

**IN THE HON'BLE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

I.A. No. _____ of 2017

IN

WRIT PETITION (CIVIL) NO. 132 of 2016

IN THE MATTER OF:

RANJEESH KUMAR PANDEY & ORS.

....PETITIONERS

VERSUS

UNION OF INDIA & ORS.

...RESPONDENTS

AND

IN THE MATTER OF:

Vidhi Centre for Legal Policy

A-313, First Floor, Defence Colony,

New Delhi-110024

...APPLICANT/INTERVENOR

APPLICATION FOR INTERVENTION

PAPER-BOOK

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ADVOCATE FOR THE APPLICANT: MS. RASHMI

NANDAKUMAR

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TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS

COMPANION JUDGES OF THE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF THE
ABOVENAMED APPLICANT

MOST RESPECTFULLY SHOWETH

1. The present Application for Intervention is being filed in furtherance of the order dated 23.10.2017 passed by this Hon'ble Court in the present matter. The relevant part of the order is reproduced hereunder:

"Access to education has already been regarded as a Fundamental Right as per Article 21A of the Constitution. There is a statutory obligation under the Rights of Children to Free and Compulsory Education Act, 2009. It is impossible to think that the children who are disabled or suffer from any kind of disability or who are mentally challenged can be included in the mainstream schools for getting education. When we say 'disability', we do not mean 'disability' as has been defined in the Rights of Persons with Disabilities Act, 2016. The Rights of Persons with Disabilities Act, 2016 includes certain physical disabilities which may not be a warrant for getting admission in special schools. The students who suffer from blindness, deafness and autism or such types of disorder may be required to have separate schools with distinctly trained teachers. The State shall file an affidavit keeping our observations in view within four weeks.

Needless to say that the affidavit shall also mention when the State is going to meet this obligation.”

It is respectfully submitted that with a view to assist this Hon'ble Court on the issue of education of children with disabilities, the present intervention application is being filed. A copy of the order dated 23.10.2017 passed by this Hon'ble Court is attached hereto and marked as **ANNEXURE A-1 (Pages __ to __)**.

2. The Intervenor is Vidhi Centre for Legal Policy ("hereinafter referred to as Vidhi"), an independent think-tank doing legal research and assisting government in making better laws. Vidhi is a not-for-profit company limited by guarantee, registered under Section 25 of the Companies Act, 1956, having its registered office at A-313, First Floor, Defence Colony, New Delhi 110024, and bearing Company Identity Number: U930000DL2013NPL256042. A copy of the Board Resolution dated 24.10.2017 authorising Ms. Dhvani Mehta to file the present intervention is attached hereto and marked as **ANNEXURE A-2 (Pages __ to __)**.
3. The Intervenor has been engaged in conducting extensive legal research on disability and access to education. In the past, the Intervenor has assisted the State Governments of Delhi and Karnataka in legislative efforts to regulate school education, made submissions to the Ministry of Human Resource Development on the New Education Policy, 2016 as

well as the Standing Committee on the No Detention Policy, in 2017, and has undertaken independent research projects on:

- (a) Regulation of Private Schools in India;
- (b) Right to Education and Minority Rights;
- (c) Section 12(1)(c) of the RTE Act in collaboration with other organizations in the State of the Nation Report.

4. In pursuance of its commitment to further the aims of justice, the Intervenor has intervened before this Hon'ble Court in Writ Petition (Civil) No 215 of 2005 in the matter of *Common Cause v Union of India* in this Hon'ble Court in furtherance of a report on Advanced Directives, wherein the Intervenor submitted before this Hon'ble Court that advance directives are an integral part of the right to die with dignity guaranteed under Article 21 of the Constitution of India. The Intervenor is also assisting Senior Advocate Arvind P. Datar, who has been appointed as amicus curiae in an ongoing PIL by the Supreme Court, to study the appointments of district and civil judges in the lower judiciary, including the feasibility of setting up a Centralised Selection Mechanism.
5. The abovementioned examples demonstrate the Intervenor's genuine interest in advancing the development of law in the area of education and disability rights in terms of Article 14, 21 and 21A of the Constitution of India. In view of the extensive research conducted by the Intervenor on the subject of Inclusive Education, the Intervenor prays for leave

to intervene in the present matter in order to assist this Hon'ble Court.

6. The present petition seeks the appointment of special educators in all schools in the State of Uttar Pradesh to cater to the needs of children with disabilities. It is submitted that the State's obligation to ensure inclusive education under Article 21A for children with disabilities forms the framework within which appointment of special educators is to be conceptualized. In this regard, the present intervenor will make the following submissions:
 - (a) The obligation of the State to ensure free and compulsory education in terms of Article 21A extends to children with disabilities. The provisions of the Right of Children to Free and Compulsory Education Act, 2009 read with the provisions of the Right of Persons with Disabilities Act, 2016 makes it imperative on the State to ensure inclusion of all categories of children within mainstream education, irrespective of the level and type of disability.
 - (b) International conventions, national policies and expert studies suggest that certain categories of children cannot be treated as being 'uneducable' or having alternate aspirations or capabilities. Creating separate educational facilities also violates the requirement of non-discrimination by the State. In fact, the State has a positive obligation to take affirmative measures to include children with disabilities that render them particularly vulnerable to exclusion.

- (c) In the strictest sense, inclusive education entails that children with disabilities should be educated in regular classrooms with age-appropriate peers. Inclusive education entails identifying and removing barriers and providing reasonable accommodation, enabling every learner to participate and achieve within mainstream settings.
- (d) The inclusion of children with disabilities in mainstream is regarded as desirable for equality and human rights. The benefits of inclusive education include removal of stigmatisation of children with disabilities and better assimilation in the mainstream society. In financial terms, it is less costly for the State to establish and maintain schools that educate all children together rather than setting up a complex system of different types of schools specializing in different groups of children.
- (e) Admittedly, the State has a margin of error in ensuring inclusion. Inclusion may be progressively achieved, as long as the State ensures access to the mainstream education and non-discrimination. However, the progressive realization of inclusion requires steps taken towards that end. Therefore, the State cannot continue to maintain segregated institutions as the solution for education, without any attempt to reduce their scope. Progressive realization may be achieved by allowing for schools to identify children on an individualized assessment of learning needs and safeguards related to the requirement to establish the suitability of special education. Further,

the State may promote limited access to a mainstream school for a fixed time period with additional access to a special school, in order to avoid complete exclusion.

I. THE STATE HAS AN OBLIGATION TO ENSURE INCLUSIVE EDUCATION AND TAKE POSITIVE STEPS TO ENSURE NON-DISCRIMINATION OF CHILDREN WITH DISABILITIES

7. Inclusive Education, as defined under Section 2(m) of the Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as the "RPWD Act"), is a system of education wherein children with and without disabilities learn together and the system of education is suitably adapted to meet the learning needs of different types of students. This implies that children with disabilities need to be accommodated in the same school environment, with adequate flexibility to ensure that the inclusion is meaningful.
8. The obligation of the State towards inclusion in mainstream schools is implied within the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the "RTE Act"), which defines a 'child with disability' to include
 - (a) a child with blindness, low-vision, leprosy-cured, leprosy-cured, locomotor disability, hearing impairment, mental retardation and mental illness in terms of the the Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995, which stands repealed by the RPWD Ac.

(b) a child with autism, cerebral palsy, mental retardation or a combination of such conditions and includes a person suffering from severe multiple disabilities in terms of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999

Under the –RTE Act, children with disabilities are included in the category of children belonging to disadvantaged groups and economically weaker sections, for whom 25% of seats are reserved in unaided schools. The inclusion of children suffering from disabilities mentioned above indicates that there was legislative intent to ensure that all mainstream schools provide the necessary facilities to cater to such children. It is also evident that the obligation of the State does not vary depending on the type and level of disability involved.

9. The RPWD Act also creates an obligation on the State to ensure that schools recognized or established by the government make provisions for inclusive education for children with disabilities. This includes education for children with long-term physical, mental, intellectual or sensory impairment in mainstream schools. Further, children with benchmark disability have the right to free education in a neighbourhood school, or a special school of his/her choice, up to the age of eighteen. Benchmark disability is defined as not less than forty percent of specified disability as per the Schedule to the Act,

which includes physical disability (including visual or hearing impairment), intellectual disabilities (including specific learning disabilities and autism spectrum disorder), mental illness etc.

9. The obligation to create access to inclusive education is also recognised internationally in Article 24 of the United Nations Convention on Rights of Persons with Disabilities (hereinafter referred to as "the UN Convention") which requires that persons with disability have the right to inclusive education, based on non-discrimination and equal opportunity. Article 24 is reproduced hereunder for the purpose of reference:

"Article 24: Education

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 life long 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:

(a) 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;

(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.

10. From a conjoint reading of the aforesaid provisions, it is evident that there is widespread recognition that for growth and development of children with disabilities, there has to be a move towards creating inclusion while simultaneously deinstitutionalizing special schools. To this end, Section 17 of RPWD Act provides for duties of the appropriate government and local authority, to support existing educational institutions, rather than setting up special schools. Admittedly, both Section 31 of the RPWD Act as well as Section 3 of the RTE Act provides a child with benchmark disability or severe disability to opt for a neighbourhood school or a special school of his/her choice or to opt for home-based education. However, in both these cases, the option rests with the child, the parents and guardians and with adequate facilities

in neighbourhood schools, such options may no longer be needed.

11. Apart from the obligation of the State to ensure free and compulsory education for children with disabilities, there is also the obligation that there is no differential treatment of children with different types of disabilities. It is submitted that creating special schools for children with certain types of disabilities deprives such children their equal right to study in mainstream schools with other children of the same age. It is worth considering that discrimination is also possible within subsets of a larger category, for example children with autism versus children with motor disability even though both are a part of a larger category of children with disabilities. This Hon'ble Court has been hesitant in condoning for such segregation and has in the past objected to discrimination among different categories of disabilities in the provision of government services. In the case of *Deaf Employees Welfare Association v. Union of India* reported as (2014) 3 SCC 173, this Hon'ble Court observed as follows:

"The deaf and dumb persons have an inherent dignity and the right to have their dignity respected and protected is the obligation on the State. Human dignity of a deaf and dumb person is harmed when he is being marginalized, ignored or devalued on the ground that the disability that he suffers is less than a visually impaired person which, in our

view, clearly violates Article 21 of the Constitution of India. Comparison of disabilities among "persons of disabilities", without any rational basis, is clearly violative of Articles 14 of the Constitution of India."

12. This is also in line with the fact that it is now internationally recognised that there is no rational basis to think that certain categories of children are uneducable. This is elaborated by the Committee on Rights of Persons with Disabilities was created which issued the General Comment No. 4 (2016) on 'Article 24: Right to inclusive education' (hereinafter referred to as "UN General Comment"). The UN General Comment recognizes that role of education is not merely to produce academic outcomes but also to ensure social integration and equal participation of children with disabilities. It further recognises that progressive deinstitutionalization of special schools for children with disabilities is needed for creation of an equal and humane society. A copy of the UN General Comment is attached hereto and marked as **ANNEXURE A-3 (Pages __ to __)**.
13. The need for inclusion beyond academic outcomes is also recognized in the Salamanca Statement on Principles, Policy and Practice in Special Needs Education, 1994 (hereinafter referred to as "Salamanca Statement"). The Salamanca Statement was adopted at the 'World Conference on Special Needs Education: Access and Quality' organised by UNESCO and Spain in the year 1994. The aim of the

Conference was to further the objective of Education for All by considering the fundamental policy shifts required to promote the approach of inclusive education, namely enabling schools to serve all children, particularly those with special educational needs. The Salamanca Statement provides that regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system'. It is also relevant to consider that the European Journal of Special Education in 1993 had noted that there was no evidence to suggest benefits of special education and therefore, unless overwhelming evidence was found to the contrary, States had to abide by inclusive education. (Hegarty, S. (1993) 'Reviewing the literature on integration', European Journal of Special Needs Education, 8(3): 194–200). A copy of the Salamanca Statement is attached hereto and marked as **ANNEXURE A-4 (Pages __ to __)**.

14. It is, therefore, submitted that assumptions about the differential capabilities of children are not only unscientific and unsubstantiated but also run counter to non-discrimination obligations of the State. This includes discrimination within different categories of disability. Therefore, the State should refrain from selecting categories of children who may be excluded from access to mainstream education.

II. THE STATE HAS A POSITIVE OBLIGATION TO ENSURE INCLUSION OF CHILDREN WITH SEVERE DISABILITIES.

15. The UN General Comment also recognizes that inclusive education must be achieved through continued commitment to removing barriers to access. Article 24 must also be viewed as an essential human right in line with a series of conventions in international human rights law including the UNESCO Convention Against Discrimination in Education, Convention on Rights of the Child as well as the International Covenant on Economic, Social and Cultural Rights.
16. This goal can be achieved by ensuring that the classroom environment, curriculum and teacher training is in line with reasonable accommodation of children with disabilities as well as individualized support measures. Section 16 and 17 of the Act provides for some obligations of the State to ensure this, however these obligations are general in nature to cater to all types of disabilities. The State is required to frame a comprehensive policy to identify the different facilities, educators, educational facilities etc. which are needed for different types and levels of disabilities. In this regard, reference may be made to the Canadian Supreme Court's decision in *Moore v. British Columbia (Education)*, reported as 2012 3 S.C.R. 360, which found that equality in access to education could not be determined by comparing the access of a disabled child with another child with a

different category of special needs. The State must ensure that there are adequate supportive measures to overcome the barriers met by different categories. A copy of the Canadian Supreme Court's decision in *Moore v. British Columbia (Education)* is annexed hereto and marked as **ANNEXURE A-5 (Pages __ to __)**.

17. The UN General Comment has recognised that children with communication challenges due to visual/hearing impairment and those on the autism spectrum are especially being led down by their States as far as their inclusion in mainstream schools are concerned. The obligation of the State is to provide adequate innovation through technology, pedagogical techniques such as interactive classrooms, flexibility in curriculum and special training within inclusive classrooms to ensure their right to education. The obligation may not be avoided by characterizing such education as burdensome.
18. One example of an appropriate affirmative State measure is reservation of 25% of seats for children with severe disability within the category of children from disadvantaged groups and weaker sections in private schools under Section 12(1)(c) of the RTE Act. Considering that the State has recognized access to schools for such children, it is essential that the focus should be on ensuring that the inclusion is made meaningful through effective support measures.
19. It is recommended that support measures may include Universal Design Learning, a system of

education that provides for individualized learning outcomes for all children; implementation of formative assessments under continuous and comprehensive evaluation; utilization of special training provisions under the RTE Rules, 2010 for age appropriate education in order to similarly assist children with learning disorders; and training of all teachers to ensure accommodation of diversity in the classroom. The Sarva Shiksha Abhiyan Framework for Implementation displays recognition of some of these principles. A copy of the relevant extracts of the Sarva Shiksha Abhiyan Framework for Implementation is attached hereto and marked as **ANNEXURE A-6 (Page ____ to ____)**.

20. Therefore, in cases of severe disability, the State has a further obligation to take affirmative measures to ensure meaningful inclusion, instead of considering segregation of schooling.

III. THE STATE HAS AN OBLIGATION TO LIMIT SEGREGATION OF SCHOOLING.

21. Article 24 of the UN Convention recognises that the goals of Inclusive Education can only be met through progressive realization, therefore States may take incremental steps towards inclusion. However, the UN General Comment clarifies that non-discrimination and the right to free and compulsory education are *core* rights and therefore, must be immediately realizable. Thus, there may be gradual expansion of meaningful education; however, there may be no denial of admission. Further, the General Comment recognizes

that the continued maintenance of separate or special schooling is inconsistent with the attempt to progressively realize these rights. This implies that further setting up of special schools is incompatible with these obligations.

22. The Salamanca Statement provides that education must presumptively occur in the neighbourhood school. Variation from this must have two significant safeguards. *First*, the State must establish that the needs of the child are better suited to a special school. *Second*, such an assessment must be individualized rather than categorical. *Finally*, even in these exceptional cases, part-time attendance of a regular school must be encouraged to ensure inclusion. For instance, in Canada, this has been implemented since 2014 through the Education Act for New Brunswick. This is accompanied by further safeguards such as the need to demonstrate that the learning outcomes are inadequate despite reasonable efforts at inclusion through government support were conducted. Similarly, the USA Individuals with Disability Education Act mandates the creation of individualized education plans for children with disability to monitor expected outcomes. Therefore, at the highest, segregation of education of children with certain types of disabilities cannot be generic and ought to be done either on an individual basis or at the option of the child/parent/guardian. As such, the State should refrain from encouraging the culture of

special schools in order to meet the goals of inclusive education.

23. In light of the above, the intervenor submits that the State must endeavour to ensure inclusive education within neighbourhood schools and take incremental steps towards reducing the dependence on special schools.
24. The Intervenor reserves the liberty to place on record additional material, if so directed by this Hon'ble Court.
25. The present Application has been filed in the interest of justice and to assist this Hon'ble Court in the effective adjudication of the present matter. The Intervenor has no personal motive involved in filing the present application and seeks to gain no profit therefrom.

PRAYER

26. In view of the submissions made above, it is most respectfully prayed that this Hon'ble Court may be pleased to:
 - (a) Allow the Intervenor to intervene in the Writ Petition (Civil) No. 132 of 2016 and be pleased to array the Intervenor as a party respondent in Special Leave Petition (Civil) No. 132 of 2016; and/or
 - (b) Pass any order (s) deemed fit and proper in the facts and circumstances of the case.

FILED BY:

RASHMI

NANDAKUMAR

Advocate for the

Intervenor

PLACE: NEW DELHI

DATED:

