies, private persons, and armed groups".¹⁰² This, the ACHPR clarifies, includes "regulating and monitoring the commercial and other activities of non-state actors that affect people's access to and equal enjoyment of economic, social and cultural rights" and "ensuring the effective implementation of relevant legislation and programmes and to provide remedies....".¹⁰³

In 2022, the ACHPR issued its General Comment No.7 on *State Obligations Under the African Charter on Human and Peoples' Rights in the Context of Private Provision of Social Services*.¹⁰⁴ The ACHPR there underscores that "instead of improving access to economic, social and cultural rights, many private actors were increasingly contributing to the low level of enjoyment of these rights on the continent".¹⁰⁵ In addition, "increasingly commercial interests in Africa are transforming social services into private commodities."¹⁰⁶ Describing the provision of social services as an "inherently public activity", the ACHPR indicates that States should "impose public service obligations" on private actors when they elect to participate in the provision of social services.¹⁰⁷

The ACHPR stresses that the purpose of such regulation of private actors is "not simply to ensure that they do not explicitly abuse rights, but also to ensure that these private actors support, rather than undermine, broader efforts to realise economic social and cultural rights".¹⁰⁸ This requires the establishment,

¹⁰¹See, however, Right to Education Initiative "New law protects the right to education of 84 million people with disabilities in Africa" (27 February 2019), available: <https://www.right-to-education.org/news/new-law-protects-right-education-84-million-people-disabilities-africa>, which notes concerns that the Protocol "appears to not conform with the overall goal of inclusive education". In this regard, much will depend on how the Protocol is interpreted, both by States and by the African Commission on Human and People's Rights.

¹⁰² ACHPR, Principles And Guidelines On The Implementation Of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights, para 7.

¹⁰³ Id.

¹⁰⁴ ACHPR, State Obligations Under the African Charter on Human and Peoples' Rights in the Context of Private Provision of Social Services (20 October 2022), available: <https://achpr.au.int/en/documents/2022-10-20/general-comment-7-state-obligations-under-african-charter-human>.

¹⁰⁵ Id, Preface.

¹⁰⁶ Id, para 11.

¹⁰⁷ Id, para 15.

¹⁰⁸ Id, para 43.

monitoring and enforcement of an “effective interplay of laws and regulations”.¹⁰⁹ According to the ACHPR, such package of laws and regulations must address:

“the minimum requirements regarding accessibility, including access for persons with disabilities, in line with the obligation to guarantee reasonable accommodation, and ensuring that service providers do not directly or indirectly charge additional fees for these accommodation.”

More generally, such regulation, must, at a minimum, address:¹¹⁰

- The administration of a private service provider, including licensing and registration.
- The level of fees and other indirect or direct charges.
- The need for transparency in information provided by private service providers in relation to:
 - The entities administrative and financial structure;
 - All fees and charges;
 - Quality of the operations and services provides; and
 - Profit earned and dividends paid out.

b. Domestic law on the right to education for children with disabilities in Lesotho

i. The right to education under the Constitution of Lesotho

Lesotho’s Constitution, in significant measure, incorporates the State’s international human rights obligation to ensure that persons with disabilities are guaranteed the rights to equality and non-discrimination.¹¹¹ Section 4 of the Constitution specifically provides that every person in Lesotho is entitled to the human rights and freedoms contained in the Constitution regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹¹²

Furthermore, section 18 provides for the right to “freedom from discrimination”. The term “discriminatory” in the section means:

“affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.¹¹³

¹⁰⁹ Id.

¹¹⁰ Id, para 47.

¹¹¹ Sections 4 and 18 of the Constitution of Lesotho (1993).

¹¹² Constitution of Lesotho, 1993.

¹¹³ Id, section 18(3).

Although disability is not expressly included as a prohibited ground of discrimination, in the case of *Fuma v Commander Lesotho Defence Force and Others*,¹¹⁴ the High Court has affirmed that the classification of “other status” in section 18 includes HIV status and disability. Specifically, the court asserts that “[t]he applicant has on the balance of probabilities proven his *other status* based case that he has, in comparison to the others in his situation, been unconstitutionally discriminated against. The *status* which [the applicant] has satisfactorily established is that of visually disabled person with HIV.”¹¹⁵

Some rights, including economic and social rights, are situated under Chapter 3 of the Constitution as “Principles of State Policy” and are identified in Section 25 as non-enforceable by the courts. Under this Chapter, Section 26 of the Constitution provides that it should part of the public policy of the government of Lesotho to adopt specific policies aimed at promoting a society based on equality and justice for all regardless of status grounds. Persons with disabilities would be protected under the general provisions relating to “any person” and “other status” under this section.¹¹⁶ However, problematically, this provision is inconsistent with section 4 and international human rights law, as it makes these critical human rights objectives applicable to citizens only, rather than to “all persons. Regarding the right to education, section 28(b) of the Constitution provides that “Lesotho shall endeavour to make education available to all and adopt policies aimed at securing, amongst other things, “that primary education is compulsory and available to all.”

Lastly, another constitutional provision that specifically refers to persons with disabilities but provides no enforceable rights is section 33 of the Constitution which makes provision for the “rehabilitation, training and social resettlement of disabled persons” by adopting various policies. It states that:

With a view to ensuring the rehabilitation, training and social resettlement of disabled persons, Lesotho shall adopt policies designed to—

- a. provide for training facilities, including specialized institutions, public or private; and
- b. place disabled persons in employment and encourage employers to admit disabled persons to employment.

ii. Legislation and policies protecting the right to education of children with disabilities

¹¹⁴ *Thabo Fuma v The Commander, Lesotho Defence Force and Others* (CONST/8/2011) [2013] LSHC 68 (10 October 2013) available at <https://lesotholii.org/node/7904> (accessed 3 August 2022).

¹¹⁵ *Id* at para. 40.

¹¹⁶ Section 26 of the Constitution reads as follows: “(1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (2) . In particular, the State shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in the society to enable them to participate fully in all spheres of public life.”

There are a number of different laws, policies and plans which, to some extent, protect the rights of children with disabilities to access education in Lesotho. These include:

- the National Disability and Rehabilitation Policy;¹¹⁷
- the Children’s Protection and Welfare Act;¹¹⁸
- the Education Act;¹¹⁹
- the Higher Education Act,¹²⁰
- the National Disability Mainstreaming Plan (2015),¹²¹
- the Building Control Act (1995),¹²²
- the Lesotho National Vision (2020),¹²³
- National Strategic Development Plan II 2018/19 to 2022/23,¹²⁴
- the Education Sector Plan 2016-2026,¹²⁵ and

¹¹⁷ See National Disability and Rehabilitation Policy (2011) p. 10. The policy aims to achieve meaningful inclusion of persons with disabilities in mainstream society and create “an enabling environment for persons with disabilities living and working in Lesotho to realise their full potential” through removing barriers and changing the attitudes which prevent persons with disabilities from gaining access to services and public amenities; promoting equal opportunities for persons with disabilities and promoting good practices for the private sector and civil society to adopt.

¹¹⁸ Child Protection and Welfare Act No. 7 of 2011. Sections 11 and 13 of the Act provide for the right to education and the rights of children with disabilities specifically. Under this law, children with disabilities have the right to education and training.

¹¹⁹ Education Act No. 3 of 2010. See Sections 3 and 4 of the Education Act No. 3 of 2010. As regards the establishment of an inclusive education, the Act is unclear. While explicitly aiming to make provision for free education at all levels and giving effect to Section 28 of the Constitution, as well as placing an obligation on the State to ensure that learners are not discriminated against in accessing education and “are availed educational opportunities provided” to develop, it makes use of terms such as “handicapped” and refers to the vague terms “special treatment, education and care” without defining them.

¹²⁰ The Higher Education Act, 2004 provides that the admissions policy in institutions of higher learning must not discriminate on account of race, gender, religion and political affiliation.

¹²¹ Access to inclusive education is one of the priority areas of this plan. It provides government ministries with strategic means through which they must mainstream disability into their already existing programs.

¹²² Section 19(2) of the Act is the only provision of the Act that mentions disability. It states that the subject to subsection (1) which provides that the drafter of plans, specifications, documents and diagrams provided under the Act, the “Minister may by notice published in the gazette, order that any plan, specification, document or information in relation to a proposed building, shall provide for the physical access to the proposed building to persons of different categories of disabilities.” However, it does not go further than that to make provision or promote the “universal design” of schools and related facilities so that they are accessible to all persons from the very beginning as is required under article 4(f) of the CRPD.

¹²³ The National Vision of 2020, p. 38. The Vision document does not explicitly mention “inclusive education” but outlines, as two of its strategic actions to bring about a “healthy and well-developed human resource base”, the promotion of special education programmes for persons with disabilities and improving education infrastructural facilities.

¹²⁴ National Strategic Development Plan II 2018/19 to 2022/23, p. 111, available at: <https://www.gov.ls/wp-content/uploads/2021/06/National-Strategic-Development-Plan-II-2018-19-2022-23.pdf>. This Plan mainstreams youth, children, disability, gender, climate change, the environment and social protection across all sectors, citing that they are all crucial considerations for inclusive growth. One of the strategic objectives is the promotion of an “Inclusive and Equitable Education System” and in order to improve access to education at all levels, a key intervention under this plan is to expand climate resilient school infrastructure to be child-friendly and conducive for people with disabilities.

¹²⁵ In line with Sustainable Development Goal 4, this Plan stipulates that the Lesotho government aims to enhance the system that will deliver relevant and inclusive quality education to all Basotho effectively, efficiently and equitably. In order to improve access to quality equitable secondary education, the Plan has as one of its strategic actions: improving educational facilities in existing schools to cater for inclusive education.

- the National Policy on Integrated Early Childhood Care and Development.¹²⁶

1. *The Children's Protection and Welfare Act*

The CPWA explicitly sets as one of its stated "objects" to:¹²⁷

"extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection of the welfare of children to which Lesotho is a signatory".

Consistently with international law, it provides for obligation to make the "best interests of the child" the overriding principle which must be considered in "all actions concerning a child."¹²⁸ This principle must be a "the primary consideration" for "all courts, persons, including parents, institutions or other bodies in any matter concerning a child".¹²⁹

The CPWA also provides that all children have "a right to access education..¹³⁰ Regarding children with disabilities in particular, it affirms that "a child has a right to education regardless of the type or severity of the disability...".¹³¹ In a separate provision titled "children with disabilities", the CPWA reiterates their rights to "education and training" to help them enjoy a "full and decent life and achieve the greatest degree of self-reliance and social integration."¹³²

Section 22 of the Act details "states duties and responsibilities" in terms of the Act, including two duties that relate directly to children with disabilities. In this regard the Act obliges the State to ensure "that there is awareness about children with disabilities, their rights, their needs, their potential and their contribution in society."¹³³ It also requires:

"the provision of rehabilitation services including community based rehabilitation, support services including assistive devices, equal education

¹²⁶ The National Policy on Integrated Early Childhood Care and Development (2013), p. 91, available at: https://planipolis.iiep.unesco.org/sites/default/files/ressources/lesotho_integrated_early_childhood_care_development_policy.pdf. The Policy states that part of its strategy to improve and expand preschool services for children 3 to 5 years old, and improve transition from home and preschool to primary school as a means of enhancing integrated and early childhood care and development, there is a need to promote and implement inclusive preschool education for children with developmental delays and disabilities.

¹²⁷ Section 2(1).

¹²⁸ Section 4(1). See also: UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 5 April 2023].

¹²⁹ Section 4(2).

¹³⁰ Section 11(1).

¹³¹ Section 11(3).

¹³² Section 13.

¹³³ Section 22(d).

opportunities in an integrated setting, full participation in family life, equal opportunities in recreation and sports for children with disabilities.”¹³⁴

2. *The Education Act*

The Education Act is aimed at making provision for “free and compulsory” primary school education and “education for all in accordance with the provisions of section 28 of the Constitution”.¹³⁵ According to the Act, the Minister of Education and Training “shall classify schools” in accordance with the categories enumerated in section 12, including “public schools”, “independent schools” and “special schools.”¹³⁶ Special schools are defined as public or independent schools “in which learners who may require education different from that offered in schools receive special education.”¹³⁷

Regarding “independent schools”, which are also commonly also referred to as “private schools” in Lesotho, section 7(1) of the Education Act requires all schools to “registered in accordance with this Act” and clearly indicates that “a person shall not operate a school unless it is so registered”. Section 7(5) thereafter makes it a criminal offence for any person or entity to contravene section 7(1)’s requirements. Section 9 provides for “requirements for registration of schools”, including, among other elements:

- a constitution which guides the method of the management of the school;¹³⁸
- proof of title or legal right to land from which the school will operate;¹³⁹ the buildings and facilities which will be used for such a school;¹⁴⁰ and
- the financial position of the applicant at the time of application and “the means by which it is proposed to finance the continued operation of the school”.¹⁴¹

These registration requirements, however, do not require these schools to indicate whether they will operate as a “regular” or “special school”. Nor do they reach anywhere near the comprehensive kind of regulations that are required under international law and standards to guarantee the right to education.

Section 12 of the Act empowers the Minister of Education to classify schools, including independent schools, on several grounds, including those which are permitted to “leverage fees determined by their school boards”,¹⁴² as well those which may “receive ... conditional subvention or grants”.¹⁴³ It also expressly confirms, in a separate subsection, that the Minister may classify independent

¹³⁴ Section 22(e).

¹³⁵ Sections 3(a) and (c). See also Section 4 on the “Administration of the Act”.

¹³⁶ Section 12(c).

¹³⁷ See definition under section 2 of the Education Act.

¹³⁸ Section 9(1)(c).

¹³⁹ Section 9(1)(e).

¹⁴⁰ Section 9(1)(f).

¹⁴¹ Section 9(1)(g).

¹⁴² Section 12(b)(ii).

¹⁴³ Section 12(b)(iii).

schools as “special schools”¹⁴⁴ and determine which special schools are “entitled to receive such public funds as may be determined by the Minister responsible for Finance”.¹⁴⁵

Given these provisions, it is notable that section 13 of the Act, titled “funding” does not make any reference to special schools, lumping the Minister’s powers to determine the funding level for all schools together.

The Minister is also given broad powers to cancel the registration of any school – public or independent – for an number of reasons, including: failure to “satisfactorily” manage the school;¹⁴⁶ operation of a school contrary to the provisions of the Act;¹⁴⁷ if the school is “conducted in manner that is detrimental to the physical, mental or moral welfare of learners”;¹⁴⁸ or in the “public interest”.¹⁴⁹

Finally, the Education Act dedicates a full chapter (Chapter IV) to “School Supervision”, which established an “inspectorate of schools”. The inspectorate functions include:

- inspecting the work of schools “each year” and reporting on “trends”, “achievements” and the “implementation of policies”;¹⁵⁰
- providing advice and support to schools;¹⁵¹
- submitting annual reports to Parliament;¹⁵² monitoring the “effectiveness of teacher training”;¹⁵³ and
- inspecting “such schools, or class of schools as may be specified by the Minister”.¹⁵⁴

In general, the “trend” towards privatization of education services in Lesotho has been acknowledged in some research relating to the topic.¹⁵⁵ The negative impacts of such privatization include:

“the unaffordability of user fees charged by private sector service providers triggering inequality on access to services; the reluctance of the Sotho government to adequately fund the sectors and effectively regulate private actor activities and the disenfranchisement of poor and unemployed citizens

¹⁴⁴ Section 12(c)(i).

¹⁴⁵ Section 12(v)(iv).

¹⁴⁶ Section 16(2)(b).

¹⁴⁷ Sections 16(2)(a) and 16(2)(c).

¹⁴⁸ Section 16(2)(e).

¹⁴⁹ Section 16(2)(i).

¹⁵⁰ Section 18(4)(a).

¹⁵¹ Section 18(4)(b).

¹⁵² Section 18(4)(c).

¹⁵³ Section 18(4)(e).

¹⁵⁴ Section 18(4)(l).

¹⁵⁵ See for example: Africa Portal “Privatisation of Health and Education Services In Lesotho” (17 Feb 2020), available: <https://www.africaportal.org/publications/privatisation-health-and-education-services-lesotho/>.

of their human right entitlements to enjoying access to education and health care”.¹⁵⁶

The problem with the non-registration of private schools has also been documented in media accounts in Lesotho for a long time.¹⁵⁷ ICJ’s interviews also confirm that the continued operation of unregistered – and underregulated – private schools is well known to the MoET and other stakeholders.

The Act does not make explicit or implicit mention of an inclusive education system and instead refers to “special treatment”, “specialized curriculum” or “special learners”, terms which are not fleshed out fully. It also makes use of archaic terms like “handicapped” to describe disability.

Both the CPWA and the Education Act prohibit discrimination against children with disabilities as regards accessing education, as is required of Lesotho in terms of Articles 4(3) and 24(1) of the CRPD. However, the Education Act may have a negative impact on the ability of children with disabilities to access education.¹⁵⁸ For instance, section 6(3) of the Act, appears to permit a learner’s non-enrolment in school or discontinuation of their attendance at school on the basis of a disability.¹⁵⁹ Moreover, the measures prescribed by the Act to provide education pertain to formal, primary education and the Act does not adequately address the measures needed to realize the rights of persons with disabilities to education and education and training opportunities beyond the primary level.¹⁶⁰

The remainder of the section will primarily consider the Inclusive Education Policy and the Persons with Disability Equity Act, to assess compliance with the obligation of access to inclusive education for children with disabilities under international human rights law, as set out above, as well as the realities and circumstances faced by children with disabilities in Lesotho. It is important to note the Policy has not been incorporated into legislation, such as the Persons with Disability Equity Act, for instance, by the Parliament of Lesotho. The inclusive education policy was developed by the Ministry of Education and Training to set out guidelines that will

¹⁵⁶ Id.

¹⁵⁷ Ntsebeng Motsoeli “Illegal Schools Scramble To Register” (Dec 2010); available: <https://sundayexpress.co.ls/illegal-schools-scramble-to-register/>. Lesotho Times “3 charged for operating unregistered schools” (March 2011), available: <https://lestimes.com/3-charged-for-operating-unregistered-schools/>. See also UNESCO “Non-State Actors in Education”, available: <https://education-profiles.org/sub-saharan-africa/lesotho/~non-state-actors-in-education>.

¹⁵⁸ See LNFOD “Policy Brief on effective implementation of inclusive Education in Lesotho for benefit of people with disabilities”, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/policy_brief_on_effective_implementation_of_inclusive_education_in_lesotho_for_benefit_of_people_with_disabilities.pdf.

¹⁵⁹ Section 6(3)(c) of the Education Act states that the provision under section 6(2) which states that ‘Where a learner is enrolled at a school, the learner shall attend that school on each day, and for such parts of each day, as instruction is provided at the school for the learner’ does not apply to a learner “suffering from a disability or disease which prevents him or her from attending.”

¹⁶⁰ See LNFOD “Policy Brief on effective implementation of inclusive Education in Lesotho for benefit of people with disabilities”,

enable it to provide education to learners with special needs, including learners with disabilities, and does not carry the full legal force of legislation.¹⁶¹

3. *The Persons with Disability Equity Act*

The Persons with Disability Equity Act¹⁶² is the primary law enacted to incorporate the CRPD into the domestic law of Lesotho. Section 3 of the Act defines "inclusive education" as:

"the general education system which provides age appropriate accessible instruction, assessment, intervention, accommodation, modification, support service, adaptation, physical learning environment and any other relevant additional resources to a learner with disability, in order to help them realize their full potential on an equal basis with others." (Emphasis Added).

In line with the definition in the Inclusive Education Policy, this definition illustrates that implementing inclusive education in Lesotho involves making necessary modifications to infrastructure and curricula and addressing structural barriers that effectively respond to the varying needs of all learners to ensure they can access quality education on an equal basis. Importantly, and consistently with the jurisprudence of the CRPD Committee, it requires that this is done not primarily by the expansion of the special school system, but rather by the wholesale adaptation of the "general education system" and "regular schools" in Lesotho.

The Act is thus aimed at addressing at a wide ranging number of issues relating to disability in Lesotho, including ensuring that persons with disabilities can access education at all levels on an equal basis with others.¹⁶³ Section 20 of the Act provides that the Minister "shall take necessary steps, to achieve the full realisation of the rights of persons with disability" and section 23 prohibits learning institutions from barring learners on the basis of their disability. The Persons with Disability Advisory Council, established under section 4 of the Act, is mandated to oversee implementing the inclusive education system.¹⁶⁴ This entails ensuring that all teachers also receive the relevant training on disabilities and inclusive education, and that assistive devices are provided to learners with disabilities,¹⁶⁵ as expressly required under article 24(4) of the CRPD. How these responsibilities of the Council are intended to coalesce with the Special Education Unit and the department of education more broadly is not clear.

¹⁶¹ Inclusive Education Policy, p. 5. The Policy acknowledges that "Constitution of Lesotho provides for Education as a DPSP (Directive Principle of State Policy) and not as a justiciable right."

¹⁶² Persons with Disability Equity Act No. 2 of 2021.

¹⁶³ Section 23.

¹⁶⁴ Section 23(3) reads :

"The Council shall, in consultation with relevant government departments or agencies, ensure and make provision in all districts, for all learning institutes, private and public to—

- a. provide an inclusive education for a person with a disability;
- b. have educational assistive devices; and
- c. employ a teacher who is qualified in the use of accessible format methods"

¹⁶⁵ Sections 23(3) and 24.

Progress in the implementation of this Act, including the establishment of the Council, has been slow-moving.¹⁶⁶ Official information on the progress of implementation of the Act, generally, and more specifically regarding inclusive education, is difficult to source despite significant efforts made by the ICJ to do so while conducting research for this report.

4. *The Inclusive Education Policy*¹⁶⁷

The key policy governing Lesotho's inclusive education system is the 2018 Inclusive Education Policy ("the Policy"), which states that it aims to ensure "protection of the right of children with disabilities to enrolment in regular or special schools." It asserts that the Ministry of Education and Training's departments and all stakeholders should "acknowledge that [learners with special education needs]¹⁶⁸ have the right to education *in a common learning environment* with their peers" (emphasis added).¹⁶⁹

The Policy is aimed at ensuring that learners with special education needs, including those with disabilities, are enrolled in schools, as well as integrated and retained in the Lesotho school system and can access quality education in a way that prepares them to live independently in society.¹⁷⁰ The Policy defines inclusive education as:

"a process of addressing and responding to diverse needs of all learners through increasing participation in learning, cultures and communities and reducing exclusion within and from education. It aspires for the conducive environment that best corresponds to learners' requirements and preferences which can maximise academic and social development. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of appropriate age range and a conviction that it is the responsibility of the *regular system* to educate all children."¹⁷¹ (Emphasis Added).

The above definition is largely in keeping with what the CRPD Committee has outlined in its General Comment No. 4.¹⁷² This definition places the same emphasis on the need to respond to a diverse range of learners' needs, including those with disabilities, through appropriate adaptations to curricula, teaching

¹⁶⁶ The Reporter, "Hope on the horizon for disabled people", 13 February 2022, available at: <https://www.thereporter.co.ls/2022/02/13/hope-on-the-horizon-for-disabled-people/>; LNBS, "Expectations high for LNFOD this financial year", 3 March 2022, available at <https://lnbs.gov.ls/view-article/4/expectations-high-for-lnfod-this-financial-year>.

¹⁶⁷ Inclusive Education Policy (2018), available at: <https://planipolis.iiep.unesco.org/sites/default/files/ressources/approved-inclusive-education-policy-2018.pdf>.

¹⁶⁸ According to the Policy at p. 2, "special education needs" refers to "a situation in which learners who are in need of additional support, depend on the extent to which education system adapt curriculum, teaching and/or to provide additional human or material resources so as to stimulate efficient and effective learning for these learners."

¹⁶⁹ Inclusive Education Policy, p. 3 and 5.

¹⁷⁰ Inclusive Education Policy, p. 6 and 13.

¹⁷¹ Inclusive Education Policy, p. 1.

¹⁷² CRPD Committee, General Comment No. 4: on the right to inclusive education (2016), para. 72.

methodologies, support, and accommodations. Moreover, the Policy lists, as one of its objectives, “adapting the national curriculum in order to conform with inclusive education principles” which further provides that the Minister “shall modify assessment criteria by appropriate representations to meet individual learners’ needs.”¹⁷³

The Policy further indicates that it was introduced to implement a more targeted approach to effectively respond to the needs of “learners with special education needs” (including learners with disabilities) because integration without a comprehensive inclusive education framework, had not been entirely effective in this regard.¹⁷⁴ The policy therefore requires the restructuring of the MoET to give effect to a number of objectives:

- improving the teaching and learning environment;
- strengthening the capacity of education providers in supporting learners with special education needs;
- enhancing partnerships;
- enhancing governance and management capacity in inclusive education; and
- enacting laws and policies supporting inclusive education in Lesotho.¹⁷⁵

To achieve these broader objectives the policy sets a range of tasks which the MoET is required perform, such as:

- rehabilitating existing school facilities;
- developing guidelines on various issues to do with inclusive education;¹⁷⁶ mobilising resources for provision of inclusive education;
- facilitating capacity building on inclusive education for various stakeholders; coordinating pre- and in-service training for teachers;
- ensuring adaptation and modification of the curriculum;
- sensitizing members of Parliament on inclusive education; and
- advocating for inclusive laws and policies.¹⁷⁷

Numerous actors within the MoET, including the Special Education Unit, have been identified as “key to the achievement of inclusive education through budget allocation and technical support”. Their functions range, but include:

- overseeing the implementation of the Policy;
- providing technical support to the Inclusive Education Department;
- ensuring the accessibility of all curricula and instructional materials;
- providing accessible learner support services;
- supplying and distributing inclusive and accessible materials;
- ensuring that physical school facilities are accessible; and

¹⁷³ See Inclusive Education Policy, p. 14.

¹⁷⁴ Ibid 11.

¹⁷⁵ Id p. 13 to 15.

¹⁷⁶ See Inclusive Education Policy, p. 13 -15. This includes guidelines such as those, for instance, construction of schools, reasonable accommodation of learners with special education needs, learner safety in schools, quality assurance on inclusive education, etc.

¹⁷⁷ See Inclusive Education Policy, p. 13-15.

- ensuring the provision of reasonable accommodations for teaching and learning.¹⁷⁸

Furthermore, the policy identifies and outlines the challenges that hinder access to education for learners with special educational needs (including those with disabilities) in both formal and informal education.¹⁷⁹

The Policy states further that the “success of Inclusive Education depends on participation and involvement of various role-players and the will of all stakeholders to work together to identify and overcome barriers to inclusion”.¹⁸⁰

5. *The justiciability of the right to education*

As noted above, and briefly referred to in the Inclusive Education Policy,¹⁸¹ the right to education is provided for under Chapter III of the Lesotho Constitution which contains the expressly non-justiciable Directive Principles of State Policy. Section 25 of the Constitution provides that these Principles:

“shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realization of these principles.”

While Lesotho’s superior courts have generally applied a strict construction to section 25 as regards the enforceability of these rights, recent jurisprudence has gotten around some of these strictures by providing those aspects of economic, social and cultural rights, may be de facto justiciable through the right to life.¹⁸²

There are a number of points to be considered regarding the jurisprudence.

First, there is some authority for the direct applicability and invocation of the CRPD in domestic law. In the abovementioned *Fuma* case, the Constitutional Court stated that in deciding the matter, “the unreservedly ratified United Nations Convention on the Rights of People with Disability stands not only as an inspirational instrument in the matter but that by default it technically assumes the effect of the Municipal Law in the country.”¹⁸³ Referencing on the South African case, *AZAPO and Others v President of the Republic of South Africa*,¹⁸⁴ the Court further stated that the CRPD is in harmony with sections 18 and 19 of the

¹⁷⁸ For a comprehensive list of each department and their functions, see pages 18 to 19 of the Inclusive Education Policy.

¹⁷⁹ See Inclusive Education Policy, p. 11-12. Such challenges include long distances to schools, minimal access to appropriate learning materials and poor adaptation of school curricula to the learner’s needs.

¹⁸⁰

¹⁸¹ Inclusive Education Policy, p. 5: “At the national level, the Constitution of Lesotho provides for Education as a DPSP (Directive Principle of State Policy) and not as a justiciable right (Chapter III, Section 28).”]

¹⁸² See Hoolo ‘Nyane “The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life?” (2022) 22 African Human Rights Law Journal 266-288, p. 269-270.

¹⁸³ *Thabo Fuma v The Commander, Lesotho Defence Force and Others*, para. 22.

¹⁸⁴ SA 1996 (4) 672 (CC).

Constitution, “inclusive of its instrumentality in the upholding of a *right to human dignity and to life*. In this context, reference is being made to the rights of the disabled persons in particular.”¹⁸⁵

Secondly, there is also authority for the application of international standards, even without incorporation into domestic law. In *Tsepe v Independent Electoral Commission and Others*, the court stated, regarding Lesotho’s international law obligations, that “these, if anything, reinforce the interpretation of section 18(4)(e) of the Constitution and require equality, which is substantive and not merely formal and restitutionary in its reach”.¹⁸⁶ In this instance, the court gave a wide interpretation to Lesotho’s international legal obligations, in terms of the international human rights instruments to which it is a party, and directly applied them.¹⁸⁷

Thirdly, and perhaps most critically, their appears to be a move within courts to apply the directive principles as an interpretative lens for the right to life in the Lesotho Constitution. In this way, ESC rights could be rendered justiciable, though not on their own, but if tied to another justiciable provision of the Constitution, as a matter of domestic law. In *Lesotho Medical Association and Another v Ministry of Health and Others*,¹⁸⁸ the High Court took a progressive stance on this issue,¹⁸⁹ finding that although the DPSPs are “not justiciable”, they are “not merely decorative of the paper on which they have been crafted” but instead are “a constitutional guide to the state in formulating policies” and a “constitutional interpretative guide” to courts.¹⁹⁰

The Court thereby used the DPSPs to interpret the right to life as encompassing important considerations relating to health particularly in the context of the COVID-19 pandemic, emphasizing the State’s positive obligations to protect, promote and fulfil the right to life.¹⁹¹ Of course, the aspects of the right to health engage the right to life, under the jurisprudence of various international authorities. For instance, in its General Comment No. 36, the Human Rights Committee set out that:

“The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity... The measures called for to address adequate conditions for protecting the right to

¹⁸⁵ *Thabo Fuma v The Commander, Lesotho Defence Force and Others*, para. 22.

¹⁸⁶ *Tsepe v Independent Electoral Commission and Others* [2005] LSHC 96 (27 April 2005) at para 21.

¹⁸⁷ Itumeleng Shale ‘Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy’ (2019) 19 *African Human Rights Law Journal* 193-218, p. 217.

¹⁸⁸ (CONST.CC NO: 19/2019) [2020] LSHC 14 (24 June 2020).

¹⁸⁹ This is in contrast to previous decisions which adopt a stricter interpretation of the right to life, including the Court of Appeal in *Khathang Tema Baitsokoli v Maseru City Council LAC (2005-2006)* 85.

¹⁹⁰ *Lesotho Medical Association and Another v Ministry of Health & Others* (2020) para. 9; see also Khanyo Farisè, “COVID-19 and Africa Symposium: The State’s Duty to Provide PPE to Health Workers in Lesotho”, *Opinio Juris*, (8 December 2012).

¹⁹¹ Hoolo ‘Nyane “The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life?” (2022) 22 *African Human Rights Law Journal* 266-288 at p. 285 and 287.

life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services...¹⁹²

Moreover, in the context of the right to inclusive education in Lesotho, this type of approach seems to take on particular force given the various measures by the State to incorporate the CRPD into domestic law. As detailed above, the Persons with Disability Equity Act was introduced specifically to domesticate the CRPD.¹⁹³ It operationalizes most of Lesotho's obligations in terms of Article 24 of the CRPD. Lesotho's Inclusive Education Policy similarly indicates from the outset although the right to education is not enforceable in Lesotho courts, "the international community recognises the significance of education with respect to the economic, social and cultural development of countries and, in line with this, the government of Lesotho pledges to provide access to inclusive quality education which is equitable to all learners."¹⁹⁴

Finally, it is worth noting that similar approaches have been taken by several judicial authorities, including those on the African continent. Faced with decisions on the justiciability of a range of economic, social and cultural rights, courts in Malawi,¹⁹⁵ Uganda¹⁹⁶ and India,¹⁹⁷ as examples, have interpreted constitutionally entrenched rights, alongside similar directive principles and international standards to conclude that economic, social and cultural rights are indeed

¹⁹² Para. 26

¹⁹³ See the Statement of Objects and Reasons of the Persons with Disability Equity Act, 2021 in the Act itself.

¹⁹⁴ Inclusive Education Policy, p. 6.

¹⁹⁵ *R (Oao Kathumba & Ors.) v President of Malawi & Ors* (Constitutional Reference 1 of 2020) [2020] MWHC 29 (03 September 2020). This case concerned an alleged violation of the right to social security which is not specifically provided in the Malawian Constitution but is protected in international human rights law. The court agreed with the applicants that there is an implied right to social security in terms of the principles of national policy under section 13 of the Malawian Constitution and the right to development under sections 29 and 30. "Of paramount importance" for the High Court in determining whether there was an implicit right to social security, was their interpretation of the right to life under section 16 and livelihood under section 29 of the Constitution. Without engaging in-depth with international human rights law and standards, and rather relying on jurisprudence of the Indian Supreme Court, the High Court held that the "right to life cannot be exercised in the absence of enabling factors" such as a "means of subsistence". See also Tim Fish Hodgson, "COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 2)", 8 December 2020, available at: <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-2/>.

¹⁹⁶ *Salvatori Abuki and Another v Attorney General* [1997] UGCC 5; Constitutional Case No. 2 of 1997, available at: <https://www.globalhealthrights.org/wp-content/uploads/2013/02/CC-1997-Salvatori-Abuki-and-Richard-Abuga-v-Attorney-General.pdf>. In which the Constitutional Court held that the right to human dignity and the prohibition of inhuman treatment to include elements of ESC rights, finding that banishment would deprive the petitioners of a livelihood and, under the circumstances of the case, constituted a violation of the right to dignity and of the notion of ubuntu. See also Christopher Mbazira, "Enforcement of economic, social and cultural rights in Uganda: A brief overview", Vol 10(1) *ESR Review*, p. 14 to 17.

¹⁹⁷ *Unni Krishnan J. P v State of Andhra Pradesh* (1993) 1 SCC 645; See also ESCR-Net, "Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.", available at: <https://www.escr-net.org/caselaw/2006/unni-krishnan-jp-ors-v-state-andhra-pradesh-ors-cited-1993-air-217-1993-scr-1-594-1993>. In which the Court held that the right to education is not stated expressly as a fundamental right in Part III of the Constitution. However, the right to education is implicit in, given the fundamental significance of education to the life of an individual and the nation, and flows from the right to life as guaranteed under article 21 of the Constitution.

justiciable. The ACHPR has also recently reiterated that States are obliged to “ensure all the rights protected by the Charter are justiciable in their national legal systems”.¹⁹⁸

The Lesotho Parliament has made a more general policy commitment to moving towards providing for the justiciability of ESC rights. The proposed 11th Amendment to the Constitution Bill of 2022 (the so-called “Omnibus Bill”)¹⁹⁹ was intended to help resolve this conflict in the context of disability rights. It contained an amendment which would have made the rights of persons from what is stated as “marginalized groups” (including women, children, youth, LGBTI persons and persons with disabilities) justiciable before any competent court of law.²⁰⁰ The proposed amendments to Bill also included economic, social and cultural rights, including the right to education in the Bill of Rights, thus rendering the right to education more generally justiciable. However, due to the passing of the Bill failing for procedural reasons, the national constitutional reform process in Lesotho has stalled.²⁰¹

Though this attempt to amend the Constitution is laudable, the government of Lesotho, must in terms of its obligations under international human rights law, ensure that this process resumes and that constitutional amendments are affected to provide persons with disabilities a justiciable right to education. Lesotho “must implement or introduce legislation, based on the human rights model of disability that fully complies with article 24”.²⁰²

Moreover, the Inclusive Education Policy also states that the Minister of Education and Training shall “advocate for inclusive laws and policies” and “sensitise the members of the parliament on inclusive education”.²⁰³ Converting the inclusive education policy into legislation that fully domesticates Lesotho’s obligations under article 24 would be another critical step in ensuring the justiciability of the right to inclusive education in Lesotho.

¹⁹⁸ ACHPR, General Comment 7, para 31.

¹⁹⁹ National Reforms Authority, *Annual Report*, March 2022, p. 3.

²⁰⁰ National Reforms Authority, *Annual Report*, March 2022, p. 28. Clause 7 which is on page 12 of the Bill, “provides for affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history or law, for the purpose of redressing imbalances which exist against them.”

²⁰¹ See *Boloetse & Tuke v His Majesty the King and Others* available at: https://jud.gov.ls/wp-content/uploads/2022/09/BOLOETSE-TUKE-V-HIS-MAJESTY-THE-KING-13-15-2022_202209150836.pdf;

Southern Africa Litigation Centre, Lesotho: State of Emergency Declared Unconstitutional, 14 September 2022, available at: <https://www.southernafricalitigationcentre.org/2022/09/14/lesotho-state-of-emergency-declared-unconstitutional/>. Liesl Louw-Vaudran “Lesotho reforms hang in the balance ahead of elections”, 29 September 2022, *Institute for Security Studies*, available at: <https://issafrica.org/iss-today/lesotho-reforms-hang-in-the-balance-ahead-of-elections>.

²⁰² General Comment No. 4 on Inclusive Education Para. 60; Furthermore, in terms of Article 4(1)(b) of the CRPD, all legislation and policy must be reviewed to ensure that it is not discriminatory for persons with disabilities and in violation of Article 24, and where necessary repealed or amended in a systematic and time-bound manner.

²⁰³ Inclusive Education Policy, p. 15.

3. CURRENT CHALLENGES IN IMPLEMENTATION OF INCLUSIVE EDUCATION IN LESOTHO

The concerns raised by parents in the focus group discussion, summarized in section 2, provide the starting point for the following analysis. This is supplemented by the ICJ's own research and further interviews with principals, teachers, MoET officials and disability rights advocates. What follows is a summary of the key problems that emerged repeatedly in these interviews, not a comprehensive analysis of all the challenges in the implementation of Lesotho's inclusive education policy.

a. General failure to ensure children can attend inclusive schools

Three types of schools are recognized under the Inclusive Education Policy: "regular",²⁰⁴ "integrating"²⁰⁵ and "special"²⁰⁶ schools.²⁰⁷ There are five special schools located in four districts: Leribe, Maseru, Berea and Butha-Buthe, which cater to the diverse needs of learners with special education needs.²⁰⁸ These schools also serve learners with a wide variety of disabilities and there are some that are specifically catered to the needs of learners with visual impairments and hearing impairments respectively.²⁰⁹ This means that such schools, even where they are close to the homes of children with disabilities, such special schools can only accommodate children with particular disabilities.

As indicated above, there are a further 15 inclusive (or regular, integrated) schools spread across the country according to the MoET's apparent classification. There are approximately 4000 schools (including pre-primary, primary and post-primary schools) in the country. Therefore the vast majority of schools are non-inclusive regular schools from which children with disabilities are almost entirely excluded.²¹⁰

²⁰⁴ Inclusive Education Policy, p. 2. This is "a standard/ordinary school which can provide access to all learners without necessarily giving required support to the [learners with special education needs].

²⁰⁵ See Inclusive Education Policy, p. 1. The Policy does not define integrating schools but does define integration as "the process of placing persons with disabilities in existing mainstream educational institutions with the understanding that they can adjust to the standardised requirements of such institutions including existing contextual arrangements as well the curricula provision and educational facilities".

²⁰⁶ At page 2, the Policy defines a special school as "a school that is built and organised to provide educational self-help services to learners with multiple or profound/severe disabilities that cannot be accommodated in an inclusive or regular school".

²⁰⁷ Inclusive Education Policy, p. 10.

²⁰⁸ Inclusive Education Policy, p. 10. This excludes the "Resource Centre for the Blind" in Maseru which we do not understand to be a separate school, from St Bernadettes which the MoET appears to classify as an inclusive school.

²⁰⁹ Id.

²¹⁰ According to Lesotho's Education Sector Plan (2016-2026), the formal education sector includes 2,204 pre-primary schools; 1,478 primary schools; 341 post-primary schools; 26 technical and vocational schools; and 14 higher education institutions

It is therefore unsurprising that many focus group discussants indicated that they were not aware of any such special or inclusive schools in close proximity to where they currently lived. They did however know of the existence such schools far away and in urban centres, particularly those catering for hearing and visual disabilities.²¹¹

Overall, there is an alarming likelihood that a large number of children with disabilities remain out of school entirely, a situation confirmed by ICJ interviews with principals, teachers, and MoET officials. This possibility is alluded to in the inclusive education policy itself.²¹²

UNICEF reports that it is a common problem for children with disabilities often having to attend special schools that are located far away from their families because regular schools within their communities are “not welcoming” to them.²¹³

Despite efforts to partially incorporate elements of the CRPD into domestic law in the form of the Persons with Disability Equity Act, as well as the establishment of an inclusive education system under the Inclusive Education Policy – as a commitment by Lesotho to fulfil its obligations under article 24 of the CRPD – there are numerous barriers to inclusive education becoming a reality. The greatest of these, perhaps, remains the fact that the overall education system remains, for most children, only inclusive on paper. Many children who would prefer to attend community schools in the areas they live in are compelled to attend special schools or “inclusive schools” which are far away from their homes and resemble special schools in many respects. Those who do attend so-called “inclusive schools” operating at present suffer more generally from many of the same challenges as special schools in respect of the poor quality of education.

“Schools need to be inclusive. We don't want special schools...we need, like, everyone in Thaba-Tseka and Mokhotlong, everywhere in Lesotho, people should know about disability,” – IT consultant and disability rights advocate, Mosa Kuape.

“I think we really enjoyed that, you know, to be taught together with other children because we are competing with them and we were actually learning together,” – Nkhasi Sefuthi, disability rights advocate and LNFOED Executive Director.

This system effectively perpetuates the segregation of children with disabilities into “special boarding schools,” which the CRPD Committee has recognized as a form of “institutionalization” which “undermines community inclusion and leads to

²¹¹ These schools are St. Bernadette Resource Center for the Blind which is a public school and Kananelo Center for the Deaf. See Lesotho Second periodic reports of States parties due in 1999 CRC/C/LSO/2 para 245.

²¹² Inclusive Education Policy, p 9.

²¹³ Kristel Juriloo, «Promoting inclusive education for all children in Lesotho” *UNICEF* 6 October 2022, available at: <https://www.unicef.org/esa/stories/promoting-inclusive-education-all-children-lesotho>.

increased pressure to place children in institutional settings” in contravention of a range of CRPD rights.²¹⁴

b. Stigma and social exclusion²¹⁵

While the Constitution and various laws in the country prohibit the denial of access to education of children with disabilities based on disability, the stigma attached to disability typically serves as an enabler of discrimination.

“People should just look at the capabilities of a person before seeing them as a disabled person. We all need the education; we need to study like every other child. Parents should give children the education they deserve. They should stop hiding children. They should actually send them to school despite their disability. Parents should learn that their disability is really not inability,” – IT consultant and disability rights advocate, Mosa Kuape.

Lesotho has embarked on some awareness-raising programmes,²¹⁶ but persons with disabilities are often subjected to discrimination in Lesotho due to this stigma which may flow from superstitious and erroneous beliefs about disability.²¹⁷ Often, there is also a complete lack of understanding of how disability affects decision-making capacity or academic performance.²¹⁸

“Inform the community and sensitise them so that they don't keep learners with disabilities at home. Have training for teachers.” – inclusive school Principal.

These sentiments were reflected in most responses from focus group participants when asked whether they considered that there was stigma against disability in their communities. One participant whose child has a hearing impairment mentioned that her spouse rejected their child on the basis of his disability, but she found the community to be more accepting of him. However, most

²¹⁴ CRPD Committee “Guidelines on deinstitutionalization, including in emergencies” CRPD/C/5 (September 2022), available at: <https://www.ohchr.org/en/documents/legal-standards-and-guidelines/crpd5-guidelines-deinstitutionalization-including-para-15>, 50.

²¹⁵ Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2, 25 June 2018, para. 41, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/189/70/PDF/G1818970.pdf?OpenElement>.

²¹⁶ The government of Lesotho has embarked on a few modest awareness raising campaigns, primarily commemorations of awareness days such as the International Day for Persons with Disabilities. See Government of Lesotho, “Lesotho commemorates IDPD”, available at: <https://www.gov.ls/lesotho-commemorates-idpd/>; United Nations, Commemoration of the International Day of Persons with Disabilities, 3 December 2021, available at: <https://lesotho.un.org/en/161490-commemoration-international-day-persons-disabilities>; Government of Lesotho, “Her Majesty calls for support of persons with disabilities” <https://www.gov.ls/her-majesty-calls-for-support-of-persons-with-disabilities/>.

²¹⁷ Id; Government of Lesotho Ministry of Social Development, *A Report of a National Disability Situation Analysis* (2019) p. 26-27 available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/lesotho_situational_analysis_final_report_-_2019.pdf

²¹⁸ Ministry of Social Development, *A Report of a National Disability Situation Analysis* (2019) p. 27; Second periodic report CRC/C/LSO/2 at para 253

participants stated that their children were often subjected to ridicule and bullying from adults and other children alike.

“My child is no longer willing to interact with other children, because they always mock him” – Parent of child with autism.

“My son is nine years-old and visually impaired. I no longer allow him to play with other children, because there was a time when he was talking to other children outside the house. I thought he was talking to an adult, but it was children pretending to be adults, to tease him.” – Parent of child with visual impairment.

Discriminatory attitudes mean that children with disabilities may be denied access to educational institutions by teachers, are less likely to have their special educational needs met or may be harassed by other learners and teachers to the point where they are driven out of school.²¹⁹

c. Financial constraints: Funding and Fees

While the Lesotho Government has introduced a wide variety of laws and policies aimed at safeguarding the rights of children with disabilities to access quality education, many have not yet been implemented adequately due to resource constraints and limited budgetary allocations.²²⁰ The government of Lesotho has indicated in its report to the African Commission on Human and Peoples’ Rights that limited availability of resources necessary to implement the inclusive education system is also partly due to “corruption on the part of government officials[,] result[ing] in poor construction of schools and in some cases, total failure of construction”.²²¹ This despite the fact that UNICEF reports that “the highest share of the Government’s budget goes to the education sector”.²²²

To help vulnerable children, including orphans and children with disabilities overcome the high costs to attend secondary school,²²³ the Ministry of Social Development provides grants and bursaries for tuition fees for indigent and

²¹⁹ UNICEF and LNFOD, *Quarterly Progress Report on Project: Inclusive Education for Learners with Disabilities in Lesotho* (26 January 2021), p. 12.

²²⁰ In the *Lesotho Civil Society Organizations Complementary Report to the UN Committee on the Rights of the Child* (2017) p. 37, civil society groups, including LNFOD, shared concerns about national budgetary allocations to social development that would support persons with disabilities that end up being shared with other vulnerable groups. This limits the reach and impact of these interventions; See also Second periodic report due 1999 CRC/C/LSO/2 at para. 250.

²²¹ Combined Second to Eighth Periodic State Party Report to the African Commission (2017), para. 195.

²²² See UNICEF, *2020/21 Social Protection Budget Brief*, p. 7 available at:

<https://www.unicef.org/esa/media/8731/file/UNICEF-Lesotho-Social-Protection-Budget-Brief-2020-21.pdf>.

²²³ Lesotho CSO Complementary Report to the UN Committee on the Rights of the Child (2017), p. 38, available at: https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/LSO/INT_CRC_NGO_LSO_28140_E.pdf.

vulnerable children,²²⁴ including children with disabilities,²²⁵ attending secondary school which have been pivotal in retaining learners in schools.²²⁶ These bursaries, which vary by grade and type of school, usually cover items such as tuition fees, examination fees, registration cost, stationery, books, special subject fees (e.g. science fees and boarding fees).²²⁷

In the absence of sufficient support from the government, the cost of education for children with disabilities places a huge financial burden on parents.²²⁸ The UN Committee on the Rights of the Child, for instance, noted with concern that these costs include the “hidden” expenses of public primary education, “such as transportation and food, in particular in rural areas, and high school fees for secondary education”.²²⁹

“Some of them just drop out because they don't have the basic means...it is very common but normally the Red Cross, at times, comes, asks about the needs of students who couldn't pay and, at times, assists them and pays the fees for such students. We don't [turn students away] but the students themselves will do that. You find that they will just disappear and then when we search for them, then we find that they left them because of their finances. Some of the teachers help and some of our ex-students...” – Principal at inclusive school.

Focus group discussants pointed out that in addition to school fees or even when they are not paying school fees, many parents of learners with disabilities find themselves having to buy groceries, toiletries and assistive devices for their children to ensure they have enough food and are comfortable at boarding schools and can get learning materials in accessible formats.

“In my child's school, Resource Centre for the Blind, last year in August, children could not return to school because of the fact that there was no food, up until independence, when they were told to take the children back. The reason being that the school did not have funds to buy food for the children. So, that means that they lost their education time for that quarter. And the reason is that the government did not provide funds to buy food.” – Parent of child with visual impairment.

²²⁴ See UNICEF, *2020/21 Social Protection Budget Brief*, p. 5, available at:

<https://www.unicef.org/esa/media/8731/file/UNICEF-Lesotho-Social-Protection-Budget-Brief-2020-21.pdf>: To qualify for the OVC bursaries, a secondary school learner must be a child below the age of 18 who has lost one or both parents; have a sick, disabled or incarcerated parent; or are considered needy

²²⁵ Ministry of Social Development *National Standards and Guidelines for Care for Vulnerable Children* (2014) p. 28.

²²⁶ Combined Second to Eighth Periodic State Party Report to the African Commission (2017) para. 421; See also the National Strategic Plan on Vulnerable Children (April 2012 - March 2017) p. 18, 25 and 26 which identifies key challenges for vulnerable children in accessing education. To address these concerns, the government established a bursary scheme for vulnerable children, including orphans and children with disabilities, attending secondary school. Additional bursaries are provided by civil society organisations.

²²⁷ See UNICEF, *2020/21 Social Protection Budget Brief*, p. 5.

²²⁸ Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2, 25 June 2018, para. 53.

²²⁹ Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2, 25 June 2018, paras. 53-54.

"My worry is that is I have been promised by the Ministry of Education that they are currently looking for a proper school for my child – a boarding school...I know that the government is going to pay the school fees for my child, but these schools have other ways of getting money from us. They want us to pay security fees...All those fees, which, ultimately, end up being equal to the school fees. So, I really do not know how I am going to cope because my husband is not working. He's a bricklayer, so he does not have [inaudible] job. So I really don't know how we are going to cope next year." – Parent of child with epilepsy who is currently out of school.

Principals at all schools ICJ visited expressed the understanding that they are not allowed to charge school fees, yet they feel helpless. Schools desperately seek support from private donors. At least two schools ICJ visited have begun well organized farming activities to produce food for learners to eat, while sell the surplus livestock and crops to raise funds. Despite these efforts, and in the absence of adequate funding from the State, schools often resort to asking parents to make small contributions that they are aware most parents cannot afford.

"I don't know what I'm going to call that, but for me it's school fees. Even though the Free Primary Education means they shouldn't have to pay. But they have needs and the money given by the government is not enough, so we have to ask the parents for something. It's school fees, whether I like it or not, it's school fees... they are paying 120 rand per year... and it is not enough." – Principal at an inclusive school.

Principals at schools also indicated that the limited support that they usually receive from the government for the funding of the operation of their schools has decreased over the last two years. Several principals reported not receiving funds in the form of a "subvention" which they had typically received to supplement their expenses in previous years. Principals of inclusive and special schools also complained that budgets and staff allocations were determined by the government without considering the specific and unique needs of such schools in accommodating and catering for children with disabilities.

d. Inadequate implementation of legislation and policy

In addition to problems with ineffective allocation of resources, the Lesotho government has struggled to coordinate concerned stakeholders, including relevant government ministries, in an integrated and cooperative manner to realize the rights of children.²³⁰ Delays in the development and regular review of strategies and plans affects the government's ability to effectively implement policy in a targeted manner.²³¹

²³⁰ Second periodic report due 1999 CRC/C/LSO/2 at paras 22 and 24.

²³¹ Concluding observations on the second periodic report of Lesotho CRC/C/LSO/CO/2 Paras. 7 – 11.

“They are not implementing... They are just saying they are implementing. That is what I hate. The government just does not know how to implement, to be inclusive”. – Mosa Kuape, IT consultant and disability rights advocate.

The Special Education Unit under the Ministry of Education and Training was established in 1991 to advocate for the integration or inclusion of learners with special educational needs, including those with disabilities, into the mainstream school system at all levels.²³² It focuses on four fields: visual impairment; hearing impairment; physical disability; and intellectual impairment. The Unit is understaffed, which hinders its capacity to execute this mandate effectively.²³³ The introduction of the Inclusive Education Policy marked an incremental shift from “Special Education” to “Inclusive Education” under the MoET. However, the Ministry maintains the special education system for “severe and profound” disabilities until it has increased resources to create inclusive curricula, deploy appropriately trained teachers, facilitated more access to appropriate teaching and learning materials and national assessments.²³⁴

The Special Education Unit remains significantly understaffed and under-resourced to perform vital functions designated to it in the inclusive education policy. The impression garnered from ICJ during interviews with MoET staff is that this produces significant frustration for them. Moreover, the continued delay in the adoption of an implementation framework for the inclusive education policy further frustrates the Special Education Unit’s ability to implement the policy.

e. Inadequate capacity to monitoring implementation of inclusive education policy

MoET officials raised concerns with the ICJ about their inability to monitor the quality of education provided to children with disabilities in Lesotho. For example, only some districts employ locally located staff tasked with supporting schools regarding inclusive education. Staffing in the Special Education Unit was said to be inadequate, and its central office is in Maseru, a substantial distance from many of the schools.

MoET officials reported lacking basic resources for transport and other supports required to regular visit schools. They indicated that while they would prefer to visit schools on a regular basis, some schools, particularly those far from Maseru, were only visited once a year while others may not even be visited yearly.

The MoET therefore lacks capacity to provide critical support, including much needed training for staff and educators, on anything more than an ad hoc basis. Other critical services, such as screening and identification of a child’s disability and how best to accommodate for it, cannot be provided unless a child can be physically brought to Maseru. Even in the uncommon case in which a child is

²³² Inclusive Education Policy, p. 8.

²³³ Inclusive Education Policy, p. 12.

²³⁴ Education Sector Plan 2016 – 2026, p. 95.

brought to Maseru, the Special Education Unit does not have specialized staff, such as social workers, occupational therapists and others trained in screening and identification of disability in its employ.

“we only see the children with disabilities whose disabilities are visible. But as for the intellectual ones, we only see the disabilities as we teach. Because we don’t screen”. – Principal at a special school.

Ultimately, the MET lacks the ability to implement the inclusive education policy, though officials expressed hope that the finalization the implementation plan for the policy, which is currently underway, could change this situation.

f. Legislative gaps: private actor involvement in education

As has been detailed above, the Education Act provides for registration and classification requirements for the operation of independent schools. However, such provisions are limited and often fail to specify adequately these requirements, both in general and in relation to inclusive education. Moreover, the regulatory framework set out in the education act falls significantly short of standards set in international law, including African regional law, and provide little clarity and detail in relation to the legal duties of private actors in education in respect of “minimum standards”. Despite requests, the MoET could provide no further guidance on whether further regulations or guidelines exist and, if so, have been implemented. The current regulatory framework therefore appears to fall short of Lesotho’s obligation to protect the right to education and requires urgent attention.

It is important to note that the ICJ’s research did not reveal the presence of large commercial actors in education for children with disabilities in Lesotho. Indeed, some of those interviewed sympathize, to an extent, with the reasons why private actors have begun operating special or inclusive schools in Lesotho.

“The individual owners of these private schools are trying to close the gap which they see in education, whereby most children with disabilities are still struggling to access education and many people are not actually getting support. So actually these [special] schools, they are just being established out of frustration, they're trying to address something which they don't know how they should address things they are not getting help, so they are emerging everywhere. They're not even aware of how to go about the registration of those schools. And now the problem that they pose is that if they are not regulated,” – Nkhasi Sefuthi, disability rights advocate and LNFOD Executive Director.

Interviews with MoET officials confirm that the process for registration may deter school owners from registration.

While these frustrations are understandable, they do not extinguish the responsibility of the authorities to ensure that schools operate only in appropriate and comprehensive regulatory environment that is fully compliant with international law and standards aimed at protecting the rights and well-being of

learners with disabilities. The ICJ's interviews confirm that the quality of education and care provided at private educational facilities is a significant concern to all stakeholders, including staff at these schools, MoET officials and parents whose children attend them.

g. Legislative gaps: hostel accommodations

The ICJ's research reveals that many of the children with disabilities attending special and regular schools in Lesotho, are generally compelled to stay in hostel style accommodations at or near such schools because of the considerable distance between their homes and the schools. This alone is contrary to the international law standards on inclusive education and Lesotho's inclusive education policy.

Reports from parents interviewed and MoET officials indicate that the quality of accommodation at such hostels is often deeply inadequate. Issues raised during ICJ's interviews include:

- insufficient food;
- inadequate and dangerous infrastructure;
- inadequate numbers of caregivers;
- untrained caregivers; and
- inability of parents to contact caregivers or visit their children on a regular basis.

One principal told ICJ that "students are hungry" and therefore they "can't concentrate in class" and that "some of them are even leaving because of the challenge".

"For students, meat is not that much of a priority, just food. Even if it's just two or three spoons of beans. Sometimes they get far less than that. Sometimes they don't even get pap." – Principal of Special School

The ICJ has failed to uncover any regulation, policy or law that governs the conditions at such hostels. MoET officials interviewed also confirm that, though there have been recent internal discussions about the need for such regulation, they are not aware of any such regulation that exists at present. It is therefore unclear whether the responsibility for such hostels lies with the schools themselves, the MoET or any separate government department.

In some the schools visited by the ICJ, the hostels are run by the school staff themselves under the supervision of the principal. In others, school principals indicate that they are not involved in the running of hostels at all, which are operated by separate private actors such as school owners or nuns on behalf of the catholic church.

Given the extreme vulnerability of children with disabilities to neglect and abuse, and the significant needs such children may have for specialized care, attention and accommodation, this regulatory gap must be urgently addressed.

h. Limited access to learning materials and classrooms, and schools generally

In its Combined Second to Eighth Periodic State Party Report to the African Commission on Human and Peoples' Rights, the government of Lesotho indicated that through the Ministry of Social Development, it had also generally provided some assistive devices free of charge to children with disabilities, within the availability of resources.²³⁵ Nonetheless, there is still a shortage of such devices in some schools and even where there are assistive devices, some teachers lack the skills to be able to use them effectively in their teaching.²³⁶ However, many children with disabilities are often placed in regular schools without any support or accommodations which allow them to access educational materials, such as glasses or other magnification devices for learner who are partially sighted. This lack of accommodations makes it difficult for such learners to stay in these schools. UNICEF data also indicates that in both primary and secondary schools, children with disabilities tend to repeat more than those who do not have disabilities.²³⁷

The UN Committee on the Rights of the Child has expressed concern that poor infrastructure coupled with overcrowding in schools makes it difficult for learners in Lesotho to access schools and learning materials according to their specific needs.²³⁸

"We have limited materials for teaching the learners. We get some them from the ministry, but these are too demanding for the learners... [we have] no science kits, maths kits and when you come to the side of children with disabilities we don't have extra and adapted materials". – Principal, inclusive school.

Participants in the focus group made mention of the inadequacies of school infrastructure including poor boarding school facilities that compromised their child's health and poor ablution facilities.

²³⁵ Second Periodic Report to the Committee on the Rights of the Child (2017) CRC/C/LSO/2, para. 237

²³⁶ Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2, 25 June 2018, paras. 53 to 54, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/189/70/PDF/G1818970.pdf?OpenElement>; LNFOD & UNICEF QUARTERLY PROGRESS REPORT ON Project: INCLUSIVE EDUCATION for learners with disabilities in Lesotho p. 8 ; KNFID & SINTEF *Living Conditions among People with Disabilities in Lesotho: A National Representative Study* p. 87, available at: https://www.sintef.no/globalassets/sintef-teknologi-og-samfunn/rapporter-sintef-ts/report_lesotho_310111.pdf.

²³⁷ UNICEF MICS-EAGLE Lesotho Education Fact Sheets (2021).

²³⁸ Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2, para. 53.

“My child is now 15 years old. She is a child who is in a wheelchair. I did not have a problem getting a school for her from the ECD to primary school stages. The problem she had while she was at a primary school was to use the toilet at school. The accommodation the school provided is that she should use the teachers’ toilets because they were cleaner than the children’s toilets. But some of the teachers were not happy with that so they tried to push for the child to go to the children’s toilets. So, the problem was the availability, or accessibility, of disability-friendly toilets.” – Parent of child who makes use of a wheelchair.

In addition to inadequate or physically inaccessible infrastructure, learners with disabilities may struggle to access schools due to physical distance.²³⁹ This is a particularly significant problem for children residing in rural areas who may have to travel long distances to attend a school, especially one of the five special schools that can accommodate persons with disabilities.²⁴⁰ The African Commission on Human and Peoples' Rights also expressed concern at the small number of schools for children with disabilities and their limited capacity to service the entire country.²⁴¹

“the students complain because the seniors have been there too, and mainly these are classrooms used for the newcomers. When we see the structures used for the newcomers it is not healthy. Some bricks may fall. It’s just not good at all”. – Principal of special school.

“From my side the infrastructure is much of the problem. When the children go to the toilet it can be quite difficult for them to do on their own... All the time they will be needing help from the others, though they want to be doing things by themselves like the others.” – Principal of an inclusive school.

Even rudimentary assistive devices, such as wheelchairs, glasses or hearing aids,²⁴² which some learners with disabilities may need to engage effectively with learning, are often in short supply and many educational materials are still created in inaccessible formats.²⁴³ Some teachers have reported that a shortage of

²³⁹ Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2, 25 June 2018, para. 41, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/189/70/PDF/G1818970.pdf?OpenElement>; Inclusive Education Policy, p. 12; UNICEF and LNFOD *Quarterly Progress Report on Project: Inclusive Education for Learners with Disabilities in Lesotho* (26 January 2021), p.12.

²⁴⁰ Global Partnership, “Advancing inclusive education: making children with disabilities visible in Togo, Lesotho and Vietnam”, 3 June 2021, available at: <https://www.globalpartnership.org/blog/advancing-inclusive-education-making-children-disabilities-visible-togo-lesotho-and-vietnam>

²⁴¹ African Commission on Human and Peoples' Rights (ACHPR), *Concluding Observations and Recommendations - Lesotho Combined 2nd To 8th Periodic Report, 2001-2017*, adopted at 68th Ordinary Session April 14 to May 04, 2021, para 17, available at: <https://www.achpr.org/states/statereport?id=120>.

²⁴² Inclusive Education Policy, p. 2.

²⁴³ National Report, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/316/88/PDF/G1931688.pdf?OpenElement>; National Strategic Development Plan, available at: <https://www.gov.ls/wp-content/uploads/2021/06/National-Strategic-Development-Plan-II->

appropriate teaching and learning materials means that they also struggle to assist learners who require extra support to learn.²⁴⁴

Normally we are running out of rooms. We need big rooms. We have smartboards from the Ministry but we don't have a big room to raise them to do our work easily and we don't have electricity. We have electricity in this [one] block and in the classrooms no electricity at all." – Principal at a special school.

"The path from where they are staying to here, especially when it's raining, now if you are driving someone in a wheelchair, it's not easy...it is a major challenge...I find that some of the students will not come to school because they don't have wheelchairs. Now we have to look, search for them and then send other students for them [to carry] them up to school." – Principal at an inclusive school.

i. Inadequate teacher training and a lack of specialized teachers²⁴⁵

One of the objectives of the Inclusive Education Policy is pre- and in-service inclusive education training for teachers. Teacher skills training and professional development on inclusive education are still highly inadequate in Lesotho. This has led to problems adapting and modifying effectively the teaching and learning environment for learners with disabilities. Without proper training on inclusive education, teachers are unable to instruct learners with disabilities effectively or cannot provide them with the support and accommodations they may require.²⁴⁶ One study on the teachers indicated that they were concerned that they lacked knowledge on disability generally, were not being equipped with the requisite skills to teach learners with disabilities and, for some, had never received training on inclusive education.²⁴⁷

"The main challenge that we have is one, it's a language by itself we are using – our hands. Meaning communicating through sign language. The parents, are not able to compete with their kids...Even us we are not experts in sign language, we need some refresher, workshop or whatever, so that [we] will be equipped more and more...One hour before school we sit down and try help other [staff] who don't know sign language. We organized this ourselves." – Principal at a special school.

[2018-19-2022-23.pdf](#); Inclusive Education Policy, p. 2; Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2 , 25 June 2018, para. 53.

²⁴⁴ Tseeke, "Teachers' perceived self-efficacy in responding to the needs of learners with visual impairment in Lesotho" (2021), p. 7.

²⁴⁵ Tseeke, "Teachers' perceived self-efficacy in responding to the needs of learners with visual impairment in Lesotho" (2021), p. 7-8; Committee on the Rights of the Child, Concluding observations on the second periodic report of Lesotho, CRC/C/LSO/CO/2 , 25 June 2018, para. 53.

²⁴⁶ UNICEF and LNFOD *Quarterly Progress Report on Project: Inclusive Education for Learners with Disabilities in Lesotho* (26 January 2021), p. 12.

²⁴⁷ Tseeke, "Teachers' perceived self-efficacy in responding to the needs of learners with visual impairment in Lesotho"(2021), p. 7.

"We need more training because you find that [at the school you teach all the subjects. These kids are with you for the whole day and if you don't have enough skills. It means a child may suffer but if one is trained it means that the learner will end having profited at the end." – Principal at an inclusive school.

"Actually, we are all learning to teach these kids. All of them. No one has the special education. Maybe they will send the kid to me to talk to them, to see what the problem is. There is no one who is trained as a special education teacher. As times goes on we are trying our level best". – Teacher at a special school.

Parents in the focus group discussion strongly suggested that inadequate training was at the heart of many of the problems teachers have when dealing with children with disabilities. They felt that increased training on disability and teaching learners with disabilities would go a long way towards improving learning conditions for children with disabilities.

"... All teachers must be trained [in] education for learners with disabilities, so that our children should not be taken away from us while they are studying, but they can also have an opportunity of learning [at] the nearest schools and they are able to live with their parents." – Focus group participant.

Principals of schools are also acutely aware of the fact that this lack of training, coupled with the failure to identify children's disabilities, harms the quality of education received, despite teachers' efforts.

"The greatest challenge we have here is that these learners have disabilities, but we are not even aware. We see this at the end of the year when they don't pass. We sometimes see them blame other teacher, yet he/she tried his/her level best. The child had a problem and the teacher's approach was not appropriate." – Principal at an inclusive school.

To combat this, UNICEF has been working closely with the MoET, in collaboration with LNFOD, to improve access by all children "to quality inclusive education in the communities where they live," with funding support from the Norwegian Agency for Development Cooperation (NORAD). Through this, the MoET has been supported in building teacher's capacity on inclusive pedagogy, building gender and disability friendly toilet blocks in some, schools developing guidance and design standards for Water, Sanitation, and Hygiene (WASH) facilities in schools and distributing accessible teaching and learning materials. Despite these efforts, the problems described persist and the interventions to increase teacher training continue to be described by all stakeholders interviewed by the ICJ as ad hoc and inadequate.

5. CONCLUSION AND RECOMMENDATIONS

The Lesotho authorities should take effective measures to implement Lesotho's international legal obligations to ensure that children with disabilities can effectively exercise their right to inclusive education. Lesotho has already taken some modest steps towards that end. Such steps include:

- introducing a policy to establish an inclusive education system;
- introducing a policy for free primary education;
- embarking on the process to develop an implementation plan for the Inclusive Education Policy;
- enacting a law with the specific aim of incorporating the CRPD into domestic law, namely the Persons with Disability Equity Act;
- establishing a scheme that provides financial support to vulnerable children, including learners with disabilities;
- collaborating with local civil society and IGO partners to raise awareness about disability, provide assistive devices to learners, train teachers on inclusive education, build school infrastructure; and
- embarking on a legal and constitutional reform process to make social, economic and cultural rights, like the right to education, for all persons justiciable.

While these measures are welcome, Lesotho has failed to comply with its legal obligations to ensure equal access to quality, inclusive education for all children. In light of the challenges detailed above, and considering Lesotho's domestic law and the country's international legal obligations, the International Commission of Jurists recommends that the Lesotho authorities take the following further measures.

a. Implement more effective awareness-raising initiatives about disability rights and inclusive education.

There is a pressing need for sensitization campaigns on disability, generally, and inclusive education specifically, directed towards members of parliament, government ministries, the judiciary and other legal professionals, school management staff, school children, teachers, and members of the general public. The Lesotho authorities, and in particular the Ministry of Education, should disseminate information on the right of all children to inclusive education and direct resources to embarking on campaigns to sensitize a wide range of stakeholders on disability rights. At the community level, the government should engage with community members about the rights of children with disabilities to access education on an equal basis with others and the harmful impacts of stigma surrounding disability on such access. These measures are critically necessary to eliminate stigma, discrimination, and other attitudinal barriers to children with disabilities accessing education.

b. Increase of resource provision in respective of education for children with disabilities.

The government should relieve the financial burden on caregivers of children with disabilities and facilitate access to schools by allocating sufficient resources – including financial, human, technological or other resources. Among the issues brought to the ICJ’s attention during its research, the authorities should consider ensuring adequate resourcing, including to ensure:

- the appropriate staffing and resourcing of the MoET’s Special Education Unit to allow it to implement and monitor the implementation of the inclusive education policy. Such appropriate staffing requires, at a minimum, experts in screening and identification of disability as well staff for the unit located in every education district of country;
- that no parent of a child with a disability has to pay any fees whatsoever – whether school fees, hostel fees or any other fees – to attend school;
- the improvement school infrastructure that will enable the enrolment of children with a range of disabilities in regular schools;
- the improvement in access to accessible teaching and learning materials to all children with disabilities irrespective of which schools they attend;
- the increase of the number of suitably qualified teachers that are able to teach learners with disabilities;
- the provision for children with disabilities attending special schools, for whatever reason, of access to equal, quality, inclusive education consistently with their diverse needs;
- the provision of accessible transport to and from school for children with disabilities;
- the provision more assistive devices according to children’s individual educational needs; and
- the provision of any other resources needed to provide for reasonable accommodations, the implementation of the inclusive education policy, and the protection of the right to inclusive education of children with disabilities more generally.

c. Invest in and carry out regular pre- and continual in-service training for teachers on inclusive education.

It is apparent from the focus group discussion and other research, that many teachers and school management staff typically lack the support and knowledge and skills to teach learners with disabilities. To facilitate universal realization of the right to inclusive education, Lesotho should work on introducing programmes that will ensure that suitably qualified teachers, including teachers with disabilities, are placed in regular schools.

In terms of Lesotho’s international human rights legal obligations and the Inclusive Education Policy, training should specifically focus on how to implement inclusive education in learning environments including by: making necessary accommodations; adapting teaching methods; engaging with learners with

disabilities; modifying the curricula to meet learner needs; and learning sign language, braille and other forms of communication and that may be necessary to effectively communicate with and teach children with disabilities.

Such trainings should be conducted before teachers begin teaching and should continue throughout their tenure as teachers, preferably on-site at schools, in cooperation with partners in civil society and developmental agencies.²⁴⁸ Given the legal imperative to include children with disabilities in the general education system, such trainings should not focus exclusively on training teachers at special schools and “inclusive” schools.

d. Scale up the Special Education Unit’s capacity to monitor the quality of inclusive education by visiting each school quarterly.

Given the poor state of the inclusive education system in Lesotho, extraordinary monitoring of the quality of education provided is urgently needed. The Inspectorate of Schools, in close collaboration with the Special Education Unit, should be empowered, resourced, and mandated to visit each of the 15 inclusive schools and five special schools in the country at least on a quarterly basis (four times per year).

The resources required will include human resources to perform monitoring and financial resources, including for transport, food and accommodation for quarterly monitoring visits. Organizations of persons with disabilities and the parents of children at such schools should be invited to participate in these monitoring visits.

e. Conduct a review of all legislation application to education for children with disabilities to ensure its compliance with human rights standards.

A comprehensive legislative review should give due attention to:

- The obligation to incorporate the principal elements of Lesotho’s inclusive education policy into binding legislative provisions requiring inclusive education.
- The apparent inconsistency of the Education Act with Lesotho’s Constitution and international legal obligations to the extent that it appears to permit a learner’s non-enrolment in school or discontinuation of their attendance at school based on a disability.
- The apparent failure of the Education Act to adequately require the effective and comprehensive regulation private actor involvement in education.
- The apparent regulatory gap regarding the legal standards applicable to hostels/other boarding accommodation for children with disabilities at special and inclusive schools.
- The apparent regulatory gap in mandating a coherent process for the screening, identification, and assessment of children with disabilities to determine their learning needs.

²⁴⁸ UNICEF and LNFOD, p. 10-11.

- The inconsistencies between the Education Act, the Children’s Protection and Welfare Act and the Disability Equity Act.

f. Accelerate the finalization of the implementation plan for the Inclusive Education Policy.

This is necessary to complete the transition of the Special Education Unit under the Ministry to the Inclusive Education Department and ensure that the Inclusive Education Department is fully and appropriately equipped to implement the inclusive education policy.

g. Ensure the justiciability of all human rights, including economic, social and cultural rights for “everyone”.

Following the failed enactment of the Omnibus Bill which would have extensively amended the Constitution, it is recommended that the Lesotho authorities resume the constitutional reform process to establish the Commission. The proposed Human Rights Commission may well have a critical role to play in the monitoring of the implementation of the inclusive education policy.

Moreover, and in keeping with reforms recommended in the Omnibus Bill, all human rights recognized under international law and Lesotho’s international legal obligations must be made justiciable and enforceable and the Constitutional should be reformed to remove the distinctions between rights, including groups of rights those classed as economic, social and cultural rights and those identified as civil and political rights. The uncertainty regarding the justiciability of economic, social and cultural rights creates obstacle for those working to advance the rights and interests of persons with disabilities, including parents of children with disabilities, and ensuring the enforcement of the right to inclusive education. In this process, and to ensure compliance with international law, the protection of all rights should be explicitly extended to all people irrespective of their citizenship or documentary status.

h. Ratify the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities.

While UN human rights instruments, including the CRPD, provide the essential framework, it is important these are supplemented by regional arrangements, including the Protocol.

i. Ratify the Optional Protocols to the CRPD and ICESCR.

This will enable the respective treaty bodies under these instruments to receive individual complaints. Allowing for individuals to complain to these bodies for violations of the right to inclusive education is a further means of enhancing access to justice and providing for access to effective remedies for rights violations.

j. Ensure that Lesotho submits all outstanding reports, and reports that will be due in the future, to all Treaty Bodies supervising treaties to which it is party.

Although Lesotho is Party to the CRPD, ICESCR, and CRC, it has only submitted two State reports the Committee on the Rights of the Child.²⁴⁹ It has failed to submit any reports to the CESC or CRPD Committee, in serial breach of its obligations under those instruments.²⁵⁰

k. Continue working collaboratively with civil society and intergovernmental partners to ensure that learners have necessary and reasonable accommodations that adapt well to their individual needs.

In its Concluding Observations and Recommendations on Lesotho's Combined 2nd to 8th Periodic Report, the African Commission on Human and Peoples' Rights commends Lesotho for ongoing collaboration between government and civil society on various disability rights issues, including the enactment of the Persons with Disability Equity Act, then a Bill.²⁵¹ In the midst of severe resource constraints, the government of Lesotho should maintain and strengthen cooperation with civil society (such as LNFOD) and intergovernmental organizations (such as UNICEF) who can support them in, among others:

- Adequately mapping out and understanding the diverse needs of children with disabilities in the context of the education system through surveys, research, and disaggregated data collection;
- Improving access to existing regular schools across the country to ensure that learners with disabilities can attend schools in their area;
- Distributing accessible learning materials and assistive devices to schools; and
- Conducting trainings with teachers on the right to inclusive education, appropriate modes of instructing learners with various disabilities and practical means of adapting teaching methods to ensure the needs of individual learners are met.

²⁴⁹ See:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=LSO&Lang=EN.

²⁵⁰ Id.

²⁵¹ African Commission on Human and Peoples' Rights, *Concluding Observations and Recommendations - Lesotho Combined 2nd To 8th Periodic Report, 2001-2017*, para. 26.

Annex: List of schools visited by the ICJ:

Name of school	District	Special or Inclusive	Type of disability
Resource Centre for the Blind	Maseru	Special school	Visual impairment
Abia High School	Maseru	Inclusive (regular) school	Physical Impairment
Mamello Centre	Leribe	Special school	Intellectual and Multiple Disability
Motsekuoa Primary	Mafeteng	Inclusive (regular) school	Physical Impairment
Mafeteng LECSA Primary	Mafeteng	Inclusive (regular) school	Intellectual and Multiple Disabilities
Kananelo Centre for the Deaf	Berea	Special school	Hearing impairment

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