

CHAPTER 2

THE BASIC EDUCATION ACT OF 2013: WHY IT IS ONE STEP FORWARD AND TWO STEPS BACK FOR CHILDREN WITH DISABILITIES IN KENYA

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Summary

The Basic Education Act 14 of 2013 ensures the right of all children with disabilities to free and compulsory education for the first time in Kenya. However, the Act continues to perpetuate discrimination against Kenyan children with disabilities. First, the law fails to provide reasonable accommodations in education, which amounts to disability discrimination. Second, the law fails to ensure an inclusive education system as required by article 24 of the CRPD. While there has been some debate as to whether article 24 bans all specials schools, the Basic Education Act creates a system in which all children with disabilities are required to attend separate schools, solely based on their disability. Although an inclusive education system may not be possible to achieve in Kenya overnight, the law does not do enough to promote equal educational opportunities for children with disabilities as required by the CRPD. At the very least, children with disabilities should be guaranteed the right to an education in the least restrictive environment, which, we argue, is possible to achieve immediately. The right to education in the least restrictive setting ensures that children with disabilities are provided the opportunity to learn with

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their non-disabled peers. However, enforcing the right to education in the least restrictive environment should not be the final goal; it is only a means that will lead towards full inclusion for all children with disabilities in Kenya, as mandated by the CRPD.

1 Introduction

Children with disabilities have been subjected to discrimination in education for the longest time in Kenya. According to the Kenya National Survey for Persons with Disabilities, about 67 per cent of persons with disabilities have some primary education.¹ Of those, only nine per cent attended public schools with non-disabled children.² Thus in Kenya today, many children with disabilities are not allowed to attend school at all, and those who do attend school are not allowed to attend school with non-disabled children. Instead, they have been forced to attend special schools designed specifically for their specific type of disability. These special schools have developed based on the assumption that students without disabilities would not want to attend school with children with disabilities and vice versa. As a result, children with disabilities have been denied their basic right to education on an equal basis with their non-disabled peers.

In August 2010, Kenya adopted a new Constitution. This Constitution expressly prohibits discrimination against children and adults with disabilities in education for the first time in Kenya's history.³ Article 54 of the Constitution specifically guarantees the right of people with disabilities to be treated with dignity and respect, and to have 'access to educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person'.⁴ Further, article 53(b) guarantees every child in Kenya the right to 'free and compulsory basic education'.

It is against the background of the new Constitution that the government of Kenya passed the Basic Education Act 14 of 2013 (the Act). The purpose of the Act is to implement article 53(b) of the Constitution by ensuring a free and compulsory education for all children in Kenya. Not only does the Act recognise the importance of the right to a free basic education for all children with disabilities, but it specifically prohibits

1 Kenya National Survey for Person with Disabilities Report (2008) 15.

2 As above.

3 Art 27(4) of Constitution of Kenya provides: 'The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, *disability*, religion, conscience, belief, culture, dress, language or birth,' (emphasis added).

4 See generally art 54 of Constitution which guarantees the right to access educational institutions, the right to be treated with dignity and to use sign language, Braille etc.

schools from denying admission to students with disabilities;⁵ on the other hand, the Act authorises the creation of a special public education system for students with disabilities.⁶

In 2007, Kenya signed the UN Convention on the Rights of Persons with Disabilities (CRPD), and ratified it in 2008. The purpose of the CRPD is to protect and ensure equal enjoyment of human rights for children and adults with disabilities.⁷ According to the CRPD, state parties are required to protect the best interests of children and to ensure the realisation of their rights under the Convention.⁸ Article 24 of the CRPD specifically guarantees the right to education for all children and adults with disabilities as well as an obligation on state parties to provide an 'inclusive education system'.⁹

The Act may be commended for establishing, for the first time in Kenya, the right of all children, with and without disabilities, to education. However, it falls short of complying with article 24 of the CRPD. The Act legislates the status quo in education by segregating children with disabilities in so-called 'special schools'.¹⁰ It also fails to mention the right to inclusive education, which has been determined to be the best way to achieve quality education for children with disabilities. Some might argue that the Act benefits children with disabilities in Kenya since many of these children were never even allowed to attend public schools and that situation will now change. However, as we argue in this article, the Act discriminates against children with disabilities by continuing a system of special schools, and by failing to create an inclusive education system which would also ensure reasonable accommodations that are necessary to fully implement the goal of inclusive education for all children with disabilities. In particular, in this article, we discuss the extent to which the Act fails to comply with article 24 of the CRPD, and what action Kenya should take to fully protect the right of children and adults with disabilities to education on an equal basis with people without disabilities, as required by the CRPD.

In the first part of the article, we present an overview of the Act which shows, in our view, the ways in which the Act discriminates against children with disabilities. In the second part of the article, we discuss the concepts of equality, non-discrimination and reasonable accommodations, which are essential to any education system that is to comply with article 24 of the CRPD. The final section of the article explores the Act's failure

5 See sec 34 of the Act, which provides: 'A school or person responsible for admission shall not discriminate against any child seeking admission on any ground, including ... disability.'

6 See Part VI of the Act entitled 'Special Needs Education'.

7 Art 1 Convention on the Rights of Persons with Disabilities (CRPD).

8 Art 7(2) of the CRPD.

9 Art 24(1) of the CRPD.

10 Sec 44 of the Act.

to adhere to the principles that are essential in protecting the right of children with disabilities to education, followed by our recommendations.

2 The right of children with disabilities to education under the Act

The Act came into force on 25 January 2013. The Act is divided into 12 parts.¹¹ Most of the Act addresses the relationship between the county and national governments in providing education. However, Parts IV and V of the Act also establish the right of children to free, compulsory education, and the creation of special schools for children with disabilities.¹²

Section 28 of Part IV of the Act is perhaps one of the most progressive provisions of the Act. This section requires the government to implement the right of every child to a free and compulsory education. This mandate is in line with Kenya's obligation under international law, specifically the International Covenant on Economic Social and Cultural Rights¹³ as well as the CRPD. The government is also mandated to establish different schools, in order to achieve this fundamental right to education for every child in Kenya.¹⁴ To ensure that the education is free, the Act provides that no public school may charge a fee for admission to school.¹⁵ To ensure that the education is compulsory, the Act has made it a criminal offence for parents who fail to take their children to school, with a maximum term of two years' imprisonment.¹⁶ Section 34 also prohibits a school from denying admission to a child based on his or her disability.¹⁷ In line with Kenya's international obligations, the Act mandates the government to ensure that all the above provisions are available to every child.¹⁸ In addition, for those children who are marginalised or from disadvantaged

11 Part I deals with the interpretation of terms according to the act, the guiding principles of the Act. Part II establishes the National Education Board, its functions under the Act include *working* with different stakeholders to ensure the removal of barriers to education. Part III establishes the County Education Boards, which functions include, amongst others, coordinating and monitoring education training. Parts IV and VI of the Act establish the free and compulsory education and promotion of special needs education. Parts V through XIII identify the coordination of responsibilities between the county and the national government, which is also beyond the scope of this article. Whether the coordination as proposed by the Act is efficient is outside the realms of this paper.

12 Sec 28 and 44 of the Act.

13 UN General Assembly 'International Covenant on Economic, Social and Cultural Rights', adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entered into force on 3 January 1976. Article 13 provides for the right to free and compulsory primary education.

14 Sec 28(2) of the Act.

15 Sec 29 of the Act.

16 Sec 31 of the Act.

17 Sec 34(2) of the Act.

18 Sec 39 of the Act.

groups, the government is required to ensure that they are not discriminated against in their access to education.¹⁹

The government is also mandated under the Act to establish and maintain public special schools.²⁰ The children who qualify to enrol in these special schools include children with intellectual, physical, emotional, hearing or vision impairments as well as students with special talents or multiple disabilities.²¹ To ensure that these schools are up and running efficiently, the government is mandated to provide special needs teachers and support staff in the schools.²²

In contrast to the CRPD which adopts a social model of disability,²³ the Act incorporates a medical model of disability. Special schools are defined as those schools whose 'purpose is to help a particular class of children not only attain education but some form of treatment or care'.²⁴ The medical model, also known as the deficit model, views people with disabilities as 'sick' and in need of a medical intervention. This model locates the 'problem' of disability within the person rather than in an environment that creates barriers to the full inclusion and participation of people with disabilities.²⁵ On the other hand, the CRPD, rejects the medical model of disability, and instead adopts a more holistic model of disability, commonly referred to as the social model of disability. The social model of disability sees disability as an interaction between an individual and the environment and society.²⁶ According to this view, people with various conditions and impairments become 'disabled' only when they encounter environmental and other barriers that prevent them from accessing their rights on an equal basis with nondisabled people. According to the social model, therefore, people with disabilities can be included in society when the environmental and other barriers are removed.

The Act does not adopt a social model of disability. It does not declare that all children have a right to education on an equal basis with other nondisabled children; nor does it require the removal of barriers to their full inclusion. Instead, children with disabilities are sent to separate

19 As above.

20 Sec 44(1) of the Act.

21 Sec 44(3)(a), (b) and (c) of the Act.

22 As above.

23 AS Kanter 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 287.

24 Sec 2 of the Act.

25 AS Kanter 'The law: What's disability studies got to do with it or an introduction to disability legal studies' (2011) 42 *Columbia Human Rights Law Review* 403 419-421; G Quinn & T Degener *Human rights & disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 15.

26 Kanter (n 25 above) 420; See also C Ngwena 'Deconstructing the definition of "disability" under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613 625.

'special' schools. Moreover, the purpose of education for children with disabilities under the Act is not to ensure their equal right to education but to expose them (only) to an 'appropriate curriculum for children with disabilities'.²⁷ But as the United States Supreme Court wrote 60 years ago, separate educational facilities are inherently unequal'.²⁸ Thus the Act discriminates against children with disabilities not only by creating separate schools, but also by requiring separate curricula for children with disabilities.

As this brief summary of the Act reveals, on one hand, it seeks to protect the right to public education for every child; but, on the other hand, it directly discriminates against children with disabilities by forcing them to attend separate, segregated, special schools with special curricula. As discussed more fully in the next section, the Act fails to provide children with disabilities in Kenya the right to education on an equal basis with their non-disabled peers, in violation of international standards.

3 The right of children with disabilities in Kenya to equality and non-discrimination

3.1 The right to equality in education

The principle of discrimination can be understood as treating similar situations differently without an objective or reasonable justification.²⁹ Both the Constitution of Kenya of 2010³⁰ and the Act³¹ prohibit discrimination on the basis of disability. These laws also recognise the right to positive discrimination, otherwise known as affirmative action.³² Nevertheless, such measures of positive discrimination must be reasonable and justifiable.³³ Some may argue that the establishment of special schools is an example of affirmative action for children with disabilities since these schools provide children with disabilities the different treatment they need in order to remedy past discrimination against them. However, the European Court of Human Rights (ECtHR) as well as other countries' courts have held that the creation and continuation of special schools

27 Ngwena (n 26 above) 625.

28 *Brown v Board of Education*, 347 US483 (1954).

29 *Willis v The United Kingdom* ECHR (11 June 2002) para 48.

30 See art 27(4) of the Constitution of Kenya 2010.

31 Sec 4(e) of the Act.

32 *DH v The Czech Republic* (57325/00) ECHR (13 November 2007) para 175.

33 As above.

amounts to prohibited discrimination.³⁴ According to these views, the way to remedy past discrimination is not to create separate schools but to integrate children with disabilities into regular schools and to provide them with the assistance they may need to succeed.³⁵

It is undisputable that children with disabilities in Kenya are marginalised in the field of education. However, children with disabilities deserve much better than the provisions provided in the Act. The next section of this article explains the way in which the Act violates the right to equality and non-discrimination on the grounds of disability, as required under international law, including the CRPD.

The principles of non-discrimination and equality have been referred to as the flip side of the same coin.³⁶ In other words, for equality to be present, discrimination must be absent.³⁷ However, there is no agreed upon definition of the concept of equality or non-discrimination.³⁸ Formal equality is understood as requiring that similar cases be treated similarly, and different cases be treated differently.³⁹ But the concept of equality refers only to partial equal treatment because human beings can never be in completely identical situations.⁴⁰ Thus equality is not an absolute truth; rather, it is a relational concept: it can only exist in a comparative state between two groups, such as between children with and without disabilities.⁴¹ To attain formal equality in education, then, children with and without disabilities must be afforded the same rights, opportunities and treatment.⁴² To realise the goal of formal equality for children with disabilities in education, therefore, the law may provide simply that

34 See *DH v The Czech Republic* (n 32 above); *Orsus v Croatia* (Application no: 15766/03) ECHR (16 March 2010); and *Horvath v Hungary* (Application no: 11146/11) ECHR (29 January 2013), where the court, even though it did not expressly state that special schools are discriminatory, gave all the reasons as to why education in special schools may be substandard compared to the public mainstream schools; See also *European Action of the Disabled v France* European Committee of Social Rights Complaint 81/2012, where the committee unanimously held that students with autism are entitled to education in mainstream schools.

35 *Brown* (n 28 above).

36 A Bayefsky 'The principle of equality and non-discrimination in international law' (1990) 11 *Human Rights Law Journal* 1; See also C McCrudden & S Prechal 'The concepts of equality and non-discrimination in Europe: A practical approach' *European Network of Legal Experts in the field of Gender Equality* (2009) 12.

37 P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights* (1990) 539.

38 Bayefsky (n 36 above) 2; See also K Frostell 'Gender difference and the non-discrimination principle in the CCPR and the CEDAW' in L Hannikainen & E Nykänen (eds) *New trends in discrimination law: International perspectives* (1999) 33; BG Ramcharan 'Equality and nondiscrimination' in L Henkin (ed) *The International Bill of Rights* (1981) 246-247; EW Vierdag *The concept of discrimination in international law* (1973) 2.

39 McCrudden & Prechal (n 36 above) 11.

40 Ramacharan (n 38 above) 252; Vierdag (n 38 above) 9.

41 J Fawcett *The application of the European Convention on Human Rights* (1987) 299.

42 Vierdag (n 38 above) 14.

children with and without disabilities are to be treated alike.⁴³ The problem with the formal equality approach to education, however, is that it does not take into account various social, economic, and personal characteristics and abilities or disabilities of individual students.⁴⁴ Hence, formal equality is often criticised for assuming that all children are on an equal footing and thereby failing to address the specific barriers that some children may face in accessing their right to equal educational opportunities.⁴⁵ Furthermore, formal equality does not guarantee children with disabilities equal opportunities in schools, as it does not require the schools to provide the accommodations that may be necessary to fully realise their right to education.

In contrast to formal equality is substantive equality, which is understood to mean that the results of the treatment must be equal.⁴⁶ Here, the focus is less on the opportunity for equality, and more on 'equality of results'.⁴⁷ The concept of substantive equality demands that people with and without disabilities, require different treatment in order to ensure that equal results can be achieved.⁴⁸ For example, a law that states that all children are entitled to equal education may satisfy the requirements of formal equality; however, it will not ensure that a child who uses a wheelchair will be able to enter a school that has only stairs at its entrance; nor will it ensure that a child who is blind or deaf will be able to access materials and communicate effectively with other students and the teacher in the classroom; nor will it ensure that a child with a learning disability will be able to receive the tutoring or testing accommodations that he or she may need. Hence, to fully ensure equality in some cases, 'different' treatment must be provided to ensure equal results. In order to ensure equal education for all children, the law must ensure that children with disabilities receive the accommodations or modifications that they require to ensure that they may access education on an equal basis with their non-disabled peers. The Act fails to ensure this 'different' treatment that will guarantee equality of results for children with disabilities in Kenya.

3.2 The right to non-discrimination in education

Non-discrimination is the cornerstone of international human rights law. However, the content and scope of non-discrimination remains in

43 See PG Polyviou *The equal protection of the laws* (1980) 2-3; S Fredman 'Combating racism with human rights: The right to equality' in S Fredman (ed) *Discrimination and human rights: The case of racism* (2001) 17.

44 Fredman (n 43 above).

45 MK Eriksson *Reproductive freedom: In the context of international human rights and humanitarian law* (2000) 30.

46 R Oostland *Non-discrimination and equality of women: A comparative analysis of the interpretation by the UN Human Rights Committee and the UN Committee on Elimination of Discrimination against Women* (2006) 19.

47 Polyviou (n 43 above) 3.

48 Oostland (n 46 above) 21.

dispute.⁴⁹ Discrimination simply means to treat people differently. The jurisprudence of the ECtHR has stated that different treatment of persons who are in an analogous situation with identifiable characteristics amounts to discrimination.⁵⁰ However, not all different treatment amounts to discrimination. Different treatment will not always amount to discrimination if there is an objective and reasonable justification for such discrimination.⁵¹ Different treatment is not in itself conclusive of discrimination even though it is a requisite. For example, the Human Rights Committee found a violation of articles 2(1) and 3 of the International Covenant on Civil and Political Rights (ICCPR) in *Mauritanian Women v Mauritius*⁵² when different treatment based on gender alone was not conclusive. The Committee reasoned that no 'sufficient justification' had been found for the distinction.⁵³

Discrimination can also be direct and indirect. Direct discrimination occurs when people equal in status are treated differently. This means that children with disabilities will be discriminated against when they are denied admission to public schools because of their disability. However, direct discrimination rarely occurs because today in most countries, including Kenya, have constitutional provisions that bar direct discrimination. The Act, too, does not directly discriminate against children with disabilities because public schools are prohibited from denying them admission based on their disability. However, the Act does require children with disabilities to attend public special schools. The question that we must now address is whether this provision is a violation of the right of children to be free from discrimination, as required by the Kenyan Constitution as well as the CRPD.

Although no court decision in Kenya has applied the principle of equality to people with disabilities, other countries' courts have addressed the issue of what constitutes discrimination based on disability. For instance, the US Supreme Court in 1982 held that discrimination based on disability is not a suspect class that would require the government to show

49 Bayefsky (n 36 above) 2; Vierdag (n 38 above) 2; Ramacharan (n 38 above) 246.

50 *Carson v UK* (Application no: 42184/05) ECHR (16 March 2010) para 61; See also *Burden v UK* (Application no: 13378/05) ECHR (29 April 2008) para 60.

51 See *Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistics case)* (1968) Series A no 6, para 10, where the court stated that: '[T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the existence of right laid down in the convention must not only pursue legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means and the aim sought to be realized.'

52 *Mauritanian Women v Mauritius* (Communication no: 35/78) UNHR Committee (9 April 1981) UN Doc CCPR/C/OP/1 (1984) 134.

53 See *Belgian Linguistics case* (n 51 above) where the court held that the non-discrimination principle was only violated if the distinction had no reasonable and objective justification.

a compelling state interest.⁵⁴ All that is required is for the government to show a rational basis for discriminating based on disability.⁵⁵ Having said that, however, in a later case, the Supreme Court held that it is discrimination for the state to provide people with disabilities certain services (in an institution) while providing similar services to people without disabilities in the community.⁵⁶

In addition to direct discrimination, indirect discrimination, otherwise called disparate impact discrimination,⁵⁷ occurs when a neutral law, practice or requirement has a disproportionate effect or impact upon a protected group of people.⁵⁸ The ECtHR has developed no clear distinction between direct and indirect discrimination. However, the Court has found indirect discrimination in several recent cases.⁵⁹ First, in the case of *DH v The Czech Republic*, the Court found indirect discrimination against Roma children in the Czech Republic. A series of tests were used to establish the intelligence and suitability of pupils in mainstream and special schools.⁶⁰ The special schools were designed for those with intellectual disabilities and other learning difficulties. The same test was applied to all pupils who were considered for placement in special schools. However, in practice, the test had been designed for the mainstream Czech population. As a result of their general unfamiliarity with Czech mainstream culture, Roma students performed less well than their Czech peers. Between 50 to 90 per cent of Roma children were educated outside the mainstream education system. The ECtHR found that this was a case of indirect discrimination.⁶¹

54 See *Cleburne v Cleburne Living Center Inc* 473 US 432 (1985), where the Court declined to apply the strict scrutiny test to a challenge to a zoning ordinance that required a special permit for a group home for people with mental disabilities. The Court however, held in favour of the applicants because the city's reasons failed the rational basis test.

55 The US Supreme Court has developed criteria in determining whether a law discriminates people. The criteria are divided into three. The highest level of scrutiny is the 'strict scrutiny test' where the government needs to show compelling reasons for discriminating on this basis of the suspect class ie race, national origin and religion. The second level of scrutiny is intermediate scrutiny test where a government must show an important reason. Discrimination based on sexual orientation or gender is protected by this category. The third is rational basis where government is allowed to limit someone's right based on a rational government interest. This classification includes disability.

56 See *Olmstead v LC* 527 US 581 (1999).

57 Disparate impact is the American version of indirect discrimination. See generally T Loenen 'Indirect discrimination: Oscillating between containment and revolution' in T Loenen & P Rodrigues (eds) *Non-discrimination law: Comparative perspectives* (1999) 196-197.

58 Interights *Non-discrimination in international law: A handbook for practitioners* (2011) 18.

59 S van den Bogaert 'Roma segregation in education: Direct or indirect discrimination – An analysis of the the parallels and differences between Council Directive 2000/43/EC and recent ECtHR case law on Roma educational matters' (2011) 71 *Heidelberg Journal of International Law* 719

60 *DH* (n 32 above) para 79.

61 *DH* (n 32 above) para 184.

In a second case, *Orsus v Croatia*, the Court noted that the concept of indirect discrimination needs further development.⁶² The dissenting judges were critical of the majority opinion for failing to offer 'practical guidance on how to develop and apply the notion of indirect discrimination'.⁶³

Indirect discrimination has also been defined as discrimination that occurs as the result of equal treatment.⁶⁴ This means that a law may require children to be treated in the same way in attaining education but fails to ensure that children with disabilities receive the accommodations or modifications they may need in order to have the same access to education as non-disabled children. For instance, a law may require all children pass a reading test before they may be admitted to a particular school. Although this is a neutral law, its effect may be to discriminate against blind children, for example, if the admission tests for the school are not available in Braille or another alternative format. Indirect discrimination looks at the effect of the rules, rather than how they are constructed.⁶⁵ Thus like the concept of substantive equality, indirect discrimination is also concerned with results. However, a court will likely find indirect discrimination only if there is no objective and reasonable justification for the treatment. The CRPD Committee has held, therefore, that the right not to be discriminated against 'can be violated when states, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different'.⁶⁶

3.3 Failure to provide reasonable accommodation is disability discrimination

The CRPD prohibits both direct and indirect disability discrimination, in most, if not all, areas of life. Article 5(1) provides that every disabled person shall be treated equally before the law. Article 5(2) specifically prohibits discrimination based on disability. To understand disability discrimination, it is not enough to look at the first two provisions of article 5; paragraph 3 of article 5 is also important since it explains the meaning of disability discrimination as follows: 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that *reasonable accommodation* is provided.'⁶⁷

62 *Orsus* (n 34 above) para 19.

63 As above.

64 Vierdag (n 38 above) 70.

65 Vierdag (n 38 above) 71.

66 To date, the CRPD Committee has adopted views on three individual communications provided pursuant to the Optional Protocol. The CRPD has found violations in two of the three of them, including *HM v Sweden* (Communication no: 3/2011) CRPD/C/7/D/3/2011 (19 April 2012) para 8.3.

67 Emphasis added. See too art 24(2)(c) of the CRPD which provides: 'In realizing this right, States Parties shall ensure that ... *reasonable accommodation* of the individual's requirements is provided', (emphasis added).

For the first time in any international treaty, the CRPD states that the failure to provide reasonable accommodation is considered explicitly as a form of disability discrimination.⁶⁸ Article 2 of the CRPD defines reasonable accommodation as the necessary and appropriate modification on a case by case basis to ensure an individual with a disability enjoys the same rights as others.⁶⁹ However, if an accommodation would cause the state an undue burden, it would not be considered 'reasonable'.⁷⁰ The concept of reasonable accommodation is now being developed by the CRPD Committee in its responses to country reports. The CRPD Committee has already criticised several countries for their failure to provide reasonable accommodations, including in the area of education.⁷¹ Further, in cases that have come before the CRPD pursuant to the Optional Protocol, the CRPD Committee has held that failure to provide reasonable accommodation amounts to disability discrimination.⁷²

In the context of education, reasonable accommodation means changes that a school must make to the building, programmes or services that would enable a child with disability to attain education on an equal basis with his or her nondisabled peers. Reasonable accommodations may include: changing admission rules that may exclude children with disabilities; making renovations or building new schools that are accessible to children with mobility impairments; ensuring communication access for students with sensory disabilities; and providing tutoring or other assistance such as extra time on exams for students with learning disabilities.⁷³ Although the need to provide reasonable accommodations involves a subjective judgment about a student's disability and abilities, the denial of reasonable accommodations may be seen as *sui generis* discrimination.⁷⁴ Of course, ensuring the right of children with disabilities

68 Kanter (n 23 above).

69 Art 2 of the CRPD.

70 As above.

71 See Concluding observations for Hungary CRPD/C/HUN/CO/1 (2012) para 15; Concluding observations for Spain CRPD/C/ESP/CO/1 (2011) paras 20-21; Concluding observations for Tunisia CRPD/C/TUN/CO/1 (2011) para 12; Concluding observations for China CRPD/C/CHN/CO/1 (2012) paras 11-12.

72 See, *HM* (n 66 above), the CRPD Committee held that a failure to provide reasonable accommodation under the CRPD constitutes discrimination. The applicant had complained that she was being discriminated against by the state party for failure to take into account her rights to equal opportunity for rehabilitation and health. The applicant wanted to have a hydrotherapy pool at her home which would change the housing plan in the area in which she was staying. The state party had denied her this permission because it was a major departure from the development plan. According to the state party they would have allowed her to if it was not going to be a minor change to the development plan. The committee reasoned that the essence of preventing disability discrimination is by providing reasonable accommodation. The only time that reasonable accommodation would be denied is when it is causing 'disproportionate or undue burden'. In this case, the state party could not prove that the reasonable accommodation sought by the applicant was going to cause undue burden on the part of the state.

73 See *Bartlett v New York State Board of Law Examiners* (1998) 156 F.3d 321.

74 *Zucke v Regents of the University of California* (1999) 166 F.3d 1041 1046.

to reasonable accommodations does not mean that schools have to change or lower their academic standards.⁷⁵

4 The Act discriminates against children with disabilities

Based on the previous discussion of what constitutes disability discrimination, it is clear that the Act discriminates against children with disabilities in Kenya in a number of ways. First, the Act fails to comply with the fundamental principle of equality. The purpose of the Act is to ensure that all children in Kenya are provided with a free and compulsory primary education. Both children with and without disabilities should be treated 'equally' which involves both the same treatment as well as different treatment based on the need of some children for accommodations. However, the Act creates special schools for children with disabilities without any legitimate justification. Although some children may need assistance or accommodation, that is not true for all children with disabilities. There is no justification for treating children without disabilities differently from children with disabilities who require no accommodation. Yet even for those children with disabilities who may need assistance or accommodations, there is no reason, to require that they attend separate schools or receive separate curricula. Such assistance and accommodations may be provided in regular schools as is done today in many countries throughout the world. By segregating children with and without disabilities on the basis of disability constitutes discrimination against children with disabilities who are relegated to attain their right to free and compulsory basic education only in segregated, special schools.

For example, in the United States, the Supreme Court held in the landmark case of *Brown v Board of Education* that laws that create separate schools are unconstitutional as a violation of the fundamental right of all to equality.⁷⁶ The Supreme Court rejected the doctrine of 'separate but equal',⁷⁷ stating that 'separate educational facilities are inherently unequal'.⁷⁸ Similarly, the European Court of Human Rights has recently

75 *Southeastern Community College v Davis* 442 US 397 (1979) 413, in this case the US Supreme Court held that the Rehabilitation Act does not require an academic institution 'to make fundamental or substantial modifications to its programs or standards'.

76 *Brown* (n 28 above), though this case was based on race, the same principle can be applied to children with disabilities in Kenya who have historically been segregated in public education.

77 The doctrine of separate but equal was established in *Plessy v Ferguson* 163 US 537 (1896), where the court upheld a Louisiana law that required that railway passenger cars have 'equal but separate accommodations for the white and colored races'. Plessy was arrested for refusing to vacate a seat in a coach for the whites.

78 *Brown v Board of Education* (n 28 above) 495; See also *Bolling v Sharpe* 347 US 497 (1954) which was held on the same day as *Brown*. The Court in *Bolling* concluded that segregation in public education is reasonably unrelated to any proper governmental objective.

held in a series of cases involving Roma children that maintaining separate schools and programmes for them is discriminatory, including on the basis of disability.⁷⁹ Moreover, in its response to reports that have been filed by countries that have ratified the CRPD, the CRPD Committee itself has criticised countries that have special schools, citing such schools as a violation of article 24's mandate of an inclusive education system.⁸⁰

The second way in which the Act fails to comply with the CRPD is its failure to ensure the provision of reasonable accommodations. A prohibition on disability discrimination does not entail merely outlawing differences based on disability; it may also entail failing to provide reasonable accommodations to people with disabilities who require such accommodations to exercise their rights. Article 24 of CRPD mandates states parties to ensure that children with disabilities receiving the accommodations they need to access education.⁸¹ The Act ignores the mandate.

The third way in which the Act violates the requirements of the CRPD is that it fails to recognise the right of students with disabilities to an inclusive education system. The definition of an inclusive education system is not included in the CRPD. However, prior international documents have defined inclusive education. The first international document that defined inclusive education is the Salamanca Statement, which provides:

The fundamental principle of the inclusive school is that all children should learn together, wherever possible, regardless of any difficulties or differences they may have. Inclusive schools must recognize and respond to the diverse needs of their students, accommodating both different styles and rates of learning and ensuring quality education to all through appropriate curricula, organizational arrangements, teaching strategies, resource use and partnerships with their communities. There should be a continuum of support and services to match the continuum of special needs encountered in every school.⁸²

The Kenyan law does not even mention inclusive education, nor does it require that the state is under any obligation to determine whether or not

79 *Orsus* (n 34 above), *DH* (n 32 above), and *Horvath* (n 34 above) all involved Roma children being subjected to special schools and the ECtHR held that special schools are discriminatory in nature unless the government can show a reasonable justification for the different treatment.

80 See Concluding observations for Hungary CRPD/C/HUN/CO/1 (2012) para 39; Concluding observations for Spain CRPD/C/ESP/CO/1 (2011) para 43; Concluding observations for China CRPD/C/CHN/CO/1 (2012) para 35; Concluding observations for Australia CRPD/C/AUS/CO/1 (2013) para 45; Concluding observations for Austria CRPD/C/AUT/CO/1 (2013) para 40.

81 See art 24(2)(c) (n 67 above).

82 UNESCO & Ministry of Education and Science, Spain 'The Salamanca statement and framework for action on special needs education' UN Doc ED-94/WS/18 (1994) 11-12, available at http://www.unesco.org/education/pdf/SALAMA_E.PDF (accessed 22 July 2014).

a student with a disability should be educated in the regular school rather than in a separate school. For example, in the US, which does not require that all students with disabilities are educated in inclusive classrooms, students with disabilities are nonetheless insured their right to an education in the 'least restrictive environment'. This means that students with disabilities in the US are entitled to attend schools and participate in classes and programmes that are the least restrictive of their individual liberties.⁸³

In the context of education, the least restrictive requirement has been interpreted to require the inclusion of students in the mainstream or 'regular' schools and classrooms. The least restrictive requirement also means that education for children with disabilities should be in the mainstream schools with the supplemental aids and services the students may need. This additional requirement is intended to facilitate the integration of children with disabilities in the US into the mainstream education system.⁸⁴ As a result, one federal court of appeals in the US overturned a 1983 decision that had authorised the placement of a child with a severe mental disability in a specialised school.⁸⁵ In this decision, the appeals court reasoned that the services the student required could be provided just as easily in the public school as in the special school. Accordingly, the court held that to require the student to attend a separate school amounted to a violation of the law's least restrictive placement requirement. The Court rejected the lower court's holding that schools have the broad discretion in deciding to place children with disabilities in segregated or mainstream schools. Accordingly, the appeals court considered the benefits the child would receive in a segregated setting versus the regular school. If the benefits that a child would receive in the segregated setting could be achieved in the regular school setting, then the child should be educated in the least restrictive, regular school setting. This decision has led the authors to conclude that the court's test now creates a presumption in favour of the inclusion of children with disabilities in regular classrooms and schools.

In 1989, another appeals court in the US developed an alternative test to determine the propriety of placing a child in a separate school rather than his neighbourhood school.⁸⁶ In *Daniel RR v State Board of Education*, this appeals court determined that the school had not complied with the

83 MC Weber et al *Special education law: Cases and materials* (2013) 287.

84 Individuals with Disabilities Education Act 20 USC § 1412(a)(5)(A): the Individuals with Disabilities Education Act is a Federal law that requires states to have programmes that will allow children with disabilities to access education on an equal basis with other children. The Federal government supports the education through allocation of funds to School Districts for Special Education.

85 See *Ronker v Walter* 700 F.2d 1058 (1983).

86 Different tests have been developed over the years and the third was set out in the case of *Sacramento City v Rachael H* 14 F.3d 1398 (1994) where the 9th Circuit added a third dimension to the *Daniel RR* test which is cost. Here the court must look at the cost of educating children with disabilities in segregated settings and regular settings.

least restrictive setting requirement of the US education law.⁸⁷ In this case, the appeals court inquired first whether the education, with the use of supplemental aid and services, could be achieved satisfactorily. Secondly, the court determined if segregation was necessary for the education of the child. If so, then the court must examine whether the school has mainstreamed the child to the maximum extent appropriate, specifically whether the school has made efforts to include the child in programmes with nondisabled children wherever possible. The first part of this test requires the court to look at the steps the school has taken to include the child with disabilities in the regular classroom.⁸⁸ It is important to note that mere gestures by schools to include children with disabilities in regular classrooms would not pass this test, according to the court.⁸⁹ Here, the court must look at unique benefits the child will receive in regular classrooms such as development of social skills resulting from interaction with nondisabled peers.⁹⁰ Under this second part of the *Daniel RR* test, courts are also required to look at the effect of inclusion of children with disabilities on other children in school. If the inclusion leads to disruption in the classroom, then segregation may be justified.⁹¹ The test also allows segregation if the inclusion will demand the teacher's attention to the disadvantage of other children.⁹² However, caution should be exercised while examining the negative effects of inclusion of children with disabilities on other children.⁹³

As these cases illustrate, the right to education in the least restrictive environment developed in the US pursuant to its Individuals with Disabilities in Education Improvement Act of 2004, favours the placement of children with disabilities in classes with children who are not disabled. This idea is not present in the Act. As stated, the Act favours special schools over mainstreaming. In this way, children with disabilities in Kenya are denied an opportunity to interact with their peers as part of their education in the least restrictive environment. The purpose of the Act was not only to avoid discrimination of the children with disabilities, but also to ensure that they receive quality education.⁹⁴ Quality can be attained not only by examining what the schools teach but also through ensuring that children with disabilities are, in fact, in public schools. This is because, in fact, public schools have a better curriculum compared to special

87 *Daniel RR v State Board of Education* 874 F.2d 1036 (1989).

88 *Daniel RR* (n 87 above) 1048; See also *Greer v Rome City School Dist* 950 F.2d 688 (1991) 696.

89 *Daniel RR* (n 87 above).

90 *Daniel RR* (n 87 above) 1049; see also M Minow 'Learning to live with the dilemma of difference: Bilingual and special education' (1985) 48 *Law & Contemporary Problems* 157 160.

91 *Daniel RR* (n 87 above) 1048-1049.

92 As above.

93 *Greer* (n 88 above) 697.

94 Sec 64 of the Act.

schools.⁹⁵ Moreover, it has been established that children with disabilities become better students and perform better when they are in the same schools with their non-disabled peers.⁹⁶

Although the CRPD does not refer to the concept of the least restrictive environment, this concept is central to the right to education. The goal of any education system, including Kenya's, must be full inclusion, as envisioned by article 24 of the CRPD. Ensuring the right to education in the least restrictive setting as a first step will be a major achievement for Kenya at the present time. The right of children with disabilities to education in the least restrictive setting may be used as a bridge towards attaining full inclusion for children with disabilities in Kenya.

Article 24 of the CRPD mandates state parties to ensure an inclusive education system.⁹⁷ Kenya ratified the CRPD in 2008 yet its children remain relegated to a woefully inadequate segregated education system. To continue the placement of children with disabilities in special schools in Kenya violates the spirit and language of the CRPD. While it is important to appreciate that article 24 of the CRPD does not explicitly prohibit the operation of special schools, it is also important to have in mind the general principles of article 3 when reading article 24.⁹⁸ Article 3 prohibits discrimination and seeks to ensure equality of treatment and results of all children and adults with disabilities. Kenya's adherence to a separate education system for students with disabilities fails to respect the differences, dignity and equality rights of children with disabilities in Kenya. Furthermore, article 24 is subject to the principle of progressive realisation.⁹⁹ Although progressive realisation of a right means that the right need not be realised immediately it does not mean that a state may deny children with disabilities the right to education in mainstream schools, entirely. The minimum core content of article 24 is to ensure that there is no discrimination on the basis of disability. Such regressive

95 See the above mentioned Roma Cases where it was discovered that all the special schools designed for Roma children had a poor curriculum compared to public schools where non-Roma children attended (n 79 above).

96 R Rieser *Implementing inclusive education: A Commonwealth guide to implementing article 24 of the UN Convention on the Rights of Persons with Disabilities* (2012) 31.

97 '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...' (Emphasis added).

98 Art 3 of CRPD provides: 'The principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women; (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.'

99 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.

measures as creating special schools for children with disabilities are not in line with the letter or spirit of the CRPD.

Moreover, the concept of education in the least restrictive setting should not be considered the end result; rather it should be seen as a means towards attaining the result of an entirely inclusive education system for all children with disabilities. Therefore, the longer Kenya waits to amend the Act in order to ensure an inclusive education system, as required under the CRPD, the longer children with disabilities in Kenya will face an inherently unequal education system, and one which appears to violate the CRPD.

5 Conclusion

The Act ensures the right of all children in Kenya the right to a free and compulsory education. However, the Act discriminates against children with disabilities in Kenya. It fails to provide children with disabilities with the right to reasonable accommodation in education, to ensure education in the least restrictive setting, and it fails to require the establishment of an inclusive education system, as required under international law, especially article 24 of the CRPD.

While there has been some debate as to whether or not article 24 bans all special schools for children with disabilities, there is no debate that it prohibits a system which assigns children with disabilities to separate, special schools solely on the basis of their label of disability, as is provided in the Act. Such a policy runs afoul the right to equality and non-discrimination as well as the general principles of the CRPD. Thus although the CRPD does not expressly ban special schools, article 24 of the CRPD has been interpreted by the CRPD Committee as requiring changes in countries that have a system of special schools for students with disabilities. Furthermore, the ECtHR has also consistently held that special schools may amount to discrimination, as have some courts in the US.

Although an inclusive education system in Kenya may not be possible overnight, ensuring the right to an education in the least restrictive environment should be possible to enforce immediately. The right to education in the least restrictive setting would require that each child be assessed individually to determine which classroom is the least restrictive to his or her liberties. A least restrictive classroom is one in which children, with and without disabilities, learn together. However, enforcing the right to education in the least restrictive setting should not be the final goal, but rather a means that will lead towards full inclusion for all children with disabilities in mainstream schools, as mandated by the CRPD.