



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

19 November 2014

Case Document No. 2

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

**SUBMISSIONS OF THE
GOVERNMENT ON ADMISSIBILITY
AND THE MERITS**

Registered at the Secretariat on 12 November 2014

EUROPEAN COMMITTEE ON SOCIAL RIGHTS

COLLECTIVE COMPLAINT SUBMITTED BY THE MENTAL DISABILITY ADVOCACY
CENTER (MDAC) AGAINST THE KINGDOM OF BELGIUM (109/2014)

SUBMISSIONS OF THE KINGDOM OF BELGIUM ON THE MERITS

INTRODUCTION

The collective complaint 109/2014 submitted by the Mental Disability Advocacy Center (MADC) v. the Kingdom of Belgium regarding certain issues of Inclusive Education for Children with Intellectual and Psycho-social Disabilities is focusing exclusively on the Flemish Community of Belgium.

MDAC argues that the Flemish Community has failed to establish a reasonable timeframe, to measure progress and to finance full inclusion of children with disabilities into regular education. MDAC argues that accordingly, the Flemish Community is in violation of the obligations undertaken by Belgium in Articles 15 and 17 of the Revised Social Charter, as well as with Article E in relation to Articles 15 and 17 of the Revised Social Charter, read in conjunction with the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

Originally, when Belgium signed the Social Charter in 1961 (which it ratified in 1990) "education" was still a competence of the national government. A Belgian law, the Act on special education, adopted on 6 July 1970, implemented at that time relevant obligations under the original Social Charter. Today, Belgium has been transformed in a federal State, with Communities and Regions. All these authorities have respective competences in specific domains.

According to the Belgian Constitution, the Flemish Community ("*Vlaamse Gemeenschap*") has exclusive competence regarding the matter pertaining to this collective complaint of MDAC. It has therefore been asked to provide the content of the Belgian submissions on the merits of the case in this regard.

The Flemish Vice-Minister-President, Ms. Hilde Crevits, who is also Flemish Minister for Education, has provided on behalf of the Flemish Government the following comments, to which the Kingdom of Belgium fully subscribes:

1. General situation of the education system for pupils with disabilities in the Flemish Community

MDAC argues that 85% of Flemish school children who are in need of some sort of reasonable educational accommodation, attend special education and are hence not integrated in the regular educational system. It is true that the Flemish educational system for pupils with disabilities comprises two parallel systems: (1) special education and (2) integrated education. It is also a fact that the majority – although not as many as 85% – of pupils with disabilities (or more general 'special educational needs') attend special education. In the following paragraphs we shall explain how our educational system has developed in this way and indicate the direction we intend to develop towards.

1.1 A historical tendency favouring special education

On 6 July 1970 the Act on special education was adopted to ensure a high standard of education for pupils with disabilities. Under this Act, schools were established for children and young people aged 2.5 to 21 years¹ who are temporarily or permanently directed towards special education because of their educational needs and possibilities. This way, the Flemish Government was implementing the original Social Charter, which Belgium signed in 1961 and ratified in 1990. Article 15 of the original Social Charter encompassed the obligation *"to take adequate measures for the provision of training facilities, including, where necessary, specialised institutions, public or private."*

For four decades special education continued to develop and has hence influenced the Flemish educational system.

Firstly, special education has ensured the right to education for children and young people with disabilities in the Flemish Community. Only a very limited number of children and young people are unable to attend education because of their very complex problems (less than 0.1% of school-aged children). These non-attenders have received an exemption of compulsory schooling. The assessment-method of the applications for exemption is currently being evaluated. An expert panel has been tasked to develop a scientifically and socially responsible assessment framework, which will be used as a basis for the decisions in the future. The expert panel will base itself on international comparison, literature, existing practice and scientific research. Recent developments in welfare, such as the evolution of facilities for persons with disabilities to Multifunctional Centers, will also have an impact on the group of children and young people in boarding and semi-boarding schools for non-attenders.

Another consequence of establishing a specialised educational system is that these special schools - through their years of experience - have built up essential expertise and means to provide education to pupils with disabilities. Accordingly, most pupils with disabilities attend these special schools for their known expertise and accommodations. Section 1.3 provides an overview of the number of pupils with disabilities in mainstream and special education.

1.2 Integrated education

In 1986, the normalisation and integration idea led to the adjustment of the Act of 6 July 1970 on special education, which was thereafter called the 6 July 1970 Act on special and integrated education. From then on, children and young people with

¹ If the welfare sector has no available care options for the pupil, he/she can stay on in specialised education beyond the age of 21.

disabilities got the opportunity to attend mainstream education under the guidance of a special school.

The number of pupils with disabilities attending mainstream schools with this support and guidance of special schools has continuously been rising since its introduction. The number of pupils in integrated education (GON) increased from 1,522 pupils in the 1999-2000 school year to around 15.000 pupils in the 2012-2013 school year. However, their percentage share in the total number of pupils in nursery, primary and secondary education remains restricted. Pupils with moderate or severe mental impairments can also be enrolled in mainstream primary and secondary education (ION-project). In the school year 2013-2014 all 111 applications were accepted.

Both forms of support, GON and ION, were subject of a scientific evaluation in 2012. The results and recommendations of this evaluation will be discussed with stakeholders and used to develop a new support-framework for pupils with special educational needs in mainstream schools.

1.3 Situation today: working towards more inclusion

Although the Flemish Government is aware that currently most of the pupils with disabilities go to special schools, the following paragraphs will clarify some of our statistics. During the school year 2012-2013 the following numbers were registered:

	Nursery school		Primary school		Secondary school	
	Number	%	Number	%	Number	%
Special education	2.023	0.75	28.481	6.77	20.177	4.60
Integrated education (GON)	1.620	0.61	4.905	1.16	5.235	1.19
Mainstream education (including GON-pupils)	265.953	99.25	392.351	93.23	418.817	95.40
Total	267.976	100.00	420.832	100.00	438.994	100.00

The numbers of pupils in integrated education (GON) in this table are only based on the number of administratively registered pupils. However, in reality there are two groups of pupils which do also enjoy integrated education but are not included in these numbers:

- (1) First group: Pupils with a moderate disability who receive special support and guidance in primary and secondary school, are only registered as pupils in integrated education for the first two years. After these 2 years, most of these pupils remain in mainstream education, but are no longer registered as integrated pupils.
- (2) Second group: Pupils with autism spectrum disorder form an exception to this first group. This group does continue to receive support on the basis of extra budget. This group comprises about 3.000 pupils.

The total number of pupils in integrated education (GON) – including these two unregistered groups - is estimated to be at least 15.000. Accordingly, taking into account this number, it is so that not 85% (as MDAC argues) but about 75% of all pupils with disabilities attend special schools.

The Flemish Government is aware that the majority of pupils with disabilities attend special schools as a result of an original policy which held that the best education for these pupils could be offered by special schools. However, since 1986 the Flemish Government is investing in integrated education, gradually making its educational system more inclusive. Transforming the Flemish educational system into an inclusive system requires a lot of investment and time. This year, with the new legislative act of the Flemish Parliament concerning measures for pupils with special educational needs: the M-Decree, the Flemish Government took a first important step towards a more inclusive educational system. The tools and instruments contained in this decree will be discussed in the following section.

2 A new Flemish Parliament Decree regarding measures for pupils with special educational needs: the M-Decree

After years of debate about fundamental changes of the school system for pupils with disabilities and international developments such as the CRPD and the European revised Charter, the Flemish Parliament voted a new Parliament Decree on March 21st 2014 regarding measures for pupils with special educational needs² (the M-Decree³). With this Decree, the Flemish Government chose to develop its educational system towards inclusion.

The M-Decree contains provisions, tools and instruments which take steps towards inclusive education. Accordingly, the Decree will deal with many of the situations described in the complaint. In its advice on the M-Decree, the Council of State emphasised that, following the ratification by Belgium of the CRPD in 2009,

² Official name: "*Het Decreet betreffende maatregelen voor leerlingen met specifieke onderwijsbehoeften*"

³ Decrees are the legislative acts adopted by the regions and communities. They have the same legislative value as laws adopted by the federal legislator.

inclusive education for pupils with disabilities should be the rule and not the exception. The Council further pointed out that, following Article 4 (2) CRPD, this inclusive education should be realised progressively, taking into account the Flemish Government's available resources.

2.1 Transition from a medical to a social model of disability

The M-Decree contains a number of provisions that support the transition from the medical to a social model of disability:

- 1) The decree provides a definition of 'pupils with special educational needs' which is based on the social model of disability and the framework of the International Classification of Functioning, Disability and Health for Children and Youth (ICF-CY). Pupils with special educational needs are pupils with long-term and important participation problems owing to the combination of one or more functional impairments at the mental, psychological, physical or sensory level, restrictions in the performance of activities, and personal and external factors.
- 2) The identification of these pupils will not only concern on the pupil's limitations, but will rather focus on an analysis of the educational and supportive accommodations needed and of the effectiveness of the measures already taken in the mainstream school. This analysis concerns the following elements:
 - a. whether the different stages of the care continuum for the pupil concerned were completed;
 - b. whether, after a process of action-oriented cooperation involving the pupil and his or her parents, it is concluded that the accommodation (including remediation, differentiation, compensation and dispensation measures) required to keep the pupil within the joint curriculum, is either disproportionate or insufficient;
 - c. whether the pupil's educational needs were described in application of a classification system which is scientifically underpinned and based on an interactional vision and social model of disability;
 - d. whether the educational needs cannot just be attributed to an SES characteristic (social-economical-status) of the pupil;

- e. which type applies to the pupil. For a number of types this is still based on medical criteria, among other things depending on a differentiated support system and financing mechanisms.

2.2 The obligation to provide reasonable accommodations in mainstream education

The M-Decree legally anchors the obligation to provide reasonable accommodations in mainstream education in the mission statement of mainstream primary and secondary education and the obligation for schools to work together with the pupil guidance centre and parents in a systematic, planned and transparent way. Comparable measures are taken in the legislation about higher education.

A few brochures and action oriented diagnostic protocols have already been compiled to familiarise schools with this. With the M-Decree we also invest in skills development by appointing an additional team of educational advisers.

2.3 New rules regarding the right to enrolment in mainstream schools

The M-Decree revises the rules regarding the right to enrol for pupils with special educational needs, this revision will enter into force on 1 January 2015. The M-Decree stipulates that pupils who are capable to participate in the joint curriculum when provided with reasonable accommodations, are fully entitled to enrol in mainstream education. The use of reasonable accommodations does not affect the pupils qualification for regular certification. Legally speaking, this is a major step forward for pupils with disabilities who are currently attending mainstream education within the framework of integrated education.

Today the Pupil Guidance Centres (CLBs - *Centra voor Leerlingenbegeleiding*) have the authority to issue a report of special educational needs (certificate and assessment report) which gives right to enrol in a school for special education and access to integrated education.

In the future, GON-pupils will receive a motivated report. Accordingly, GON-pupils can continue to follow the joint curriculum in mainstream education with the needed reasonable accommodations. When the pupil requires an individually adapted curriculum, because the accommodations needed to follow the joint curriculum are inadequate or unreasonable, the pupil will receive a report which allows access to the special education.

Pupils who have a report which entitles them to an individual adjusted curriculum are enrolled by a mainstream school under a defeasance clause. The school can assess the reasonableness of the necessary accommodations. To that end it has to consult with the parents, the class council and the pupil guidance centre on the accommodation measures required to allow the pupil to make study progress on the basis of an individual adjusted curriculum.

If the school confirms that the accommodation is unreasonable, the school management board may annul the enrolment. The parents may call on the services of the pupil guidance centre and a local consultation platform to help them find a suitable school.

If the school considers the accommodation measures to be reasonable, the enrolment is finalised and the pupil qualifies for additional funding or subsidisation. This results in a legal framework for schools to deliberately abandon attainment targets and learning objectives and to include children and young people with disabilities in mainstream education who are in need of an individual adjusted curriculum.

The reasonableness of accommodations is assessed with the criteria set out in the Protocol of 19 July 2007 on the concept of reasonable accommodation in Belgium. These criteria and considerations include:

- Is the measure in question effective, and does it allow the person with a disability to participate?
- Does the measure neutralise the restrictive influence of the unadjusted environment on the individual's participation?
- Does the measure allow for the equal participation of the person with a disability?
- Does the measure ensure that the person with a disability can participate autonomously?
- Does the measure guarantee the safety of the person with a disability?
- When and whether an accommodation measure exceeds the limits of what is reasonable should always be assessed both in practice and in individual situations on the basis of a number of indicators:
 - o the financial impact of the accommodation, with account being taken of possible supporting subsidies and the financial standing of those who are obliged to provide the accommodation;
 - o the organisational impact of the accommodation;

- the frequency and duration to be expected of the use of the accommodation by one or more persons with a disability;
- the extent to which a person with a disability can actually participate as a result of the accommodation;
- the impact of the accommodation on the safety and opportunities for use by other users;
- the absence of an alternative.

2.4 Legal protection

When parents disagree with the school's decision on the enrolment, they can lodge a complaint with the Commission on Pupils' Rights ("*Commissie inzake leerlingenrechten*" or CLR). This Commission has been installed at the level of the Flemish Ministry of Education and Training and is composed of experts in equal treatment and educational law. The M-Decree reinforces this legal review procedure by adjusting the responsibilities, composition and consequences of the decisions taken by the Commission on Pupils' Rights. Harmonisation will also take place with those bodies that are charged with monitoring, following up and safeguarding the implementation of Article 33 (2) CRPD and Article 40 of the Flemish Parliament Decree of 10 July 2008 containing a framework for the Flemish equal opportunities and equal treatment policy. The adjusted procedure guarantees the involvement of (representatives of) persons with disabilities, education providers and staff in the decisions on the merits regarding complaints presented to it. The education inspectorate may be assigned by the Commission on Pupils' Rights to carry out an audit.

The data and information currently available to the Flemish Government does not reflect the total amount of refused admissions. The M-Decree ensures greater monitoring: parents need to make a formal admission so as to oblige schools to notify their decision on the enrolment in a formal manner. These formal notifications will allow the Flemish Government to get a realistic sense of the exact difficulty of enrolment in mainstream education for pupils with disabilities.

2.5 Support: a scheme of guarantee

MDAC criticises the M-Decree by alleging that it does not introduce new funding mechanisms which would allow schools or localities to increase the support for pupils with disabilities. Additionally, MDAC points out that the funding of regular schools for including pupils with disabilities has not increased.

It is true that schools of special education have more support available than regular schools. The alternative however, a differentiated financing system linked to the

pupil, is only tenable when the identification of those who qualify for additional funding can be done in an objective manner. The regular and supplementary resources which schools receive need to be taken into account when identifying this additional funding.

The M-Decree contains a scheme of guarantee regarding the funding for the support and accommodations of pupils with disabilities. The scheme of guarantee entails that when there is a realisation of a lower expenditure for special education in relation to the reference school year (school year before the implementation of the M-Decree), the freed resources for that year will be invested –via *envelop funding*⁴- in the support of the pupils with disabilities in the mainstream and special education. The goal is to realise inclusive education in collaboration with the special educational system, as we need its general and disability-specific expertise in mainstream education.

The calculation and allocation of envelopes between the mainstream and special education, and between the different schools, takes account of at least the following principles:

1° As to the allocation of envelopes between the mainstream and special education: the established shift of pupils from special to mainstream education due to the return from or reduced inflow in special education. This takes account of demographics;

2° As to the allocation of envelopes between schools of mainstream education: the relative attendance of students with a motivated report and a report for an individual adjusted curriculum;

3° As to the allocation of the envelopes between the schools of special education: the established shift of the populations of *typology students*.

Conclusion

The Flemish Government recognises the principle of inclusion and has debated on how to transform its educational system -which was constructed on an original idea of specialization, rather than inclusion- to an inclusive system. International developments, such as the ratification by Belgium of the revised Social Charter and the CRPD have driven this debate forward.

With the M-Decree the Flemish Government is making clear efforts towards inclusive education. The Flemish Government realises that it will take time to transform its current educational system, especially in the current economic climate

⁴ Envelop funding: a way of funding by which an organization receives a lump sum which it can freely use for its assignments/tasks.

with its scarce resources. The M-Decree opts for a progressive realisation of inclusive education by way of introducing the possibility to employ resources, expertise and people from special education to support pupils and teachers in mainstream education.

With this M-Decree and other related regulations, the Flemish Government is progressively realizing the social rights of persons with disabilities as set out in Article 4 (2) CRPD. It needs to be kept in mind that this progressive realisation takes account of the Flemish Community's' available resources. According to the said article of CRPD, States Parties to that instrument are required to progressively realise the social rights contained in their international obligations. At the core of this progressive realisation is the obligation to take appropriate measures towards the full realisation of these rights, to the maximum of their available resources. The realisation of social rights can be hampered by a lack of resources and can be achieved only over a period of time. This means, that a State's compliance with its obligation to take appropriate measures needs to be assessed in the light of the resources available to it.

The M-Decree will fully enter into force in September 2015 and needs some time to prove its effects. Once it has entered into force, the results and implementation will be monitored. This will be done, from the school year 2015-2016 onwards, by making an annual progress report and if needed, by taking additional measures and adjustments.

In the light of the above, the Flemish Government deplores that MDAC has filed this complaint without allowing the M-Decree to be fully implemented and respectfully requests the honourable members of the Committee to declare the complaint unfounded.

The Kingdom of Belgium whole-heartedly endorses this request of the Flemish Government.

A handwritten signature in black ink, appearing to read 'P. Rietjens', with a large, sweeping flourish extending from the end of the signature.

Paul RIETJENS

Agent of the Belgian Government before the Committee

Brussels, November 7, 2014