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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

27 May 2014

Case Document No. 1

Mental Disability Advocacy Center (MDAC) v. Belgium
Complaint No.109/2014

COMPLAINT

Registered at the Secretariat on 30 April 2014

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Secretariat of the European Social Charter
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Collective Complaint

Mental Disability Advocacy Center v. Belgium

on Certain Issues of Inclusive Education for Children with Intellectual and Psycho-Social Disabilities

Violation of Article E in relation to Articles 15 and 17 of the Revised Social Charter

I. EXECUTIVE SUMMARY

1. According to the latest reports on the Belgian community of Flanders, just over 6% of school children are in need of some sort of reasonable educational accommodation. Of these students, 85% attend special schools that exist in separate buildings, segregated from the mainstream educational system.
2. According to the applicable norms of international law, all children have the right to education. This right is translated into an obligation of the state to ensure that all children receive education without discrimination on any grounds, including disability.
3. The ongoing widespread segregation of children with disabilities is endorsed by the Flemish authorities, who have failed to establish a reasonable timeframe, measure progress and finance full inclusion of children with disabilities into regular education, contrary to the obligations Belgium has undertaken in accordance with the United Nations Convention on the Rights of People with Disabilities (UN CRPD), and is in violation of Articles 15 and 17 and Article E in relation to Articles 15 and 17 of the Revised Social Charter.

II. ADMISSIBILITY

a. Standing of the Mental Disability Advocacy Center

4. The Mental Disability Advocacy Center (*hereinafter* “MDAC”) is an international non-governmental organisation, based in Budapest, Hungary, with participatory status with the Council of Europe. It is a Hungarian foundation registered under No. 8689 by the Decision No. 11. Pk.60797/2002/3 of the Metropolitan Court of Budapest (effective as of 24 October 2002). According to the registration documents and the MDAC Charter, the statutory representative of the organisation is the Executive Director, Oliver Lewis.
5. MDAC has had standing with the European Social Charter collective complaint mechanism since 2005.
6. According to Article 3 of the Second Additional Protocol, international non-governmental organisations referred to in Article 1(b) may submit complaints only with respect to those matters regarding which they have been recognised as having particular competence. According to Article 4.3. of MDAC’s Charter, the objectives of the organization are to promote legal and other forms of advocacy for human and civil rights of people with mental health and/or intellectual disabilities, as well as to improve the quality of their lives by advocating public policies that promote community integration, self-determination and support of individuals with mental disabilities and their families.
7. MDAC has worked extensively in the area of inclusive education. In 2008, MDAC put forward a collective complaint to the European Committee of Social Rights against Bulgaria, in which the Committee found that lack of access to education of children with intellectual disabilities is a violation of Charter rights. MDAC also contributed to a 2011 shadow report to the UN Committee on the Rights of the Child concerning the Czech Republic and its de facto exclusion of children with disabilities from mainstream schools, prompting the Committee to

request the Czech Republic to “[e]nsure the provision of adequate financial, technical and human resources to schools to effectively provide mainstream education for children with disabilities; and amend its legislation to prohibit schools from refusing children on the grounds of insufficient material resources.”¹ Other shadow reports include a report on Slovakia to the Human Rights Committee and a report on Hungary to the Committee on the Rights of Persons with Disabilities. MDAC, in conjunction with partner organisations and attorneys, is currently litigating cases related to the right to inclusive education in the Czech Republic, Slovakia and Bulgaria.

8. MDAC is supported in this complaint by the Flemish NGO *Gelijke Rechten voor Iedere Persoon met een Handicap* (Equal Rights for Each Person with a disability, hereinafter “GRIP”), a Flemish civil rights organisation for persons with disabilities. GRIP has also worked extensively for the realisation of the right to inclusive education. In 2010, for example, the organisation led a lobbying campaign to strengthen the rights of enrolment for children with disabilities in mainstream schools (subscription rights under the GOK decree) and published a position paper on inclusive education in collaboration with Parents for Inclusion (OVI). GRIP also submitted a shadow report on Belgium to the UN Committee on the Rights of Persons with Disabilities in 2011.

b. Standing of Belgium

9. Belgium ratified the Revised European Social Charter on 2 March 1996. The document entered into force on 1 May 2004.

10. Belgium ratified the additional protocol to the Revised European Social Charter providing for a system of collective complaints on 23 June 2003. This entered into force on 1 August 2003.

11. This complaint is submitted in writing under Article 4 of the Additional Protocol and relates to Articles 15, 17 and E of the Revised European Social Charter (*hereinafter* “the Social Charter”). These provisions were accepted by the Respondent Government upon the ratification of the Social Charter.

III. SUBJECT MATTER OF THE COMPLAINT

a. The Belgian system of education for children with intellectual disabilities

i. The Federal legislative framework

12. Although education falls within the competencies of the Belgian communities rather than the federal government, the applicant organisation briefly lays out the federal framework relevant to the topic of the complaint.

¹ See Committee on the Rights of the Child, Concluding Observations on Czech Republic, CRC/C/CZE/CO/3-4, para. 52(a)

13. The Belgian Constitution of 17 February 1994 states that “Belgium is a Federal State made up of communities and regions.”² Several responsibilities of the federal government can be and are delegated to the community level.

14. Under Article 24 of the Belgian Constitution, education is free up to the age at which it ceases to be compulsory, parents are guaranteed freedom of choice for their children’s education, and “any preventive measure is forbidden.” Everyone is entitled to an education, and “all pupils or students, parents, teaching staff or institutions are equal before the law or federate law.” However, “the law and federate law take into account objective differences, in particular the characteristics of each organising authority that warrant appropriate treatment.”³

15. The Special Institutional Reform Act of 8 August 1980 transferred the authority to develop disability policy to the community level. This includes vocational training, but excludes the governance and financing of disability allowances.

16. The Belgian legislation defines special education as “a type of education that on the basis of a pedagogical project delivers teaching, education, care and therapy suited to the capacity of the pupils of whom the development of the total personality is not or is insufficiently assured by the mainstream education, temporarily or permanently.”⁴ There is no common special education curriculum in Belgium.

17. The Anti-Discrimination Act of 10 May 2007 prohibits discrimination based on disability, current or future health condition, and a physical or genetic characteristic, among others. The sphere of application includes employment and participation in economic, social, cultural or political activities but does not explicitly prohibit discrimination in education..

ii. The Flemish framework for education of children with disabilities

18. In the Flemish community, the Department for Education and Training within the Ministry of Education and Training prepares educational policy.

19. The education system has three levels generally grouped according to the students’ age: pre-primary/kindergarten (2.5-5), primary (6-12); secondary (12-18). Primary and secondary education (ages 6-18) are compulsory.

20. The Flemish Community has issued a number of decrees regarding education and disability. The Decreet Basisonderwijs (Decree on Primary Education) of 25 February 1997 incorporates mainstream and special education within the same legal framework. Section 2 of the Decree states that “primary education will be organised in such a manner that, on the basis of a pedagogical project, the school creates an educational learning environment where the pupil can go through a continuous learning process.”

21. “Special primary education” is described as education that offers adapted education, care and therapy to pupils whose personal development cannot be ensured by mainstream

² Constitution of Belgium, 17 February 1994, Article I.

³ *Ibid.*, Article XXIV.

⁴ Geyer, F., *The Educational System in Belgium*, CEPS Special Report/September, 2009.

education, whether temporarily or permanently. The decree does not specify any presumption in favour of mainstream education, but treats both mainstream and special education equally.

22. In 1980, integrated education was established as an option in Flemish legislation, but it was not mandatory. As described below, the system of integrated education is not available on an equal basis to all disabled students, and children with moderate to severe intellectual disabilities are denied access to it. Children with disabilities are categorised into eight types (described below)) and the level of education and integration to which they have access depends on which type they fall under.

23. A student's access to the system known as "integrated education" [*Geïntegreerd onderwijs*] or "GON" depends on the "typology" of his or her disability. The following typology is used within the current special education system:

Type 1: children with mild mental disabilities;

Type 2: children with moderate or severe mental disabilities;

Type 3: children with serious emotional and/or behavioural problems;

Type 4: children with physical disabilities;

Type 5: children admitted to hospital or in quarantine for medical reasons;

Type 6: children with visual impairments;

Type 7: children with hearing impairments and autism; and

Type 8: children with serious learning difficulties (only at the primary level).

24. GON can be organized on all education levels. In this system, teachers and other professionals from a special school provide additional support to pupils with special needs who are placed in mainstream schools. Additional teaching periods and/or additional resources provided by the special school augment mainstream education classes. In this system, mainstreaming may be complete (all classes and activities) or partial (minimum of two half days per week).

25. The GON program is generally available only to students with physical, visual or auditory disabilities. Children and adolescents with psycho-social or moderate intellectual disabilities (those who fall under Types 1, 3 and 8), must spend at least nine months in the special education system in order to become eligible for the supported program. For Types 4, 6 and 7 there is no period of time that must be spent in special education before they are eligible for the GON program.

26. Children and adolescents with moderate or severe intellectual disabilities (Type 2) are not eligible for the GON program, but may qualify for the "Inclusive Education Project" "Inclusief Onderwijs" or "ION."

27. ION's goal is guided integration into the mainstream education system and a place is dependent upon the director of the school making a request to the department of education. However, by law the program was fixed at a maximum capacity of 100 places in 2008. In 2012 the Minister of Education instructed that all students who qualify should be able to take part in the program, but the law was not amended to reflect this and the current number involved remains at around 100 students, with all the places occupied.

28. Any additional aid received by students with disabilities depends on the “typology” of their disability. Most students receive up to two hours of additional support for two years at each level of education (primary, secondary, etc.).

29. Students can also qualify for Stimulation, Compensation, Remediation and Dispensation (STICORDI) adjustments. Support services from the programme may include the translation of study tools into Braille or large print, note-taking assistance from peers, and sign-language interpretation. The Flemish Government will either provide students with these materials or reimburse parents for their purchase.

30. A student’s right to GON and ION is established by the Pupil Guidance Center (CLB). The CLBs function at the local level. A student who is determined to have a disability for which he or she requires special education is issued a certificate stating that the student is entitled to special education. The CLB is also responsible for issuing a multidisciplinary report confirming the child’s need for special education. This is mostly based on a medical assessment according to the typology listed in paragraph 23 above.

31. However, in practice parents experience difficulties in accessing the services of CLBs. While parents are not obligated to follow the referrals or recommendations made by the CLB’s consultants, the recommendations are often made in a way that implies obligation.⁵ One parent describes her interaction with the CLB regarding her daughter’s transition from primary to secondary school as follows: “After a very successful inclusive trajectory in kindergarten and elementary school, J. went to the only secondary school in the neighbourhood that was willing to accept her. Actually she would have preferred to go with her friends to another school, which refused her based on ‘carrying capacity’ and after the advice of the CLB to not place her in a professional or technical track but rather in a general track. We never even had a conversation with the CLB representative and she didn’t know our daughter.”⁶

32. Flemish research regarding the concept of capacity of care⁷ shows that schools use this argument to refuse the enrolment of students with disabilities, based solely on disability, without having met the students.⁸

33. The Government does not provide for collection of data which would enable tracing comprehensive statistics about the number of children refused admission to inclusive education.

34. Uninformed parents are made to believe that the recommendation of CLB to place a child into a segregated school is a final decision imposed upon their child and that they have no choice but to follow the CLB’s recommendation.

35. The inclusion of pupils with special educational needs requires intense cooperation between the CLBs, the school, the parents, and the child herself, to be harmonised with other

⁵, Ruelens et al., *Op de Wip Report* 2001.

⁶ Parent’s testimony provided by GRIP.

⁷ Schraepen, B., Vanpeperstraete, L., Melis, A., Lebeer, J., Christiaens, M., & Hancké, T. (2008). Draagkracht als dynamisch concept binnen leerzorg. *Tijdschrift voor Onderwijsrecht en –Beleid*, 3, 219-223.

⁸ Schraepen, B., Lebeer, J., Vanpeperstraete, L., Hancké, T., & Christiaens, M. *Draagkracht ten aanzien van diversiteit & inclusief onderwijs voor lagere scholen in de provincie Antwerpen*. Plantijn Hogeschool Antwerpen, België, 2010.

services. It has been noted that CLBs and the ways they operate needed to be reformed in order to improve the effectiveness of their parental guidance.⁹

Procedures for challenging decisions regarding placement

36. The Decreet Gelijke Onderwijs Kansen of 2002 (the Equal Educational Opportunities Policy Decree, hereinafter “the “GOK” Decree) has been the basis of special education policy over the last 12 years. The GOK decree guarantees the right of every child to enrol in primary and secondary education. It also guarantees the fundamental right of admission to the school selected by a child’s parent(s) or guardian(s). However, Chapter III.10, 2 of the GOK decree provides that this registration is conditional on the sufficient capacity of the school to meet the student’s needs in education, therapy and care and depends on the school’s carrying capacity (“draagkrachtafweging”). Theoretically, this is permitted in a strictly limited number of cases, and the school must justify its reasons for the refusal in writing. No statistics are available documenting the actual number of students that are refused admission, and as will be demonstrated below, the procedures by which students are allowed or denied access to mainstream schools lack transparency and do not promote the right to inclusive education .

37. The GOK decree created a system of local consultation platforms (“*Lokale OverlegPlatform*” or “LOPs”). A LOP operates in one local authority or in a region and is comprised of directors of schools (regular and special), teachers represented by trade unions, parents represented by parent organisations, representatives of the municipality and representatives of the socio-economic and socio-cultural fields. Disability organisations are not included as standard, but there is an option for them to be included. There are separate LOPs for nursery/primary education and for secondary education. They are created to ensure the right of enrolment, act as an intermediary in case of conflicts and co-operate in implementing a local policy on equal opportunities in education. Their involvement can be triggered by parents contacting the LOP. Also, it is mandatory that schools notify the LOP of a decision of refusal.

38. In the case of disagreement between the parents and the school the LOP will try to mediate to find a solution. Should the mediation by the LOP be unsatisfactory, the parents of the child in question can contest the decision on refusal to the Commissie inzake Leerlingenrechten (“Pupils’ Rights Committee”), within the Ministry of Education. The appeal procedure to the Pupils’ Rights Committee under the GOK decree is administrative, and as such does not provide all the procedural guarantees, which as proper judicial review would ensure.

39. The Committee can, in principle, suggest to the Flemish government that it impose sanctions against schools that have refused admission to students with disabilities without justification. However, the Committee has never used this procedure.

40. Under article IV.8 of the GOK, there is no procedure to appeal a decision made by the Pupils Rights Committee. Not only is the decision final, but the in the Committee’s judgments

⁹ Sebrechts, L. "Education for Children with Special Needs: A Comparative Study of Education Systems and Parental Guidance Services," Working Papers 1211, Herman Deleeck Centre for Social Policy, University of Antwerp 2012, p 21

also focus upon the capacity of the school as a legitimate basis for exclusion. For example, when discussing one of its cases in its yearbook, the Committee stated that pedagogical reasons for denying registration would be incorrect, but basing its reasoning on “a need for adaptation that would be too difficult” would have been an acceptable procedure.¹⁰

41. There is a possibility to seek judicial review; however, in practice the parents are often uninformed as to their right to request a court to review the right of their child to inclusive education. A recent (2013) brochure about reasonable accommodation in education, published by the Centre for Equal Opportunities and Opposition to Racism contains some information for parents on their rights, and schools should also provide this information if requested.

42. In Flanders, the principle of reasonable accommodation has been employed in the Decree of 10 July 2008 establishing a framework for the Flemish equal opportunities and equal treatment policy. Although Article 15 of the Decree states that denial of reasonable accommodation for a person with an established limitation is discrimination, Article 19 justifies a refusal if the accommodation would impose a “disproportionate burden” on the implementer. The criteria for what is considered to be disproportionate are elaborated on in the Protocol of 19 July 2007.

43. Under the Act of 15 February 1993 (amended by the Acts of 25 February 2003 and 10 May 2007), the Centre for Equal Opportunities and Action to Combat Racism is responsible for dealing with complaints of discrimination, including on the grounds of disability, by providing information, support and mediation. The Centre changed from a federal to an inter-federal body on 15 March 2014 and now has a mandate as to the Flemish legislation and can be party to legal proceedings and go to court. This legal standing differentiates the Centre from the above described “LOPs” and the Pupils Rights Committee, which are purely administrative bodies with no legal capacity. However, parents lack information about the capacity of the various bodies and which of them is making legal appeals rather than taking purely administrative measures.

44. On 15 July 2011, the Flemish government decided not to further develop the framework of the Adapted Learning Support (*Leerzorg kader*). There is still not a fundamental framework for inclusive education, and no fundamental measures have been taken in the last 10 years. Even though the law encourages individualised accommodations, there is no common measurable system of how special education succeeds in providing accommodations to children being educated there.

45. In addition to the inadequacy of the laws to promote inclusion of children with disabilities, the current funding structure does not allow flexibility. GRIP called attention in its shadow report to the CRPD Committee to the lack of comparative data regarding financing for special education versus mainstream education.¹¹

¹⁰ Commissie Inzake Leerlingenrechten: Werkingsjaren 2009 en 2010, cases 2010/115 and 2010/130bis concerning the refusal of registration of a child with autism.

¹¹ GRIP, *Human Rights and Persons with Disabilities*, Shadow Report, Flanders 2011; INT_CRPD_NGO_BEL_15475_E.

The “M” Decree of 2014

46. In March 2014, the Flemish Parliament passed a new decree, the Decreet betreffende maatregelen voor leerlingen met specifieke onderwijsbehoeften (Decree concerning measures for pupils with specific educational needs), known as the “M” decree, whose stated intent is to ensure greater access to mainstream education for children with disabilities. The entry into force of the decree which was originally scheduled for September 2014, was delayed until September 2015. It is impossible to know what the effect of the new law will be once it is in force. However, the law appears to be discriminatory on its face as it does not even apply to children who cannot follow the regular curriculum, thereby excluding children with more significant intellectual or learning disabilities.

47. The new law will maintain the use of the system of typologies discussed above but will introduce some modifications to and will include a new Type 9 for “children with autism without intellectual disabilities.”

48. While the new law no longer allows schools to assert lack of capacity as a ground for refusing a child admission and instead relies on the criterion of reasonable accommodation to determine whether a particular accommodation will impose an undue burden on the school, there is no guarantee that the application of this criterion will result in an increase in the number of children who have access to mainstream education.

49. The law does not introduce new funding mechanisms that allow schools or localities to increase the number or range of supports they can provide to students who require accommodations, which would seem to allow schools to easily argue that any accommodation that has cost implications would be disproportionate and constitute an undue burden.

50. One of the criticisms of the 2014 legislation, the “M” decree, is that the funding of education for children with disabilities was not increased, so the resources necessary to provide supports to allow children to be included are not available to schools.

Data related to the GON program

51. In the last decade, the number of students in the GON (integrated) program has increased significantly. As Figure 3 demonstrates, between 1994 and 2006 the increase in the number of children with physical and auditory disabilities (Type 4 and Type 7 disabilities) in mainstream schools was not matched by a similar increase in the number of children with psycho-social, intellectual, and learning disabilities (Types 1, 2, and 8), which remained very low. Children with Type 5 disabilities were not included in this survey.

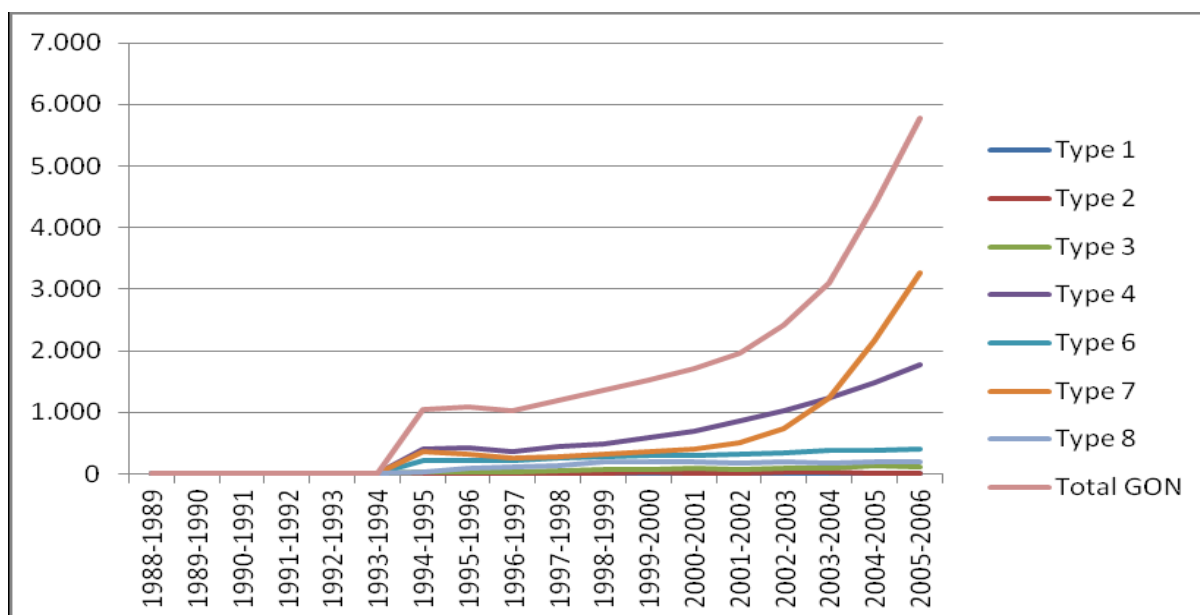


Figure 3: Evolution of integrated education in the Flemish community of Belgium, in thousands of students.¹²

52. More recent data available from the GON program show that the increase in the number of children from Type 7 (physical disabilities) in particular was quite significant between 1999 and 2009 but that there was not a similar increase for children in Types 3 (emotional and behavioural disabilities) and 8 (serious learning disabilities).¹³ Types 1 and 2 are not included in the data.

Cost of education for families of children with disabilities

53. A study by GRIP from 2008 suggests that education for children with disabilities is not necessarily free to students and their families.”¹⁴ According to the research, on average, parents are investing 10,296 EUR; government 7,906 EUR school and government and schools 3,596 EUR. It is obvious that the burden for paying for necessary supports is being shouldered by parents. These extra costs to parents include monetary contributions for materials and therapists, and the estimated cost of the time invested by parents themselves. 70% of parents that chose to pursue inclusive education for their children were highly educated. This indicates that parents/guardians with greater means were more likely to invest in inclusive education. This could indicate that they were more *able* to invest in inclusive

¹² Internal affairs of the Flemish government, 2008.

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http://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CGAQFjAH&url=http%3A%2F%2Fwww.clb limburgnoordadite.be%2Fkmsclb%2FKMS%2FKwaliteitssysteem%2FWerking%2520CLB%2FClientgerichtprocessen%2Fleerlinggebonden%2FGON%2FGON-netoverschrijdende%2520visie.doc&ei=ByzyUpDDCKiJywOI_ICADA&usg=AFQjCNE-FSNSgSDfKYovu7CkbVoMzjOvsg&sig2=OCU5AweIHNNghKghDax9DA

¹⁴ Lijne Vloeberghs m.m.v. Gert Van den Broeck, Ides Nicaise, Liesbeth Claes & Lisette Vanhelmont. GRIP / KHLeuven / HIVA, 2008.

education. If parents must provide for the costs of their children being in inclusive educational settings, children from families with lower income are disproportionately represented in segregated schooling, due to the lack of resources.

54. A recent report on Belgium's policies for children with disabilities by the European Parliament Policy Department highlights this aspect of exclusion and the disproportionate effect on children from disadvantaged families due both to lack of information and lack of resources. "Children with disabilities from disadvantaged families ... have less access to mainstream education. Where families have financial resources, they have the opportunity to invest in support and assistance ... and will generally take steps to get information and negotiate the registration of the child in the schools of their choice."¹⁵ Disadvantaged families, on the other hand, "do not have the possibility to do the same and often lack information about the available services." Such disparities are borne out by education indicators, which show an overrepresentation of disadvantaged children in the special needs education system."¹⁶

Children with disabilities excluded from compulsory education

55. Flanders has a system of exemption from compulsory schooling. This allows schools to impose conditions on the participation in education of children and young people (e.g. a minimum development age, a certain level of autonomy). This means that a number of children and young persons with a disability are exempt from compulsory schooling and attend day-centres or institutions instead of schools.

56. Children may receive services at these centres, but the services are not classified as education. In 2009¹⁷ an inventory research report showed the results of a questionnaire in (semi) boarding special needs schools and it identified 1881 children and young people (aged 2,5 to 21 years) with severe intellectual and sensomotor disabilities. 23,5% of these children and young people did not attend school, but were cared for in a care institution paid by the parents.

57. Recent information from the care management report of Vlaams Agentschap voor Personen met een Handicap (VAPH)¹⁸ also identifies this problem. As of 30 June 2011, 523 children were attending a semi-boarding school for school non-attenders, whereas 3270 children attend a normal semi-boarding school. Therefore 1 child out of 7 in a semi-boarding school is considered to be a school non-attender. The same is true in boarding schools: 1 child out of 7 in a boarding school is considered to be a school non-attender and lives in a boarding school for non-attenders. On 30 June 2011, 4789 children attended a boarding school, of which 690 children attended a boarding school for non-attenders. The fact alone that the care type for school non-attenders still exists within the VAPH and that this is aimed at 'children who are not learning' makes it clear that the right to education for a group of children is not included in the education policy.

¹⁵ European Parliament, Directorate-General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs, *Country Report on Belgium for the Study on Member States' Policies for Children with Disabilities* (2013) p. 15

¹⁶ *Ibid.*

¹⁷ Maes, B., Penne, A., & De Maeyer, J. (2009). *Inventarisatie-onderzoek: volwassenen met ernstige meervoudige beperkingen*. Katholieke Universiteit Leuven, België.

¹⁸ Vlaams Agentschap voor Personen met een Handicap (2011). *Zorgregierapport*. Brussel, België.

iii. Comparative data on education of children with disabilities in Europe

58. According to data published by the European Agency for Development in Special Needs: in 2008-2009 there were some 871,920 pupils in primary and secondary school in Flanders, including 54,336 pupils with special needs (32,068 children in primary school, 22,268 in secondary school). The great majority of pupils with special needs-- 46,091 pupils (almost 85%)--were in special schools (27,543 children in primary education and 18,548 pupils in secondary school, mainly in private special schools). Only 8,245 children with special needs (15%) were in mainstream education: 4,525 in primary school and 3,720 in secondary school.¹⁹ The data for school year 2010-2011 show that of 57,261 children identified as having special needs, 47,712 were in segregated schools and 9,549 in mainstream schools (4,809 in primary school and 4,740 in secondary school).²⁰ Thus, although the overall number of children with disabilities in mainstream schools increased, the percentage of children with special needs in mainstream versus segregated schools remained virtually unchanged.

59. These statistics demonstrate that the percentage of pupils in segregated special education in the Flemish community is the highest in Europe (Figure 1). See also Figure 2 from a University of Leeds study detailing the proportion of students in inclusive education, specialised classes and segregated education which again shows Belgium to have the highest proportion of pupils in segregated special education in Europe.

¹⁹ The ECSR cited these statistics from the European Agency for Development in Special Needs Education in its 2012 Conclusions on Belgium at p. 19.

²⁰ European Agency for Development in Special Needs Education, Special Needs Education Country Data, 2012, p. 9.

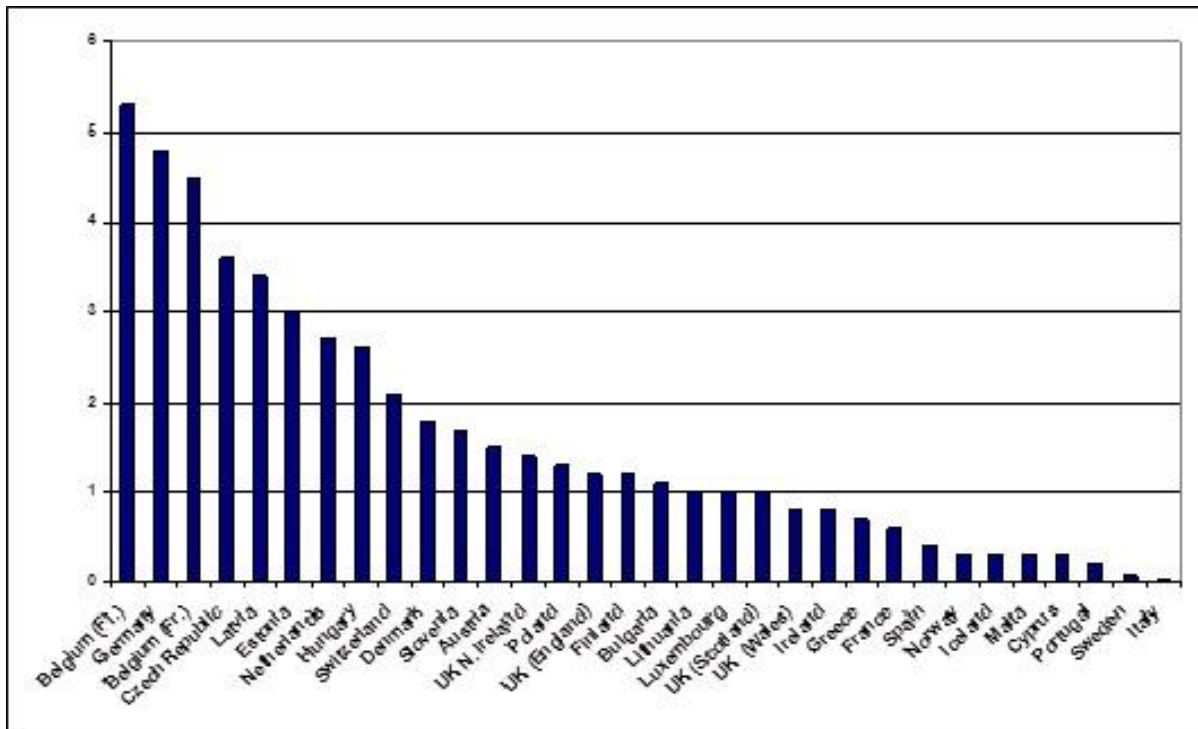


Figure 1: Pupils in special schools and classes as a % of the total school population. (European Agency for Development in Special Needs Education, Country Data 2010. [http://europa.eu/rapid/press-release_IP-12-761_nl.htm?locale=en.](http://europa.eu/rapid/press-release_IP-12-761_nl.htm?locale=en))

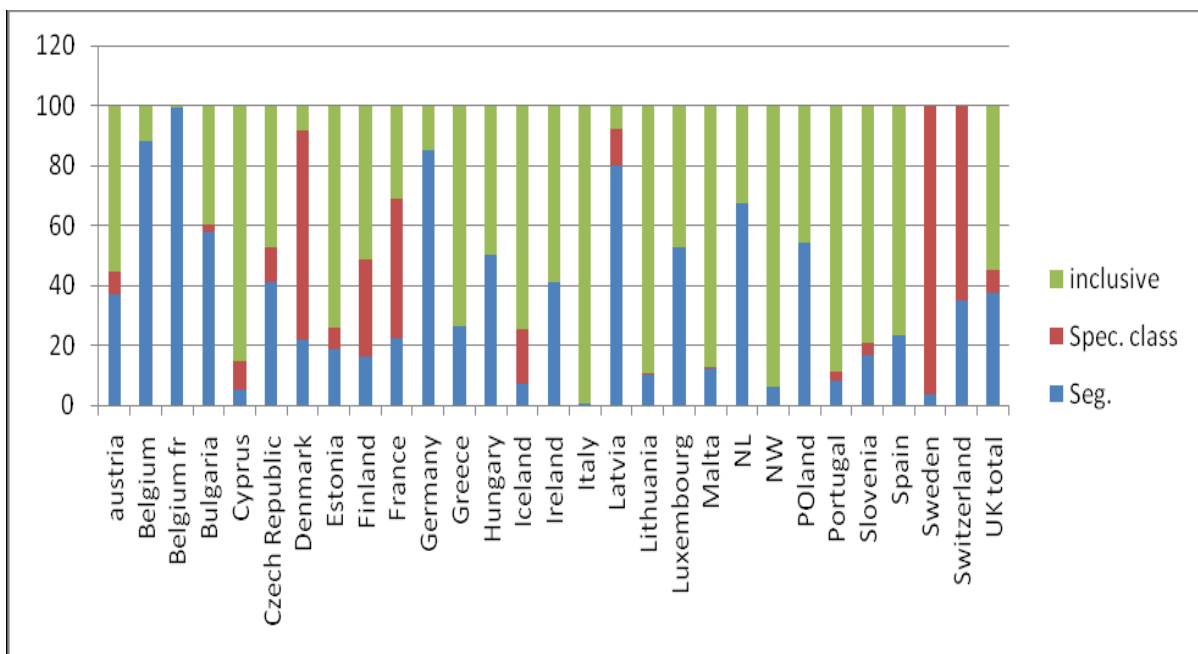


Figure 2: Proportion of students with disabilities in inclusive, segregated and specialized classes. (Ebersold, S. (2011). *Inclusive education for young disabled people in Europe: trends, issues and challenges*. University of Leeds: ANED.)

iv. Conclusion

60. It is obvious that besides good intentions around the Belgian and Flemish legislation, starting with Article 24 of the Belgian Constitution all the way down to the Flemish Equal Treatment Policy decree, inclusive education for children with psycho-social and intellectual disabilities is an exception rather than a rule, the Government justifying the failure by it being a disproportionate burden on them. The current educational system is not inclusion oriented and cannot lead to full inclusion of children with disabilities. Although Flanders has recently enacted new legislation it is not clear to what extent the legislation will change the current practices by which schools refuse admission to students by claiming that they cannot provide the supports they need.

b. International standards on inclusive education

61. The European Social Rights Committee (“the ESRC”) has repeatedly stated that the Charter is a living instrument, which must be interpreted in accordance with developments in the national laws of the Council of Europe member states as well as relevant international instruments.²¹

62. The right to education for all children with disabilities has been the subject of many international instruments, most of which Belgium has ratified. These include:

- UN Convention on the Rights of Persons with Disabilities²²;
- UN Convention on the Rights of the Child²³;
- International Covenant on Economic, Social and Cultural Rights²⁴;
- European Convention for the Protection of Human Rights and Fundamental freedoms.²⁵

i. United Nations Convention on the Rights of Persons with Disabilities (“UN CRPD”)

²¹ See, for example, *World Organisation against Torture (OMCT) v. Greece*, Complaint no. 17/2003, decision of 26 January 2005, para 31.

²² UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, Article 24.

²³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 23.

²⁴ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976; Article 2(2) and Article 13.

²⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by Protocols respectively*; Article 14 and Article 2 of Protocol 1.

63. Belgium ratified the UN CRPD with the consent of the Flemish and other communities with no reservations on 2 July 2009 and declared that the treaty is equally binding on all communities and regions within the country, including the Flemish community.²⁶ The CRPD specifically states in Article 4(5) that its provisions shall extend to all parts of federal states without exceptions.

64. Article 24 of the CRPD lays out States' responsibilities in the area of education for people with disabilities. Section 1 describes the objectives of inclusive education, which include the "full development of human potential and sense of dignity and self-worth"; the development of the "personality, talents and creativity" of people with disabilities; and effective participation in free society.²⁷

65. Sections 2-5 describe the particular responsibilities of States. Section 2 reads: "In realizing this right, States parties should, *inter alia*, 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 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 individualised support measures are provided in environments that maximize academic and social development consistent with the goal of full inclusion."²⁸

66. Section 5 lays out the right of persons with disabilities to access tertiary education, vocational training and lifelong learning "without discrimination and on an equal basis with others."

67. In its concluding observations on States parties, the Committee on the Rights of Persons with Disabilities ("the CRPD Committee") has stressed the importance of establishing education policy that guarantees the right to inclusive education for everyone, including people with disabilities, and has spoken out against special schools. In its observations on China, the CRPD Committee stressed that "the concept of inclusion is one of the key notions of the CRPD and should be especially adhered to in the field of education."²⁹ The CRPD Committee recommended that China "reallocate resources from the special education system to promote the inclusive education in mainstream schools, so as to ensure that more children with disabilities can attend mainstream education."³⁰ In its observations on Hungary, the CRPD Committee reiterated that "denial of reasonable accommodation

²⁶ UN Treaties Collection, chapter IV, § 25, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec.

²⁷ UN Convention on the Rights of Persons with Disabilities, article XXIV, § 1.

²⁸ *Ibid.*, § 2.

²⁹ UN Committee on the Rights of Persons with Disabilities, Concluding Observations on China, CRPD/C/CHN/CO/1, para. 36.

³⁰ *Ibid.*

constitutes discrimination.”³¹ The CRPD Committee has also declared that “the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realization,” and recommended that Spain “ensure that the parents of children with disabilities are not obliged to pay for the education or for the measures of reasonable accommodation in mainstream schools.”³² The CRPD Committee has also called for enhanced efforts to move away from segregated schools to an inclusive model of education.³³

68. In its first report to the CRPD Committee, Belgium acknowledged that the Flemish system of education for students with disabilities is not inclusive: “[t]he development of special education during the past 40 years has the effect that, to a large extent, students with disabilities are supported in a non-inclusive education system: 0.78% (nursery school), 6.79% (primary) and 4.24% (secondary).”³⁴

69. The ECSR has acknowledged the CRPD as the standard for disability rights: “With regard to international law, the Committee notes that the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006, which has already been signed and ratified by over 80 states and came into force on 3 May 2008, reflects existing trends in comparative European law in the sphere of disability policies.”³⁵

ii. Convention on the Rights of the Child (“the CRC”)

70. In the context of children, the right to equal opportunities in education is specifically reiterated and reaffirmed in the CRC.³⁶ The right to education is set out in Articles 28 and 29 of CRC, and the right of children with disabilities to effectively access education is set out in Article 23. Article 2 of the CRC ensures that children enjoy their human rights “without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status,” thus guaranteeing the right to education to all children.

71. The Committee on the Rights of the Child has repeatedly emphasized the importance of effective access to and quality of inclusive education in a number of its concluding observations.³⁷ The State party must “ensure that all children with disabilities have access, in

³¹ UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Hungary, CRPD/C/HUN/CO/1, para. 41.

³² UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Spain, CRPD/C/ESP/CO/1, para. 44.

³³ UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Argentina, CRPD/C/ARG/CO/1, para. 38; UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Tunisia, CRPD/C/TUN/CO/1, para. 32; UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Paraguay, CRPD/C/PRY/CO/1, para. 58.

³⁴ Belgium's initial report to the CRPD, CRPD/C/BEL/1, para. 108).

³⁵ *FIDH v Belgium*. Complaint no. 75/2011, para. 112.

³⁶ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990. The Convention explicitly prohibits discrimination on the grounds of disability, recognises the right to education of children with disabilities and provide for free primary education for all (see in particular Articles 2(1), 23 and 28 of the Convention).

³⁷ Committee on the Rights of the Child, Concluding Observations on Guyana, CRC/C/GUY/CO/2-4, para. 45; Committee on the Rights of the Child, Concluding Observations on Namibia, CRC/C/NAM/CO/2-3, para. 52; Committee on the Rights of the Child, Concluding Observations on Canada, CRC/C/CAN/CO/3-4, para. 59; Committee on the Rights of the Child,

all provinces and territories, to inclusive education and are not forced to attend segregated schools only designed for children with disabilities.”³⁸

72. In its most recent Concluding Observations on Belgium, the CRC expressed its concern at “continuous discrimination suffered by children with disabilities”³⁹ and urged Belgium to “take more practical actions to ensure inclusive education for children with disabilities.”⁴⁰

iii. International Covenant on Economic, Social and Cultural Rights (“the ICESCR”)

73. Although international treaties providing for the right to equality of educational opportunities do not explicitly determine the substance of the right to education, some authoritative guidance is provided by the UN Committee on Economic, Social and Cultural Rights (*hereinafter* “CESCR”).

74. The CESCR has elaborated an authoritative interpretation of the right to education under the ICESCR in its General Comment No. 13 on the Right to Education. In this General Comment, the CESCR lays down that in order to meet international standards, any education provided by states must satisfy the criteria of availability, accessibility, acceptability and adaptability.

75. The principle of *availability* means “functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.”⁴¹

76. To satisfy the requirement of *accessibility*, “educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the state party”.⁴² Non-discrimination is an important aspect of accessibility and requires education to “be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds”.⁴³

77. In terms of *acceptability*, “the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) [of the ICESCR] and such minimum educational

Concluding Observations on Austria, CRC/C/AUS/CO/3-4, para. 58. These are only a few examples of the CRC’s emphasis on inclusive education.

³⁸ UN Committee on the Rights of the Child, Concluding Observations on Canada, CRC/C/CAN/CO/3-4, para. 60).

³⁹ UN Committee on the Rights of the Child, Concluding Observations on Belgium, CRC/C/BEL/CO/3-4, para. 31).

⁴⁰ *Ibid.*, para 55.

⁴¹ CESCR General Comment No. 13: the Right to Education, para 6.

⁴² *Ibid.*

⁴³ *Ibid.*

standards as may be approved by the State”.⁴⁴ According to Article 13(1) of the ICESCR, “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. ... [Further] education shall enable all persons to participate effectively in a free society, [and] promote understanding, tolerance and friendship among all nations.”⁴⁵

78. In order to satisfy the requirement of *adaptability*, the education provided by states “has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.”⁴⁶

79. In each of these categories, states should respect, protect, and fulfil the right to education. It is also clear from these criteria that the term ‘education’ is used in international instruments to refer to formal institutional instruction.

80. The ECSR recalled this framework developed under the ICESCR in *MDAC v Bulgaria* and acknowledged that all education provided by states must fulfil the criteria of availability, accessibility, acceptability and adaptability.⁴⁷

iv. UN Special Rapporteur on the Right to Education

81. The UN appointed a special rapporteur on the right to education to “report on the status, throughout the world, of the progressive realization of the right to education... and the difficulties encountered in the implementation of this right.”⁴⁸

82. The UN Special Rapporteur has continuously insisted on the promotion of the principle of adaptability, emphasising that “education has to be adapted to each child rather than forcing children to adapt to whatever schooling has been designed for them.”⁴⁹ Also, according to the Special Rapporteur, “the objective of inclusiveness, that is, integration of learners with disabilities in mainstream schools has imposed upon schools and teachers the need to adapt to learners with divergent abilities and needs.”⁵⁰

83. The Special Rapporteur also referred to a number of domestic court decisions that can be used in determining the content of the provision of education on a non-discriminatory basis to children with disabilities. For example, the Supreme Court of Canada has stated that the exclusion of a disabled person from mainstream society is a product of societal constructions based on the “mainstream” attributes to which disabled persons will never be able to gain

⁴⁴ *Ibid.*

⁴⁵ Article 13(1) of the ICESCR.

⁴⁶ CESCR General Comment No. 13: the Right to Education, para 6.

⁴⁷ *Mental Disability Advocacy Center (MDAC) v Bulgaria*, Complaint No. 41/2007, decision on the merits of 3 June 2008, para. 37.

⁴⁸ Commission on Human Rights Res. 1998/33, P 6, in U.N. Econ. & Soc. Council [ECOSOC], Official Records 1998, Supp. No. 3, Commission on Human Rights, Report on the 54th Session, ch. II(A), at 124-26, U.N. Doc. E/CN.4/1998/177 (April 24, 1998). Katarina Tomaševski was appointed the first rapporteur in 1998. Currently, the Special Rapporteur on the Right to Education is Kishore Singh.

⁴⁹ Katarina Tomaševski (UN Special Rapporteur on the Right to Education), *Right to Education Primers No. 3. Human rights obligations: making education available, accessible, acceptable and adaptable*, 2001, p. 31.

Available at http://www.right-to-education.org/content/primers/rte_03.pdf (last accessed on 13 February 2007).

⁵⁰ *Ibid.*, p. 32

access.⁵¹ The Supreme Court of Canada explicitly stated that discrimination is caused by “failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation.”⁵² The Court held that the central purpose of non-discrimination is the recognition of the actual characteristics and the condition of a disabled individual, and reasonable accommodation of these characteristics.⁵³

84. As to the form of education most appropriate to children with disabilities, the Special Rapporteur cited a decision of the German Federal Constitutional Court which concluded that a general exclusion of disabled children from mainstream schools cannot be constitutionally justified and that “education should be integrated, providing special support for disabled pupils if required, so far as the organizational, personal and practical circumstances allow this. This reservation is included as an expression of the need for the State to consider all the needs of the community in carrying out its duties, including the financial and organizational factors.”⁵⁴

85. The Special Rapporteur also stressed the need to apply human rights correctives to resource allocation within the governmental obligation to ensure that funding is available for education of children with disabilities.⁵⁵ In 2007, the Special Rapporteur emphasised in his report for the Human Rights Council that the practice of separating students with disabilities can lead to greater marginalisation from society and entrench discrimination.⁵⁶

86. In order to meet these international standards, any ‘education’ provided by the Respondent Government must satisfy the requirements of availability, accessibility, acceptability and adaptability, notwithstanding the national cultural specifics of educational system. In particular, it has to be adapted to meet the specific needs of children with disabilities and to be accessible to ensure their inclusion in the education system.

v. *Other international standards*

87. As early as in 1960 the UN education body – the UNESCO, realised the importance of inclusive education, thus preparing for signatures and ratifications the Convention against Discrimination in Education. Even though Belgium is not a Member to this Convention, it may be argued that the provisions of the Convention have found their way into the customary international law. Even though the prohibited grounds for discrimination in the Convention does not include disability, the UNESCO itself interprets it as setting standards for inclusive education of children with disabilities.⁵⁷

⁵¹ Supreme Court of Canada, *Eaton v. Brant County Board of Education*, [1997] 1, S.C.R., 241, para. 67. Cited in Katarina Tomaševski, *Right to Education Primers No. 3*, see supranote 30, p. 32.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Federal Constitutional Court of Germany, Decision of 8 October 1997, 1 BvR 9/97. Cited in Katarina Tomaševski, *Right to Education Primers No. 3*, see supranote 30, p. 33.

⁵⁵ Katarina Tomaševski, *Right to Education Primers No. 3*, supranote 30, p. 33.

⁵⁶ Vernor Muñoz, “The right to education of persons with disabilities, Report of the Special Rapporteur on the right to education, 2007, A/HRC/4/29, paragraph 11

⁵⁷ See e.g. <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/inclusive-education/people-with-disabilities/>, last accessed 4 November 2013

vi. Regional standards

88. As a member State of the Council of Europe, the Respondent Government should also follow the Council of Europe's Committee of Ministers' Recommendation (1992)6 on a coherent policy for people with disabilities, the aim of which is to enable "all people who are disabled or are in danger of becoming so, regardless of their...degree and severity of disablement" to "exercise their rights to full citizenship and have access to all institutions and services of the community including education."⁵⁸

89. Furthermore, the Council of Europe adopted its Disability Action Plan 2006 – 2015.⁵⁹ This important Council of Europe policy document establishes a Europe-wide strategy to combat disability discrimination and emphasises access to education for children with disabilities in mainstream settings. It aims to ensure that "all persons, irrespective of the nature and degree of their impairment, have equal access to education" and "that disabled people have the opportunity to seek a place in mainstream education by encouraging relevant authorities to develop educational provision to meet the needs of their disabled population."⁶⁰

90. In 2010, the Parliamentary Assembly of the Council of Europe adopted resolution no. 1761 (2010) Guaranteeing the right to education for children with illnesses or disabilities and reaffirmed that, "Wherever possible, children with disabilities should receive education and vocational training – in all phases of their schooling – within the schools attended by other children and they should receive the support required to facilitate their adaptation to regular education or vocational training within the mainstream systems. Where special schools or units are deemed necessary or appropriate, these special schools or units should be linked to regular schools and should be operated as resource centres for their local communities."⁶¹

91. The Committee of Ministers of the Council of Europe recently emphasised the importance of inclusive education for ensuring full inclusion in society of children and young people with disabilities in its recent Recommendation CM/Rec(2013)2.⁶²

92. The Charter of Fundamental Rights of The European Union provide for the right to education under Article 14The right to education is framed positively: "everyone has the right to education". Under Article 26, the Charter explicitly recognises the right of persons with disabilities to integration, stipulating that "the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community." A State's system of inclusive education should be indeed considered as such a measure.

⁵⁸ See Recommendation (1992)6 of the Committee of Ministers to Member States on a Coherent Policy for People with Disabilities, adopted by the Committee of Ministers from 9 April 1992, part I.2., available at <https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=602412&SecMode=1&Admi n=0&Usage=4&InstranetImage=43361> (last accessed on 13 February 2007).

⁵⁹ Recommendation (2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

⁶⁰ *Ibid.*, Article 3.4.2 ii..

⁶¹ Resolution of the Parliamentary Assembly of the Council of Europe no. 1761 (2010) Guaranteeing the right to education for children with illnesses or disabilities, para. 5.

⁶² Recommendation CM/Rec(2013)2 of the Committee of Ministers to member states on ensuring full inclusion of children and young persons with disabilities into society. See paras. 13-15 in particular.

93. This conclusion is in full conformity with other EU documents which emphasise especially the relation between inclusive education and employment. In its 2007 Opinion of the European Economic and Social Committee on Equal opportunities for people with disabilities, the Committee noted that “without inclusive education provided for disabled children and youth, integration into the labour market would be difficult to achieve. Improving access to education for people with disabilities should become a priority for forthcoming action plans and strategies for people with disabilities.”⁶³

IV. THE LAW OF THE REVISED SOCIAL CHARTER

a. Article 15 read together with Article 17 of the Charter

94. The Mental Disability Advocacy asks the Committee to find violations of Articles 15 and 17 of the Charter and of Article E in relation to these articles against Belgium for failing to ensure that all children with disabilities have access to mainstream education with supports to ensure their inclusion..

95. Article 15 of the Revised Charter, titled “The right of persons with disabilities to independence, social integration and participation in the life of the community” insofar as relevant, reads as follows:

“With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

(1) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible, or, where this is not possible, through specialised bodies, public or private.

(2) to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services.”

96. Article 17 of the Revised Charter, titled “The right of children and young persons to social, legal and economic protection”, in its relevant parts reads as follows:

“With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities,

⁶³ Opinion of the European Economic and Social Committee on Equal opportunities for people with disabilities, (2007/C 93/08), para 3.1.2.

the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1.(a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose.

(b) (...)

(c) (...)

2. to provide to children and young persons a free primary and secondary education as well as to encourage their regular attendance at schools.”

97. Article 15, therefore, guarantees the right of children with disabilities to inclusive education, while Article 17 obligates the state to provide for the establishment or maintenance of institutions and services sufficient and adequate for this purpose, providing all children with a free primary and secondary education.

98. The ECSR has already seen these two provisions to be inseparable when looking into the right of children with a certain disability (autism) to inclusive education.⁶⁴ The present complaint being broader insofar as pertaining to children with any sort of intellectual disability or with higher support needs, but still focusing on the right of children to be included into mainstream education, the Complainant does not see any reason for the Committee to depart from its previous findings, and considers that the present complaint too justifies observation of the right to inclusive education through the prism of both the provision of Articles 15 and 17 of the Revised Charter.

99. According to the ECSR, “the aim and purpose of the Social Charter, being a human rights instrument, is to protect rights not merely theoretically, but also in fact” (*International Commission of Jurists v. Portugal*, Application no. 1/1998, 10 September 1999, para. 32. Thus, rights recognised by the law must be fully implemented to meet the Social Charter’s requirements and those of other international instruments.

100. The ECSR has, furthermore, established that primary responsibility for implementing the Charter rests with national authorities (*FIDH v. Belgium*, Complaint No. 62/2010, decision on the merits of 21 March 2012, §§54 and 55; *The Central Association of Carers in Finland v. Finland*, Complaint No. 70/2011, decision on the merits of 4 December 2012, §55; *The Central Association of Carers in Finland v. Finland*, Complaint No. 71/2011, decision on the merits of 4 December 2012, §45).

101. When it comes to education, the ECSR has emphasised that in order for an educational system to be in line with the requirements of the Charter, it must be **available, accessible, acceptable and adaptable**.⁶⁵

102. As may be seen from the descriptions of the Flemish system, it is none of those. When it comes to children with disabilities, only some of them have direct access to the mainstream

⁶⁴ *Autism Europe v. France*, Complaint No. 13//2000, decision on the merits of 4 November 2003, §47

⁶⁵ *MDAC v Bulgaria*, Complaint no. 41/2007, decision on the merits of 3 June 2008, §37

educational system, and those are only the children with physical or sensory disabilities, as children with intellectual disabilities, even if included, need to spend a certain period of time in special educational institutions. Further, this is only for children with mild disabilities.

103. Children with moderate or severe disabilities, however, are unlikely to be included in mainstream education. While there are 46,091 children with disabilities educated in segregated schools, only 100 places are secured for their inclusion in mainstream education. That's just over 0,2% of children being given a chance to be included. By locking the number of children, who have anything other than mild disability, who can participate in the inclusive education programmes to the "lucky one hundred", the Government has thus effectively relegated all the other children with disabilities to segregation and exclusion. Therefore, inclusive education is neither available nor accessible for children with anything other than a mild form of disability.

104. It is true that the right to inclusive education from Article 15§1 of the Charter is not absolute, but is subject to limitations, where inclusive education is not possible. This provision, however, needs to be read together with the relevant provisions of the specialised international treaty, the CRPD, which Belgium has ratified, and thus accepted to adhere to.

105. By ratifying both the Revised Charter and the CRPD, Belgium has accepted to fully implement their provisions and, moreover, accepted to subordinate the norms of its domestic law to the scrutiny of the Treaty. By the act of ratification of the CRPD its Article 24 was immediately imposed over the domestic norms. The Committee has continuously taken into consideration the provisions of the CRPD when evaluating Members' performance under Article 15 of the Charter, including its recent case law.

106. The CRPD explicitly requires States Parties to implement inclusive education systems that ensure reasonable accommodations for children with disabilities. Inclusive education promotes the education of children with disabilities in general education programs. Research suggests all children benefit from inclusive education programs, and therefore every child is better afforded their essential right to education. Inclusive education benefits communities, families, teachers, and students by providing knowledge and understanding of disability related issues. Inclusive education ensures children with disabilities attend school with their peers and teaches them life skills. Communities also benefit from inclusive schools by gaining more knowledge and understanding about disabilities. The inclusion of children with disabilities in general schools introduces children with disabilities into the local communities and neighbourhoods and helps to break down barriers and prejudice. Communities become more accepting of differences, and everyone benefits from a friendlier, open environment. Schools benefit from inclusive education programs as well.⁶⁶

⁶⁶ CRS/Vietnam, Inclusive Education for Children with Disabilities, available at http://issuu.com/catholicreliefservices/docs/edhowto_vietnam, last accessed 4 November 2013, as per Allison de Franco, The New World of Inclusive Education: A Review of the Convention on the Rights of Persons with Disabilities and the American Experience, available at http://www.stimson.org/images/uploads/research-pdfs/The_New_World.pdf, last accessed 4 November 2013.

107. The concept of inclusive education focuses on each individual child's ability to learn rather than treating all the children the same. Teachers are able to instruct each child in a more individualised way. All children, with and without disabilities, benefit from a teaching style catered to their individual way of learning. Inclusive education also features different teaching techniques such as drawing, singing, and participatory activities. Studies suggest young children retain more information when they are "involved" in learning rather than just lectured at by teachers. Inclusive education also allows teachers to become more dynamic in the classroom, and thus makes school more enjoyable for children and teachers.⁶⁷

108. However, in the current Flemish educational system, schools are free to refuse enrolment of children with disabilities, blankly relying on the "insufficient capacity" ("draagkrachtafweging") ensured in GOK. The administrative body responsible for reviewing denials of entry into mainstream schools, the Pupils' Rights Committee, has taken the position that a school's assertion of lack of capacity to provide the necessary supports can justify a refusal to accept the child.

109. The ECSR also considers that the effective enjoyment of certain fundamental rights requires a positive intervention by the state: the state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question.⁶⁸ The ECSR already held that "when it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter, the measures taken by the state to achieve the Revised Charter's aims must fulfil following three criteria: '(i) a reasonable timeframe, (ii) a measureable progress and (iii) a financing consistent with the maximum use of available resources.'⁶⁹ These criteria should be met cumulatively.⁷⁰ It also held that States Parties bear additional burden in relation to the rights of "groups with heightened vulnerabilities" and that they must also take "practical action to give full effect to the rights recognised in the Charter"⁷¹, while the "implementation of the Charter requires State Parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein."⁷²

110. Even though States have a wide margin of appreciation in the way in which they implement the Charter⁷³, recently the Committee confirmed that Article 15§1 of the Charter "does not leave States Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, **as this must clearly be a mainstream school.**"⁷⁴

⁶⁷ *Ibid.*

⁶⁸ European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §35.

⁶⁹ European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §37; Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53), as reemphasized in MDAC v. Bulgaria.

⁷⁰ Centre on Housing Rights and Evictions (COHRE) v. Croatia, Complaint no. 52/2008, decision on the merits of 22 June 2010, §82.

⁷¹ Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53).

⁷² International Movement ATD Fourth World v. France, Complaint No 33/2006, decision on the merits of 5 December 2007, §61.

⁷³ European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 37/2006, decision on the merits of 3 December 2007, §14.

⁷⁴ Action européenne des handicapés (AEH) v. France, Complaint no. 81/2012, decision on the merits of 11 September 2013, §71

111. In addition to clearly articulating that States must prioritise mainstream education for children with disabilities over separate education, the Committee also indicated in its decision in *AEH v. France* that such determinations must be made on a case-by-case basis.⁷⁵ The Flemish system of tracking children with disabilities and differentiating among types of disabilities for access to mainstream schools and supports is contrary to the Committee’s jurisprudence.

112. The Committee has already found Belgium to be in non-compliance with Article 15 of the Charter when it comes to inclusion of children with disabilities into the mainstream education in the Flanders region.⁷⁶

113. The Committee has repeatedly held that in the application of Article 17§2 of the Charter, the inclusion of children with disabilities in which arrangements are made to cater for their special needs should be the norm⁷⁷. The complainants are confident that the data submitted with the complaint are striking enough to convince the Committee that, unlike this standard, in Flanders, special education for children with intellectual disabilities is a norm, while their inclusion is an exception, and that, thus there has been a violation of both Article 15§1 and Article 17 §1 and §2.

b. Articles 15 and 17 read together with Article E of the Charter

114. The Committee has already observed that failure to include children with disabilities into mainstream education and the fact that such a failure is directly related to disabilities may constitute discrimination contrary to the guarantees of Article E of the Revised Charter.⁷⁸

115. The ECSR clearly established that “Article E prohibits discrimination on the ground of disability. Although disability is not explicitly listed as a prohibited ground of discrimination under Article E, it is adequately covered by the reference to “other status”.”⁷⁹

116. Belgium has already been criticized for its failures to improve the system of education for children with disabilities, and for the alarmingly disproportionate number of children with disabilities in Flanders being educated in specialised schools, with also a significant number of children who are not receiving any form of education at all, even though they are formally enrolled in the “educational system”.

117. It is obvious that the discrimination is direct, as it stems from Belgian, or more precisely, Flemish legislation, which allows for different treatment of children with disabilities in comparison with children who have no impediments. Furthermore, this distinction is largely unjustified, as the schools are only using a blanket approval from the law and decide not to include children with disabilities, sentencing them to segregation.

⁷⁵ *Ibid* §15

⁷⁶ 2012/def/BEL/

⁷⁷ See MDAC v. Bulgaria §35 and Autism Europe v. France, §49

⁷⁸ Autism Europe v. France, §50-54; MDAC v. Bulgaria, §51-54, AEH v. France, §132-145

⁷⁹ Autism Europe v. France, §51.

118. The CRPD having been ratified by Belgium and applying to all of the communities, is the standard to be applied by the school authorities throughout the country. Also the Charter requires that the type of school in which they will promote the independence, integration and participation of persons with disabilities must be a mainstream school which clearly put an obligation on the States to end practices that do not allow meaningful access to mainstream schools for large numbers of children.

119. Although Belgium may claim that it is realising the right of children with disabilities to be included in mainstream schools progressively, its failure to make any meaningful commitment to include children with disabilities, particularly children with intellectual disabilities and other disabilities that require higher level of supports, in mainstream education, solely based on the children's disabilities, constitutes discrimination as prohibited by Article E of the Charter.

120. While Flanders has recently enacted new legislation that is meant to allow inclusion of more children with disabilities in mainstream education, the legislation does not comply with the CRPD or with the Charter in that it perpetuates the exclusion of children with intellectual and other mental disabilities. There is currently no law or policy that will ensure the inclusion of such children by providing supports on an individualised basis in mainstream settings with timetables and measurable goals to assess progress.

V. CONCLUSION

121. In ratifying the Revised European Social Charter, Belgium signified that it intended to fully ensure rights of persons with disabilities to independence, social integration and participation in the life of the community and especially children and young persons to social, legal and economic protection. However serious systemic flaws prevent children with intellectual and psycho-social disabilities to access inclusive education and sentence them to segregation. This situation concerns thousands of children with mental disabilities every year and as a matter of urgency it requires a structurally organised solution.

122. For these reasons, the Mental Disability Advocacy Center asks the European Committee of Social Rights to find:

- that Belgium has violated and continues to violate Article 15§1 of the revised European Social Charter in regard to children with intellectual and other mental disabilities who are denied access to mainstream education and to the supports necessary to ensure their inclusion
- that Belgium has violated and continues to violate Article 17§1 by failing to provide education and training for children with intellectual and other mental disabilities who are denied access to mainstream education and to the supports necessary to ensure such inclusion

- that Belgium has violated and continues to violate Article 17§2 of the revised European Social Charter in regard to children with disabilities who are excluded from free primary and secondary education

- that Belgium has violated and continues to violate Article E read in conjunction with Article 15 and Article 17 of the revised European Social Charter.

123. The Mental Disability Advocacy Center also asks the Committee to invite the Committee of Ministers to recommend Belgium pay the sum of 10.000 euros (provisional estimate) to the complainant by way of costs. A detailed budget will be supplied to the Committee in due course.



DECLARATION AND SIGNATURE

I hereby declare that, to the best of my knowledge and belief, the information the applicant Mental Disability Advocacy Center has given in the present application form is correct.

24 April 2014
Budapest, Hungary

A handwritten signature in blue ink, appearing to be "Oliver Lewis", written over a horizontal line.

Oliver Lewis
Executive Director
Mental Disability Advocacy Center

