At the Intersection

The Right to Inclusive Education for Children with Disabilities in Australia

Sevda Clark

I Introduction

In Australia, inclusive schooling is educational policy rather than law, having been adopted through some measures in Australian states and territories. The *Disability Discrimination Act 1992* (Cth) (‘*DDA*’) prohibits discrimination in education on the basis of disability, which is reflected in legislation in the states and the territories. Relevant to the provision of educational experiences for people with disability are the *Disability Standards for Education 2005* (‘the Standards’). The Standards, formulated under the *DDA*, clarify and make more explicit the obligations of education and training service providers and the rights of people with disabilities in relation to education and training. They are legally binding and must be complied with. Pursuant to the *DDA* and the Standards, Australian students with a disability must be able to access and participate in education on the same basis as their peers. To ensure this, students with a disability may receive adjustments to access education, based on the professional judgement of teachers and with consultation with the student and/or their parents, guardians or carers. A policy process in Australia that supplements the *DDA* and the Standards is the Nationally Consistent Collection of Data on School Students with Disability (‘NCCD’), which gives Australian schools, parents, guardians and carers, education authorities, and the community information about the number of students with disability in schools and the adjustments they receive.[1]

Notwithstanding, space continues to be carved out for special schools, as demonstrated most recently by the enacted *Disability Discrimination Regulations 2019* (Cth),[2] which allow the Director-General (SA) to direct that a child be enrolled at a special school and enables an educational authority to refuse to enrol a student on the basis of disability.[3] Facilitating the exclusion of children with disabilities from mainstream education rather than promoting inclusion thereby engages the right to equality and non-discrimination. When questioned on the compatibility of the measure with human rights by the Parliamentary Joint Committee on Human Rights, the Attorney-General of South Australia stated that, while there is ‘no explicit obligation to consider the right to inclusive education’, the *Education Act 1972* (SA) requires the Director-General to consider the best interests of the child when making a direction that a child should attend a special school.[4] Notably, the Attorney-General then argued that ‘compulsory enrolment at a special school could be a special measure’ within the meaning of the *DDA*, which provides that it is not unlawful to afford persons who have a disability access to facilities, services or opportunities to meet their special needs in relation to education. However, as a matter of international human rights law, compulsory enrolment in a special school cannot constitute a special measure, in light of the right to inclusive education and the right to equality and non-discrimination and the related state obligation to provide reasonable

1 The *Australian Education Regulation 2013* (Cth), s 60 requires all schools to report the data collected for the Nationally Consistent Collection of Data on School Students with Disability (‘NCCD’) to the Australian Government on an annual basis.

2 These regulations remake the *Disability Discrimination Regulations 1996* (Cth), which sunsetted on 1st October 2019. The *Disability Discrimination Act* 1992 (‘*DDA*’) provides that discrimination on the basis of disability is unlawful in certain identified areas of public life. Section 47(2) of the *DDA* sets out specific exemptions from the prohibitions on disability discrimination in relation to anything done by a person in direct compliance with a prescribed law.

3 The *Disability Discrimination Regulations 2019* (Cth) prescribed ss 75(3) and 75A of the *Education Act 1972* (SA), thereby exempting these from the prohibitions on disability discrimination under the *DDA*. These sections provide that where, in the opinion of the Director-General, it is in the best interests of a child that the child be enrolled at a special school, the Director-General may nominate and direct that the child be enrolled at a special school.

4 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 2, 12 February 2020) 20.

accommodation for children with disabilities. Clearly, the right to inclusive education is not yet firmly established in Australia.[5]

The themes of the first public hearing of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* ('*Disability Royal Commission*') in 2019[6] was inclusive education and exploring the barriers in the Australian education system to students with disability in accessing and obtaining a quality education. It was not a matter of happenstance that education and learning was chosen by the Disability Royal Commission. The Chair of the Commission, Ron Sackville, when explaining the choice, called education an enabler of other rights such as work, housing, political participation and access to justice.[7] This second hearing explored experiences of violence, abuse, neglect and exploitation, and the consequences which flow to students and their families when students have not been given proper access to equitable education.

The paper that follows discusses inclusive education as best practice, highlights the evolving practice towards inclusion at the international level and details the codification of the right to inclusive education in art 24 of the *Convention on the Rights of Persons with Disabilities* ('*CRPD*'). The paper then concludes with an intersectional re-reading of a leading European Court of Human Rights decision in order to demonstrate how the rights of children with disabilities to an inclusive education can be justified, as compared with the prohibition of racially segregated schooling in international human rights law.

II Inclusive Education as Best Practice

Empirical research conducted over four decades is firmly in favour of inclusive education, and much research has documented the benefits of the inclusion of preschool children with disabilities, for example.[8] In contrast, segregated special education has been seen to be a 'seductive narrative'[9] that is not supported by evidence and empirical data. A study and meta-review by Jackson investigating the empirical basis for inclusion as compared with segregation finds that, in over 40 years of research, no comparative review between segregation and inclusion that argues in favour of segregation could be found.[10] The author concludes that, given the overwhelming evidence in favour of inclusion, discussions should move from a focus on 'should we include' to 'how to include more successfully', and the additional training and resources that can be provided to teachers and schools to facilitate smooth and effective outcomes.[11]

Transforming a regular school into an inclusive one has been found to improve the academic achievement of students without a disability, where learning in inclusive classrooms is positively associated with the academic achievement of students without special academic needs.[12] The finding by Szumski, Smogorzewska and Karwowski in their meta-analysis that inclusive education may be beneficial is relevant to educational policy-makers responsible for decisions about the promotion of inclusion.[13] The authors suggest the significance of their finding that inclusive education does not infringe upon the rights of the majority of students as especially important for legal argumentation, which tend to be dominated by a strong focus on students with special academic needs. Similarly, in the 'Summary of the Evidence on Inclusive Education,' the Alana report synthesising the empirical research also demonstrates that in most cases, non-disabled students are either neutrally or positively impacted by being educated in an inclusive classroom.[14]

Evolving Practice Towards Inclusion at the International Level

Inclusive education represents a legal requirement and a right of people with disabilities. The seminal case of *Brown v Board of Education* ('*Brown*')[15] in 1954 in the US Supreme Court found separate educational facilities to be inherently unequal and established the precedent that was applied to another decision,[16] a class action on the right to education. In the 1971 case of *PARC v Commonwealth of Pennsylvania*, it was held that segregating children with an intellectual disability violated the principles of *Brown*. Special education as a field thus came to be directly challenged. Two decades after finding itself at a crossroads,[17] special education is said to be going to its death by leading special education scholars.[18] 'Students educated in segregated settings graduate to inhabit the same society as students without disability; there is no 'special' universe into which they graduate. It is therefore vital to cultivate an inclusive culture within schools if we wish to create an inclusive culture'.[19]

5 For a useful overview of inclusive education in Australia, see Kathy Cologon, *Inclusion in Education: Towards Equality for Students with Disability* (Issues Paper, 2015).

6 The *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* ('*Disability Royal Commission*') is a royal commission established on 4 April 2019 by the Australian government pursuant to the *Royal Commissions Act 1902* (Cth).

7 Transcript of Proceedings, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Ronald Sackville, Rhonda Galbally, Roslyn Atkinson, A J Mason, 4 November 2019) 5[15] (Ronald Sackville).

8 See Annette Holahan and Virginia Costenbader, 'A Comparison of Developmental Gains for Preschool Children with Disabilities in Inclusive and Self-Contained Classrooms' (2000) 20(4) *Topics in Early Childhood Special Education* 224.

9 Kate De Bruin, 'Does Inclusion Work?' in Linda J Graham (ed), *Inclusive Education for the 21st Century: Theory, Policy and Practice* (Allen & Unwin, 2020) 76–7.

10 Robert Jackson, *Inclusion or Segregation for Children with an Intellectual Impairment: What Does the Research Say?* (Report, June 2008) 4.

11 Ibid 5.

12 Grzegorz Szumski, Joanna Smogorzewska and Maciej Karwowski, 'Academic Achievement Of Students Without Special Educational Needs in Inclusive Classrooms: A Meta-Analysis' (2017) 21 *Educational Research Review* 33, 49.

13 Ibid 47.

14 Thomas Hehir et al, *A Summary of the Evidence on Inclusive Education* (Report, 2016) 7.

15 347 US 483 (Kan, 1954) ('*Brown*').

16 Linda J Graham, 'Inclusive Education in the 21st Century' in Linda J Graham (ed), *Inclusive Education for the 21st Century* (Allen & Unwin, 2020) 3, 18.

17 Catherine Clark, Alan Millward and Alan Dyson, *Towards Inclusive Schools?* (Routledge, 2018) v.

18 See generally, James M Kauffman et al, 'Where Special Education Goes to Die' (2019) 27(2) *Exceptionality: The Official Journal of the Division for Research of the Council for Exceptional Children* 149. See also David Connor, 'Why is Special Education So Afraid of Disability Studies? Analyzing Attacks of Distain and Distortion from Leaders in the Field' (2019) 34(1) *Journal of Curriculum Theorizing* 10. Disability special education scholar Connor analyses six leading articles in the field of special education to show how they 'provide evidence of special education's attempt to reassert itself into a nostalgically imagined Golden Age'. Tellingly, it does so largely within its own fiercely guarded kingdom of journals in which dissention from orthodoxy equals heresy': at 20.

19 De Bruin, 'Does Inclusion Work?' (n 9).

A major outcome of the International Year of Disabled Persons was the formulation of the World Programme of Action ('WPA') concerning Disabled Persons, adopted by the General Assembly in 1982. It is a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities, which pertains to full participation of people with disability in social life and national development. The WPA emphasised the need to approach disability from a human rights perspective and restructured disability policy into three distinct areas, one being the equalisation of opportunities. The new era heralded by WPA defined disability as the relationship between persons with disability and their environment, and the need for full inclusion of people with disability in society. This culminated in the World Conference on Special Needs Education in Salamanca, Spain, where inclusive education was conceived. The *Salamanca Statement* (1984) stated clearly that 'regular schools with (an) inclusive orientation are the most effective means of […] achieving education for all'.

As noted in the scholarship, the Statement had some influence on the development of policy and legislation in many countries that responded to its call. However, in the absence of an authoritative definition of inclusive education, this influence was mitigated and led instead to considerable confusion.[20] Efforts towards inclusive education have since been piecemeal, with the decades after Salamanca being marked by the lack of a clear definition of inclusion, and the medical model dominating policy discourse.[21] This has since been remedied by the *CRPD* Committee by standard-setting, where it has articulated the human rights model of disability, in which 'barriers within the community and society, rather than personal impairments, exclude persons with disabilities.'[22] This is elaborated upon below.

These two factors, namely the lack of a clear definition and the rebadging of integration as inclusion, in turn resulted in the muddying of the waters of the literature and practice surrounding inclusive education; descriptive analyses and critical examinations of its successes and failures all stand and fall on what counts as inclusive. 'Inclusive' and 'mainstream,' two mutually exclusive terms, have been conflated.[23] Slee, for example, argues that 'special' education has been 'rebadged' as 'inclusive' education,[24] and suggests that when challenged by inclusive education, special education found itself at a crossroads at which it 'repainted the signs on the side of the bus and continued on largely unimpeded'.[25] This appropriation, also termed 'fauxclusion', is argued to be a response to the threat that inclusive education presented to special education as a field and is seen to have thwarted the genuine development of inclusive education.[26] This lack of a clear definition has been identified as problematic in the future potential and development of inclusion, and necessitates the need for precision in use of terminology.[27] Graham cites an example of a child's physical placement in a classroom, to demonstrate 'fauxclusion': the child was occupying a completely different learning space, and Graham states that that 'it is an indictment of our collective understanding of inclusive education that this child's ghostly presence in the "mainstream" class is being taken as evidence of inclusion'.[28] Though passing itself off as 'inclusion', such practices are demonstrative of integration and not inclusion: 'business as usual plus add-ons'.[29]

Although inclusive education was placed on the agenda in Salamanca, and enthusiastically adopted by many states, including Australia, Peters demonstrates that it may continue to be elusive for the majority of individuals with disabilities,[30] absent the concomitant change in policy where the discourse shifts from a medicalised view of disability to a social-contextual model.

III Codification of Inclusive Education

As the first legally binding international provision to codify the right to inclusive education, art 24 of the *CRPD* affords binding force to the aspirational aims of the *Salamanca Statement*. It does not define 'inclusive' and, a decade after its adoption, the *CRPD* Committee remedied confusion, and misappropriation of the term in its *General Comment No 4* ('*GC4*'), detailing the definition, scope and core content of the art 24 right. In establishing what inclusion is, and what it is not, the *GC4* effectively settles the varied definitions and conceptualisations of inclusion that proliferated post Salamanca.[31]

In defining inclusive education, the *GC4* has broken the existing stalemate in confusion and misappropriation of the term. The nexus between disability and inclusion is reinforced, as 'at its core… inclusive education is and has always been about

20 Kate De Bruin, 'The Impact of Inclusive Education Reforms on Students With Disability: An International Comparison' (2019) 23(7–8) *International Journal of Inclusive Education* 811, 812 ('International Comparison').
21 Susan J Peters, '"Education for All?": A Historical Analysis of International Inclusive Education Policy and Individuals With Disabilities' (2007) 18(2) *Journal of Disability Policy Studies* 98, 106.
22 Committee on the Rights of Persons with Disabilities, *General Comment No 4 (2016) on the Right to Inclusive Education*, UN Doc CRPD/C/GC/4 (25 November 2016) 2.
23 Graham (n 16) 5.
24 Roger Slee, 'Limits to and Possibilities for Educational Reform' (2006) 10(2–3) *International Journal of Inclusive Education* 109, 116. Graham (n 16) uses the term 'rebadging' to refer to practices that 'are antithetical inclusion (exclusion, segregation)' that are commonly 'rebadged as inclusion (integration)'.
25 Ibid 112.
26 Graham (n 16) 7.
27 Ibid 6.
28 Ibid 11.
29 Ibid 14.
30 Peters (n 21) 107.

disability. This is its strength and not a weakness'.[32] Inclusion is defined as a fundamental human right that is distinguished from exclusion, segregation and integration:

> *Inclusion* involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences. Placing students with disabilities within mainstream classes without accompanying structural changes to, for example, organisation, curriculum and teaching and learning strategies, does not constitute inclusion. Furthermore, integration does not automatically guarantee the transition from segregation to inclusion.[33]

Clearly, placement in mainstream schools is not enough. Further, inclusion involves the implementation of the human rights model of disability, which is based on a social-contextual understanding of disability 'in which barriers within the community and society, rather than personal impairments, exclude persons with disabilities'.[34] The standard-setting in the *GC4* on inclusive education provides a human rights agenda that treats civil, cultural, economic, political and social rights as truly universal, indivisible, interdependent and interrelated. In delineating the scope and obligations of state parties, the *GC4* seamlessly moves between the respect, protect and fulfil trichotomy of state obligations. States have the immediate duties of non-discrimination (not subject to progressive realisation), to protect against third party interference with the right and the positive obligation to fulfil the right to inclusive education, progressively.

In their commentary on art 24, Anastasiou, Gregory and Kauffman put forward a limited reading of art 24's provisions as 'operat[ing] predominately within an anti-discrimination paradigm'.[35] Yet, the *CRPD* produces a fuller and more holistic view of human rights, thereby ignoring the traditional dichotomies of international human rights law such as the anachronistic separation of so-called first generation civil and political rights, from second generation economic, social and cultural rights.[36] Article 24 stipulates immediate core obligations upon states that they are to *respect,* such as ensuring the prohibition of discrimination through the provision of inclusive education. However, it also stipulates positive obligations to *protect* against third-party violations of rights, and to progressively realise the *fulfilment* of the right to inclusive education. Inclusion *requires* the provision of individualised support and specialised instructional approaches; thus, inclusion concerns 'more than simply opening up the schoolhouse doors'.[37] Thus, '[m]eaningful participation and individualised support'[38] and 'education that is meaningful to individual learning'[39] is at the core of inclusive education. Furthermore, while art 24 may not directly address 'subtler forms of exclusion',[40] it is captured in '[ensuring] an inclusive education system' in art 24(1) and 'quality primary and secondary' education in art 24(2)(b). Further, in their mischaracterisation of art 24, the authors do not address the three minimum core obligations of art 24, which are all immediately realisable, namely: non-discrimination and non-exclusion in all aspects of education, the provision of reasonable accommodation and compulsory, quality, free and accessible primary education for all.[41]

USAID's Bureau for Economic Growth, Environment and Education's Office of Education offers a useful working definition on inclusive education. In 'What Does Inclusive Education Look Like?' USAID proposes the following, echoing the UN *CRPD* Committee in *GC4*:

> Inclusive education means having one inclusive system of education for all students, at all levels, (early childhood, primary, secondary and post-secondary) with the provision of supports to meet the needs of students with disabilities.
>
> Inclusion involves a profound cultural shift to ensure that all children, as well as staff, parents and other members of the school community, feel valued, welcomed and respected. It requires a process of systemic reform with changes and modifications in content and materials, teaching methods, approaches, structures and strategies. Placing students with disabilities within mainstream classes without accompanying structural changes to, for example, organization, curriculum and teaching and learning strategies does not constitute inclusion.[42]

31 De Bruin, 'International Comparison' (n 20) 812.
32 Juliet Davis et al, 'Inclusive Education as a Human Right' in Linda J Graham (ed), *Inclusive Education for the 21st Century* (Allen & Unwin, 2020) 79, 92.
33 Committee on the Rights of Persons with Disabilities (n 22) 4 [11].
34 Ibid 2 [4(a)].
35 Dimitris Anastasiou, Michael Gregory and James M Kauffman, 'Article 24: Education' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 656, 661.
36 Frédéric Mégret, 'The Disabilities Convention: Towards a Holistic Concept of Rights' (2008) 12(2) *International Journal of Human Rights* 261, 274.
37 Anastasiou, Gregory and Kauffman (n 35) 665.
38 Ibid 674.
39 Ibid 687.
40 Ibid 677.
41 Committee on the Rights of Persons with Disabilities (n 22).
42 Josh Josa and Cynthia Chassy, 'How-To Note Disability Inclusive Education' (Report, USAID Office of Education, November 2018) 1–2.

Clearly, placement is not enough, but it is a prerequisite for inclusive education to occur.[43] Inclusive education is thus defined in opposition to the mainstream inflexible 20th century education system.[44] Inclusive education is not the same as its parts, and though schools may be culturally, linguistically or otherwise diverse, they cannot be said to be inclusive if they do not include students with disabilities: '[a]lthough acceptance of and responsiveness to all forms of human diversity-including cultural diversity-is a central element of inclusive education, the whole is greater than the sum of its parts, and no one part can ever constitute the whole'.[45]

IV An Intersectional Re-Reading of Leading European Court of Human Rights Decision

Disadvantage is often compounded for children with disabilities who possess other diverse traits such as race, gender, or are from a culturally and linguistically diverse ('CALD') background. Intersectionality is a useful theoretical framework for understanding how aspects of a person's social and political identities might combine to create unique modes of discrimination and privilege. The intersection of forms of oppression, including racism, sexism, ageism or ableism, disempowers many people with disabilities and has 'serious and sometimes deadly implications'.[46] Coined by Kimberlé Crenshaw, who first wrote about the concept in 1989,[47] intersectionality posits that anti-discrimination frameworks operate on the basis of a 'single axis' of discrimination.[48] The consequence of the single axis approach, Crenshaw argues, is that anti-discrimination law in the United States tends to work for 'those who are privileged *but for* their racial or sexual characteristics'.[49] Intersectionality identifies advantages and disadvantages that are felt by people due to a combination of factors.

In other words, an intersectional analysis of the right to inclusive education would demand that the sum is greater than its parts. At the intersection of disability and race, students are uniquely and acutely vulnerable. However, this is an intersectional subset that tends to go unnoticed. Schiek and Lawson note that none of the cases that went before the European Court of Justice, and were at the intersection of race and disability, established ethnic or racial dimensions of disability, that undoubtedly exist.[50] However, Schiek suggests that 'the stigmatisation of Roma children as mentally disabled in order to achieve ethnically segregated schools has been brought before the European Court of Human Rights'.[51]

The case of *DH v Czech Republic*[52] was the first case challenging systemic racial segregation in education to reach the European Court of Human Rights. The 18 applicants were all school children from the town of Ostrava and were Czech nationals of Roma descent, born between 1985 and 1991 and therefore nine to 15 years old at the time of the application in 2000. Between 1996 and 1999, they were placed into 'special schools' for children with mental disabilities, where they received an inferior education based on a diluted curriculum.

The complaint was based on the argument that their treatment amounted to discrimination in conjunction with their right to education being denied. The applicants' submissions to the European Court of Human Rights included extensive research indicating that Roma children were systematically assigned to segregated schools based on their racial or ethnic identity rather than intellectual capacities.[53] When this case was brought, Roma children in the Czech Republic were 27 times more likely to be placed in special schools for the mentally disabled, than non-Roma children.[54] The Court held that this pattern of segregation was discriminatory.[55] The statistics presented to the court demonstrated the segregated nature of schools in Ostrava, concluding that, in the year of 1999, over half of Roma children were placed in special schools; over half of the students in special schools' were Roma; that any randomly chosen Roma child was more than 27 times more likely to be placed in a 'special school' than a non-Roma child.[56] Even where Roma children managed to avoid the placement in special schools, they were most often enrolled in substandard, and predominantly Roma, urban ghetto schools. Having been placed into substandard education, these Roma children had little chance of accessing higher education or steady employment opportunities.[57]

The judgment is ground-breaking in its recognition of the application of the right to non-discrimination to systemic patterns of discrimination that deny the enjoyment of rights to racial or ethnic groups, and not just to specific acts of

43 De Bruin, 'International Comparison' (n 20) 812–3.
44 Graham (n 16) 5.
45 Ibid 4.
46 Subini Ancy Annamma, Beth A Ferri and David J Connor, 'Disability Critical Race Theory: Exploring Intersectional Lineage, Emergence, and Potential Future of DisCrit in Education' (2018) 42(1), *Review of Research in Education* 46, 47.
47 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139.
48 Ibid 139.
49 Ibid 151.
50 Dagmar Schiek and Anna Lawson, *European Union Non-discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate, 2011) 20.
51 Dagmar Schiek, 'Organizing EU Equality Law Around the Nodes of 'Race', Gender and Disability' in Dagma Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate, 2011) 11–27.
52 *(Final Judgement)* (European Court of Human Rights, Grand Chamber, Application No 57325/00, 13 November 2007).
53 Ibid 49–51 [133]–[137].

54 Ibid 6 [18].
55 Ibid 71 [207]–[210].
56 Ibid 6 [18].
57 Ibid 49–50 [134], 52–3 [144].
58 Ibid 5 [15].
59 Ibid 5 [16].
60 Ibid 71 [207].
61 Ibid 53 [145].
62 Ibid 51 [145].
63 Ibid 57–8 [159].
64 163 US 537 (1896).
65 Ibid 13–15 [44].
66 Ibid 67 [192]–[193].
67 See ibid 51–2 [141]. The Court stated that 'the documentary evidence showed that a number of the applicants had been placed in special schools for reasons other than intellectual deficiencies (such as absenteeism, bad behaviour, and even misconduct on the part of the parents)'.

discrimination. In holding that segregation is discriminative, the Court clarified that racial segregation amounts to discrimination. For the first time, the Court confirmed that, where a difference in treatment takes the form of the disproportionate prejudicial effects of a general policy or measure which, though framed in neutral terms, discriminates against a racial or ethnic group, it may amount to 'indirect discrimination'. Further, where it has been shown that legislation produces an unjustified discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authorities. This will apply, according to the Court's decision, even where the wording of particular statutory provisions is neutral, but operates in a racially disproportionate manner without justification, placing members of a particular racial or ethnic group at a significant disadvantage.

While the Court held that the racial segregation of Roma children in school was discriminatory, it did not challenge the segregation of children with disabilities. The Court cited the establishment of specialised schools after the First World War for children with special needs, including those suffering from a mental or social handicap.[58] The special schools in question, under the present case, were a category of these specialised schools, intended for children with mental deficiencies who were unable to attend 'ordinary' or specialised primary schools.[59] The Court held that:

> the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider generation. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them integrate into the ordinary schools and develop the skills that would facilitate life among the ordinary population.[60]

Taking segregated schooling for children with disabilities for granted was particularly surprising in the Court's judgment, given the applicants' claim that the special school system was purportedly ended by a new *Schools Act* in 2004.[61] The applicants claimed that the 'new legislation thus acknowledged that the very existence of schools deemed 'special' imposed a badge of inferiority on those placed there'.[62] The government responded by stating that the new Act 'did not provide for a separate, independent system of specialised schools, with the exception of schools for pupils with serious mental disorders' and that students with disabilities 'were individually integrated, wherever possible and desirable'.[63]

Given the Court's cognizance of the decision to phase out special schools and absent any further dicta by the Court to the contrary, it can be argued that segregated schools were assumed to be justified and legitimate for children with disabilities. Thus, racial discrimination was found, but disability discrimination was not. We are left with a decision that reads like the seminal case of *Brown,* in its insistence that separate treatment is not equal treatment, in terms of racial discrimination. However, with respect to the rights of children with disabilities, this same decision reads more like its infamous predecessor (which was partially overruled by *Brown*), *Plessy v Ferguson*,[64] where it was held that racial segregation is not in itself a violation of equality if the facilities in question were otherwise equal—a doctrine that came to be known as 'separate but equal'.

Applying an intersectional lens to the Roma case would yield a markedly different response. The difference in treatment of Roma children, who, as stated by the interveners to the case, were seen as intellectually less capable due to the lack of a 'national definition of "disability"' meaning that the statute 'used definitions in which some form of disability was connected to the socio-cultural background of the child, thus leading to door to discriminatory practices open'.[65] Effectively, the Court ruled that the applicants may not have been intellectually disabled,[66] but had they been, the decision may have had a different outcome. The Court straddled the intersection of race and disability but approached the decision on a single axis, thereby depriving children with disabilities of the right to an inclusive education as provided through precedent. The logical extension of the Court's reasoning is that if the Roma children had in fact been mentally disabled, it would have been justified for them to be placed in segregated schooling.[67]

v Conclusion

In the leading case of *Brown,* the US Supreme Court stated that 'we must look instead to the effect of segregation itself on public education'.[68] Similarly, in assessing the segregation of students with disabilities from the mainstream student population, we must look to the underlying rationale of equality and non-discrimination law as aided by the torch of an intersectional analysis. A strong argument for segregated schooling as discriminatory, and in violation of the rights of students with disabilities to equality, has to be based on 'the common rationale for banning discrimination on all grounds'—namely that it consists of overcoming disadvantage derived from any form of ascribed otherness.[69]

68 *Brown* (n 15) 691 [492]. Whilst using the notion of segregation for race as being a relevant comparison for discrimination purposes, it is acknowledged that discrimination on the basis of disability is different from discrimination on the basis of race, as exemplified in the issues surrounding reasonable adjustments.

69 Schiek, 'Organizing EU Equality Law Around the Nodes of 'Race', Gender and Disability' (n 51) 21.