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

20 March 2017

**Case Document No. 1**

**International Federation for Human Rights (FIDH)  
and Inclusion Europe v. Belgium**  
Complaint No.141/2017

## **COMPLAINT**

**Registered at the Secretariat on 18 January 2017**



**European Committee of Social Rights**

**Complaint filed by the International Federation for Human Rights (FIDH)  
and Inclusion Europe v. Belgium**

## **I. INTRODUCTION**

This collective complaint has been brought in accordance with Article 1.b of the Additional Protocol to the European Social Charter providing for a system of collective complaints (ETS No. 58), which entered into force with regard to Belgium on 1 August 2003.

It alleges that, by failing to make sufficient efforts to promote the inclusion of children with mental disabilities in mainstream primary and secondary education provided in schools attached to the French Community (Wallonia-Brussels Federation), Belgium has failed to comply with the obligations resulting from Article E of the European Social Charter (non-discrimination), in conjunction with Articles 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community) and 17 (the right of children and young persons to social, legal and economic protection) of the revised European Social Charter.

This complaint is the counterpart for the French Community of collective complaint No. 109/2014, which was brought against Belgium on account of the inadequacy of the measures taken by the Flemish Community to ensure the right to inclusive education for children with mental disabilities. The coexistence of these two complaints is due to the fact that, within the Belgian federal state, education essentially comes within the competence of the federated entities, more specifically the Communities. From the viewpoint of international law, the state is the sole party responsible for the obligations entered into, regardless of the internal division of powers.

This complaint will explain the reasons why it is admissible (II). It will then go on to describe the circumstances that resulted in the complaint (III. Access to education in the French Community for children with disabilities). It will clarify why it is alleged that the situation in Belgium is not compliant with the requirements of the revised European Social Charter, recalling in this regard that the questions raised by the complaint have already been addressed by the European Committee of Social Rights, in connection with the examination of the regular reports submitted to it by Belgium, and by other bodies established at both the international and national levels (IV. The alleged violations). Finally, the last part of the complaint will show why the guarantee of inclusive education is important and refer to the international consensus that is emerging in this area with regard to international human rights law (V. Developments).

## **II. ADMISSIBILITY**

### **1. The complainant organisations**

The complainant organisations are (1) the International Federation for Human Rights (hereafter “FIDH”) and (2) Inclusion Europe.

(1) The International Federation for Human Rights (hereafter “FIDH”) is an international organisation for the defence of human rights and is included in the list of organisations that have the right to bring collective complaints before the European Committee of Social Rights. It has its registered office at 17 Passage de la Main d’Or, 75011 Paris, France.

Pursuant to Article 3 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, the international non-governmental organisations referred to in Article 1.b of the Protocol “may submit complaints in accordance with the procedure prescribed by the aforesaid provisions only in respect of those matters regarding which they have been recognised as having particular competence.”

The Statutes of the FIDH establish it as an association for the defence and promotion of all human rights at an international level. According to its Statutes, the vocation of the FIDH is to take action, including court proceedings or procedures before the bodies monitoring compliance with human rights, on an international level, with the aim of obtaining recognition of violations of fundamental rights. The FIDH has in the past been considered to have standing to introduce a collective complaint before the Committee in relation to Article 13 of the revised European Social Charter concerning the right to social and medical assistance (*FIDH v. France*, No. 14/2003); in relation to Article 16 of the revised European Social Charter on the right of the family to social, legal and economic protection and Article 30 on the right to protection against poverty and social exclusion (*FIDH v. Belgium*, No. 62/2010); and also in relation to Articles 13 to 16 and Article 30 of the revised European Social Charter concerning the lack of social, legal and economic protection against poverty and the social exclusion of disabled adults with complex needs and their family members resulting from the absence of reception and accommodation solutions (*FIDH v. Belgium*, No. 75/2011).

(2) Inclusion Europe (European Association of Organisations of Persons with Intellectual Disabilities and their Families) is a non-profit international association established in accordance with Title III of the Belgian Law of 27 June 1921 on non-profit associations, non-profit international associations and foundations. It has its registered office at 22 rue d'Arlon, 1040 Brussels, Belgium. According to Article 4.a of its Constitution and Bylaws, its aim is "to advance the interests of persons with intellectual disability, without regard to nationality, race or creed, by securing on their behalf, from all possible sources, the necessary support and services". For the purpose of achieving its aims, it may in particular "co-operate with the European institutions and organisations whose aim is to help persons with intellectual disability", and "employ such other means the General Assembly and Board of Inclusion Europe shall from time to time determine" (Article 5 of the Constitution).

## **2. The provisions alleged to have been violated**

The revised European Social Charter entered into force in relation to Belgium on 1 May 2004. Belgium filed a declaration (on 2 March 2004) under Article A, § 2 of part III of the revised European Social Charter, confirming that it considers itself to be bound by Articles 15 and 17 of the Charter, which guarantee respectively the right of persons with disabilities to independence, social integration and participation in the life of the community and the right of children and young persons to social, legal and economic protection. In accordance with Article E of the Charter, these guarantees must consequently be assured without discrimination.

The arguments that may be invoked in support of the violation of Articles 15§1 and 17§1, considered in isolation or read in conjunction with Article E, are so closely interlinked that it does not appear appropriate to the complainant organisations to distinguish between them. The right to inclusive education is indeed premised on the principle of equality: since disabled persons are fully-fledged citizens, they enjoy the same fundamental rights as others and must on this basis be able to receive an education within the same facilities, which have been adapted to their needs.

### III. ACCESS TO EDUCATION IN THE FRENCH COMMUNITY FOR CHILDREN WITH DISABILITIES

#### 1. Introduction

In the following paragraphs the organisations bringing this complaint will describe first of all how competence regarding education is divided in the Belgian State, including with regard to the inclusion of disabled children (2.). They will refer to the submissions in complaint No. 109/2014, currently pending, concerning the right to inclusive education in the Flemish Community (3.). Finally, they will describe the situation as regards the French Community, to which this complaint relates (4.).

#### 2. The division of competences within the Belgian State

According to Article 127, paragraph 1.2 of the Constitution, education is a competence which – subject to three exceptions<sup>1</sup> – is vested in the federated entities, specifically the Communities.

The Communities moreover have competence over policy for disabled persons pursuant to Article 128, paragraph 1 of the Constitution and Article 5, paragraph 1, II.4. of the Special Law of 8 August 1980 on institutional reforms. On the basis of Article 138 of the Constitution, the French Community however chose in 1993 to cede the power to exercise this competence to the Wallonia Region (within the territory of the French-speaking region) and the French Community Commission (COCOF) (within the territory of Brussels). This transfer of competence over disabled persons to the COCOF had the defect, in particular, of severing the link between the respective policy and that relating to education, the latter remaining under the competence of the French Community.<sup>2</sup>

With regard to the matter at issue here, it was clearly on the basis of its competence over education that the French Community acted to establish a framework for the schooling of disabled children. Accordingly, this complaint concerns the acts and omissions of the French Community in this area.

Combating discrimination falls under “the competence of the federal authorities or the federated entities, depending upon the competence exercised”.<sup>3</sup> In the case of competence over education, the applicable legislation is the Decree of the French Community of 12 December 2008 on combating certain forms of discrimination. This decree transposes the directives adopted by the European Union concerning the combating of discrimination<sup>4</sup> in the areas within the ambit of the French Community.

The above-mentioned decree only applies in the areas that “are attached to the substantive and geographical competence of the French Community, unless the latter has transferred the power to exercise the competence concerned in accordance with Article 138 of the Constitution.” Disability is one of the protected criteria (Article 3, paragraph 1 of the decree) on the basis of which discrimination is prohibited (Article 5 of the decree). According to this

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<sup>1</sup> Namely, establishing the start and finish of mandatory schooling, the minimum conditions for the issue of diplomas and the pensions regime.

<sup>2</sup> On the division of competences over disability, see in particular M. El Berhoumi and I. Hachez, “Lorsque l’inclusion se décrète : le décret de la Commission communautaire française du 17 janvier 2014 relatif à l’inclusion de la personne handicapée”, *R.I.E.J.*, 2015.74, pp. 74 to 80.

<sup>3</sup> Opinion of the legislation division of the Council of State No. 48.858/AG of 7 December 2010 concerning draft legislation to create a federal commission of human rights, *parliamentary document*, House of Representatives, No. 53-418/2, p. 9.

<sup>4</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ No. L 303 of 2.12.2000, p. 16); and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ No. L 180 of 19.7.2000).

decree, discrimination includes “The refusal to make reasonable accommodation for the benefit of a disabled person” (Article 5, paragraph 4 of the decree). The concept of reasonable accommodation is defined in Article 1, paragraph 9 of the decree as follows: “reasonable accommodations are appropriate measures, taken in relation to specific needs in a tangible situation, so as to enable a person with a disability to have access to, participate in or advance in the areas falling under Article 4, unless such measures would impose a disproportionate burden on the person required to adopt them.” Education is expressly covered by Article 4, paragraph 2 of the decree. It should be pointed out that the decree extends the prohibition of discrimination beyond the requirements of the European directives on equal treatment, as the prohibition of discrimination on grounds of disability applies beyond the fields of employment and work.

Regardless of how competences are divided within the Belgian legal system, from the viewpoint of the international legal order Belgium is responsible for any situation that may entail a violation of the international commitments that it has entered into, including where the matter concerned falls under the competence of a federated entity. The European Committee of Social Rights ruled to this effect in its decision on the merits of 18 March 2013, *International Federation for Human Rights (FIDH) v. Belgium*:

“52. The Committee refers to the general principles of public international law governing states’ international responsibility, as clearly enunciated both in Article 27 of the Vienna Convention on the Law of Treaties (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”) and in the draft articles on responsibility of states for internationally wrongful acts: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State” and “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (Draft Articles on Responsibility of States for Internationally Wrongful Acts, approved by the United Nations General Assembly, A/RES.2001/56/83).

53. The Committee considers that, as in the case of public international law, the principle of the exclusive responsibility of States Parties to the Charter derives firstly from an imperative concern for neutrality with regard to the internal structure of those states, irrespective of their respective constitutional approaches to the separation of powers or the extent to which their internal structure is based on the principles of autonomy or decentralisation.

54. Therefore, as the Committee has already stated in the past, the primary responsibility for implementing the European Social 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). Having regard to their constitutional arrangements and their domestic system of institutional relations, these authorities may in turn delegate certain powers to local authorities or the social partners. However, if they are not accompanied by appropriate safeguards, such implementation arrangements may threaten compliance with undertakings under the Charter (*FIDH v. Belgium*, *ibid.*, §55; *Conclusions 2006*, General Introduction, §10”).

The Committee on the Rights of Persons with Disabilities moreover recalled in paragraph 60 of its General Comment No. 4 that:

“States parties, at every level, must implement or introduce legislation, based on the human rights model of disability that fully complies with article 24. The Committee recalls that article 4 (5) requires federal states to ensure that article 24 is implemented without limitations or exceptions in all parts of the State party”.

### **3. The situation in the Flemish Community and Complaint No. 109/2014**

By a complaint registered on 30 April 2014 by the Secretariat of the European Social Charter, the Mental Disability Advocacy Centre (MDAC) alleged that Belgium was failing to comply with the obligations imposed by Article E of the revised European Social Charter, taken in conjunction with Articles 15 and 17, with regard to the inclusive education of children with intellectual disabilities in the Flemish-speaking part of the country (Complaint No. 109/2014).

Complaint No. 109/2014 concerns the inclusion in the school system of children with intellectual disabilities **in the Flemish-speaking part of the country**. According to this complaint: “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.”

The present complaint makes similar allegations, but relates exclusively to **education organised by the French Community of Belgium for the French-speaking part of the country**.

While the situation in the Flemish Community may not be compliant with the obligations resulting from international human rights law, the fact remains that, within the Belgian State, it is the Flemish Community “that has the highest rate of education open to all”.<sup>5</sup> It follows that the violations alleged in Collective Complaint No. 109/2014 apply *a fortiori* when examining the level of protection achieved in this area by the French Community. For an overview of the situation in the Flemish Community, reference is made to the procedural documents filed in connection with that complaint.

### **4. The organisation of education in the French Community**

The complainant organisations describe in this section the situation regarding education in the French Community and the conditions under which children with a disability have access to different types of education (4.1.). They place greater focus on the issue of the integration of children with special needs into mainstream education, an issue which lies at the heart of the present complaint (4.2.).

#### **4.1. Mainstream education and special education**

Education is compulsory in Belgium for children aged between 6 and 18. Within the structure of education in the French Community, a distinction must be drawn between mainstream education and special education, with the latter catering for children or young persons with special needs, in other words with a disability.

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<sup>5</sup> UNIA, Inter-Federal Centre for Equal Opportunities, submission under Article 32A, paragraph 1 of the Rules of Procedure of the European Committee of Social Rights in relation to Collective Complaint No. 109/2014 (*MDAC v. Belgium*), p. 6.

## A. Mainstream education

The Law of 19 July 1971 on the general structure and organisation of secondary education (Belgian Official Journal of 28 August 1971), which has been amended on a considerable number of occasions, most recently by the Decree of 11 April 2014, organises **mainstream education**, which is divided into three levels: nursery (2.5-5 years), primary (6-12 years) and secondary (12-18 years). Secondary education is in turn divided into 4 stages: the first stage – known as the “observation stage” (normally for children aged 12 to 14 – maximum 16 years); the second stage – known as the “orientation stage” (normally for children aged between 14 and 16); the third stage – known as the “determination stage” (normally for children aged between 16 and 18); and a fourth supplementary stage, which is organised specifically as part of the vocational stream of secondary education for studies in the nursing care section.

## B. Special education

**Special education** is organised by the Decree of 3 March 2004 on the organisation of special education (Belgian Official Journal of 3 June 2004), which has also been amended on various occasions.

According to the decree, special education is intended “for children and young persons who ... must receive an education that has been adjusted to their special needs and their pedagogical possibilities” (Article 2).

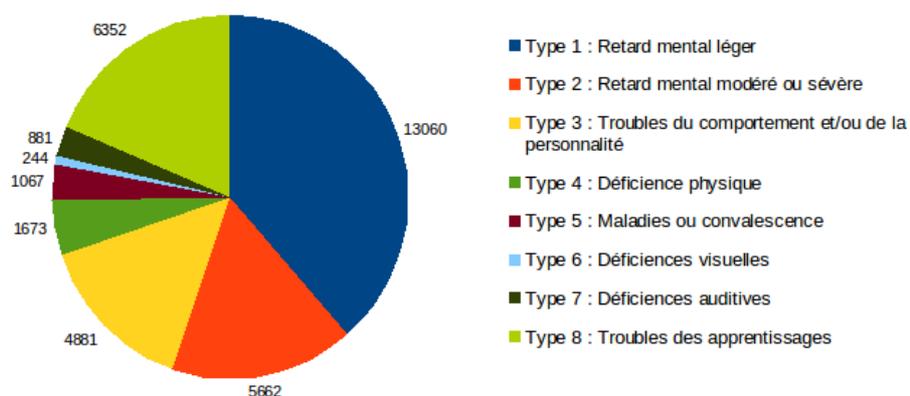
Article 12 of the decree provides that the enrolment of children and young persons in an institution, a school or a special education institute “shall be conditional upon the presentation of a report specifying the type of special education that satisfies the needs of the pupil and that is dispensed in the institution, school or institute concerned ...”.

The complainant organisations note that, according to Article 12, paragraph 1: “For types 1, 3 and 8, the enrolment report must describe, as specified in the conditions laid down by the government, the support and reasonable accommodations put in place within mainstream education and demonstrate that these have proved to be inadequate to provide an education that is suited to the specific needs of the pupil”. The complainant organisations find it inexplicable that this same obligation is not also imposed in relation to children falling under other types. This is all the more surprising as the obligation to put in place reasonable accommodations, the absence of which may constitute a form of discrimination, appears to apply by virtue of the Decree of the French Community of 12 December 2008 on combating certain forms of discrimination, as cited above.

The decree organises special education intended for children and young persons with special needs by assigning children for whom education is compulsory among 8 education types, each of which corresponds to a particular definition of disability for the child or young person concerned. In practice, the education types that include pupils with “mental retardation” (education types 1 and 2), “behavioural difficulties” (type 3) and “learning difficulties” (type 8) account for the vast majority of pupils placed in special education, and the most important category is that of pupils who are considered to have “minor mental retardation” and who thus fall under education type 1 (39%).

## Répartition des élèves dans les différents types d'enseignement spécialisé (2010-2011)

Source: Indicateurs de l'enseignement 2012, Fédération Wallonie-Bruxelles/ETNIC



Secondary education is organised, having regard to the pupil's possibilities, into four forms of education: social adjustment education (form 1), social and vocational adjustment education (form 2), vocational education (form 3), general, technical, artistic and vocational education (form 4). Only forms 1 and 2 are organised for pupils coming under type 2, who are defined in the decree of 3 March 2004 as pupils for whom "a moderate or severe delay in intellectual development" has been diagnosed on the basis of a multi-disciplinary examination (Article 8, paragraph 1).

The following table identifies the categories of pupil based on the nature of their disability, corresponding to the different "education types, along with the levels of education for which special education is organised:

Type of education	Pupil presenting	Nursery level	Primary level	Secondary level
1	minor mental retardation			
2	moderate or severe mental retardation			
3	behavioural and/or personality difficulty			
4	a physical impairment (neuro-motor)			
5	a physical and/or intellectual condition			
6	a visual impairment			
7	a hearing impairment and/or a significant communication deficit (severe dysphasia)			
8	learning difficulties (aphasia, dyslexia, dysorthographia, dyscalculia,...)			

## 4.2. The integration of pupils with special needs into mainstream education

### A. The general framework

The inclusion of a Chapter X on "Integration" in the Decree of 3 March 2004 organising special education, as amended by the Decree of 5 February 2009 laying down provisions on the integration of pupils with special needs into mainstream education, permits the promotion of the social adaptation and training of pupils with special needs, registered with a special education institution, that enables them to integrate either in full or in part into a mainstream education institution on either a temporary or a permanent basis.

Articles 132, paragraph 1 and 146, contained in Chapter X of the decree of 3 March 2004, define as follows the different forms of integration into mainstream education of pupils receiving special education:

- (1) **Permanent full integration** means that “the pupil attends all mainstream education classes throughout the school year while benefiting, in line with his or her needs, from free transportation between his or her home and the mainstream education institution attended and being guaranteed support under the special education system”;
- (2) **Partial permanent integration** means “integration whereby the pupil attends some mainstream education classes and other classes within the special education system throughout the school year. He or she shall also continue to receive free transportation from his or her home to the special education school at which he or she is enrolled”;
- (3) Finally, **temporary partial or full integration** means “integration whereby the pupil attends all or part of the mainstream education classes throughout a specific period or specific periods during the relevant school year. He or she shall also continue to receive free transportation from his or her home to the special education school at which he or she is enrolled”.

In its original version the decree did not provide for the possibility of children receiving type 2 education (children with moderate or severe mental retardation) to be integrated into schooling through permanent full integration. This possibility was opened up to them when this decree was amended on 5 February 2009 (see at present Article 131 of the decree of 3 March 2004).

The [2015 education indicators](#) confirm that, in practice, the degree of integration which is most frequently applied (and moreover the only one resulting in the registration of the pupil concerned with a mainstream education school) is **permanent full integration**. **Permanent full integration** covers:

- 57% of the 1,371 pupils in foundation level education (nursery and primary) who benefit from an integration measure (at foundation level, 39% of pupils benefiting from an integration measure are concerned by temporary full integration);
- and 88% of the 760 pupils benefiting from an integration measure within mainstream secondary education (at secondary level, 11% of pupils subject to an integration measure benefit from temporary partial integration, and 1% from temporary full integration; as far as the complainant organisations are aware, no pupil was benefiting from permanent partial integration).

For each pupil benefiting from permanent full integration into mainstream foundational level and secondary education, a certain degree of support is provided to the receiving mainstream education institution in the form of support periods (each “period” corresponds to 50 minutes) supplied by special education staff, which are added to the “periods capital” of the special education institution to which the support staff belong (Article 132, paragraph 2 of the decree of 3 March 2004). Article 132, paragraphs 2 to 7 of the decree of 3 March 2004 provide clarifications concerning the number of support periods supplied by the special education staff (between four and eight support hours per week, depending upon the level of education concerned and the “type” -- or category of disability -- concerned).

## B. The results obtained

Although the decree of 3 March 2004 therefore in principle provides for the possibility of the integration into mainstream education of pupils who initially received special education, **in practice this transfer is very difficult and has only concerned a very small number of children or young persons.**

### a. Special education

According to the [2015 education indicators](#), 17,495 pupils were attending special primary education in 2013-2014 (representing an increase of 13% since 2004, over a period of ten years) and 17,211 pupils were attending special secondary education (an increase of 21% since 2004). The complainant organisations would draw the Committee's attention to the fact that these figures have increased significantly in recent years.

Within this total, the different "types" of disability are represented in a highly disparate manner:

a) Within primary special education:

- 39% fall under education type 8 (learning difficulties);
- 26% fall under education type 1 (minor mental retardation);
- 13% fall under education type 2 (moderate to severe mental retardation);
- 11% fall under education type 3 (behavioural or personality difficulties).

a) Within secondary special education:

- 51% fall under education type 1;
- 20% fall under education type 2;
- 18% fall under education type 3.

### b. Measures of integration into mainstream education

**Compared to the total number of pupils in special education, a very small number of pupils have benefited from the measures of integration into mainstream education provided for under the decree of 3 March 2004.**

Again for school year 2013-2014, 1,361 pupils were benefiting from an integration measure at nursery or primary level (of which 57% were concerned by permanent full integration) and 760 pupils were benefiting from such measures within mainstream secondary education (of which, as mentioned above, 88% concerned by permanent full integration). (It will be noted that these integration projects mainly concern children classed in education type 1 (minor mental retardation) or type 8 (learning difficulties, such as dyslexia), while a very small number concern children classed in education type 2 (moderate or severe mental retardation). This issue will be returned to below.)

These figures must be compared with the number of children placed in special education:

	Number of pupils in special education	Number of pupils benefiting from an integration measure	Number of pupils in permanent full integration
nursery	1,400	1,361 (nursery and primary without distinction)	775 (nursery and primary without distinction)
primary	17,211		
secondary	17,495	760	668

(Table drawn up on the basis of the data supplied by the [2015 education indicators](#))

### **c. Evaluation**

**In the opinion of the complainant organisations, the increase in the number of pupils in special education is presented by the authorities as a progress (as confirmed by the very presentation of the 2015 education indicators), while a very small number of pupils benefit from integration measures in the mainstream education system, including in particular the permanent full integration measures provided for under the decree of 3 March 2004, as amended in 2009.**

How can this be explained? **The establishment of an integration project is not a systematic right and it is in practice very complicated to put in place.** The complainant organisations have identified three principal obstacles which are encountered:

**(1) The implementation of an integration project first and foremost requires action by and an agreement between four different actors**, in addition to the parents or guardian.

This is because Article 134 of the decree of 3 March 2004, introduced by the decree of 5 February 2009, provides for the following procedure:

“Any decision relating to permanent full integration may only be taken following a proposal issued by at least one of the following participants:

1. the class council of a special education institution including: all members of the teaching, para-medical and auxiliary educational staff who are directly involved in the management of the pupil;
2. the body providing guidance to pupils at the special education institution;
3. the parents, guardian or the pupil himself or herself, if he or she is an adult student;
4. the educational team of a mainstream education institution, on the basis of a favourable opinion by the participation council, each member of which has agreed. The project presented by the institution must set out the elements conducive to such integration.
5. the body providing guidance to pupils at the mainstream education institution;

Such a proposal concerning permanent full integration shall be submitted to the head of the special education institution. **The administration or governing authority of the special education institution concerned shall consult all the participants referred to in this article.**

In the event that the consultation results in a favourable opinion, it shall be signed by the participants referred to in this article and submitted to the director.

In the event that the consultation does not result in a favourable opinion, each partner that has expressed disagreement shall submit written reasons to the head of an educational institution coming within the French Community system or to the governing body of a special education school subsidised by the French Community” (underlining added).

It is therefore not uncommon that families with sufficient courage to take the steps to achieve this goal are unable to find an institution that is willing to put in place an integration project. Besides, **the various actors generally do not have much information and have not been properly trained to assess the applications submitted to them in their true light.** In such circumstances, where applications are not always correctly perceived and the interest of the child is not assessed in a sufficiently well-informed manner, it will come as no surprise that refusals are frequent.

(2) To be able to benefit from support within the context of permanent full integration, **a pupil must have been duly enrolled with the special education institution by 15 January preceding the school year for which integration is sought** (Article 133, paragraph 1 of the decree of 3 March 2004, **as introduced by the decree of 3 March 2009**).

Apart from the administrative constraint that this entails, this also constitutes a strong symbolic barrier for families that wish to enrol their children at a mainstream school.

The decree formally requires a mere enrolment in special education rather than actual attendance. However, when a pupil embarks upon an integration project at a mainstream education institution, he or she is first provided with a certificate attesting that he/she has been directed by the Social Psycho-Medical Centre [CPMS] towards a specific type of special education. The integration project, along with the planned hours of support, may only be launched on the basis of this certificate. However, if the project concerning integration into mainstream education is unsuccessful and if no other integration project can be put in place at another institution, **the child will then be redirected towards the special education type stipulated in the orientation certificate.**

For this reason, some families decide not to embark upon an integration process given the reorientation towards special education to which their child would be exposed if the project were to fail. Moreover, this Sword of Damocles hanging over their heads inevitably exerts significant pressure on families.

(3) Pupils who have completed form 1 or form 2 special secondary education are not eligible to transfer into mainstream secondary education, unless a derogation is granted by the Government in exceptional circumstances, following a request by the head of the mainstream secondary education institution and after hearing the opinion of the body responsible for the guidance of pupils and the special education inspectorate (Article 66 of the decree of 3 March 2004, as introduced by the decree of 5 February 2009).

It is because of these obstacles that, **far from progressing towards inclusion in schooling, i.e. departing from a practice that sought to confine children and young persons with a disability or with learning difficulties to special education, the French Community is losing ground in this area.** This constitutes the heart of the complaint presented to the Committee. According to the 2015 education indicators, “the share represented by special education at each level of education in the Wallonia-Brussels Federation has been steadily increasing for the last ten years.”<sup>6</sup> It can be noted that “the proportion of special education within primary education increased from 4.9% in 2004-2005 to 5.3% in 2013-2014.”<sup>7</sup>

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<sup>6</sup> <http://www.enseignement.be/index.php?page=26998>

<sup>7</sup> <http://www.enseignement.be/index.php?page=26998>

The complainant organisations infer from the above that the educational situation in the French Community of Belgium is not compliant with Articles 15§1 and 17§1 of the European Social Charter, whether considered in isolation or read in conjunction with the rule on non-discrimination laid down by Article E. They expand upon this argument in the subsequent part of the complaint.

#### IV. THE ALLEGED VIOLATIONS

##### 1. Introduction

The complainant organisations consider that the policy pursued by the French Community, as described above in part III of the complaint, causes Belgium to violate the requirements resulting from Article E of the revised European Social Charter in conjunction with Articles 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community) and 17 (the right of children and young persons to social, legal and economic protection) of the revised European Social Charter.

They point out that it has been the settled practice of the Committee to interpret the provisions of the revised European Social Charter, as an instrument for protecting human rights, in the light of international human rights law (on the proposed interpretation of the provisions of the revised European Social Charter alleged to have been violated, see section V below).

Like Article 15 of the revised European Social Charter, Article 24 of the Convention on the Rights of People with Disabilities reflects a shift from a “medical” conception of disability, which imposes the problem of integration on the disabled person and places priority on measures aimed at declaring the person unfit or offsetting the disability, to a “social” conception which recognises that social structures – such as physical infrastructure, performance assessment arrangements, forms of organisation of work or educational methods – are a source of discrimination, as they do not take account of the special needs of disabled persons.

The complainant organisations argue that **the approach based on a typology of different educational categories (the 8 “types”), which themselves correspond to different categories of disability, and the disproportionate number of children and young persons who are directed towards special education are indicative of the persistence of the “medical” model of disability within the organisation of education in the French Community, which breaches the international commitments made by Belgium. This is in particular the case since, as has been stressed above, far from progressing towards inclusion into schooling, i.e. departing from a practice that seeks to confine children and young persons with a disability or who encounter learning difficulties to special education, the French Community is backsliding in this area, which constitutes a manifest breach of the obligation incumbent upon the State to achieve measurable progress within a reasonable timeframe and to ensure the effective exercise of the fundamental rights which it has committed itself to guaranteeing.**

In this part of the complaint, the complainant organisations would highlight three reasons why, in their contention, Belgium is not compliant with the requirements of the revised European Social Charter, taking account of the various forms of discrimination to which the situation described in part II of the complaint gives rise (discrimination against disabled children; discrimination between different types of disability; discrimination on the grounds of socio-economic origin) (2.). They will then go on to recall the positions previously adopted by the European Committee of Social Rights in such matters (3.). These positions are consistent with those of other human rights protection bodies on an international level (4.) and at national level (5.).

## 2. The alleged forms of discrimination

The complainant organisations allege that the situation as described results in three forms of discrimination, in breach of Article E of the revised European Social Charter, read in conjunction with Articles 15 and 17.

### A. Discrimination on the ground of disability

The complainant organisations note first of all the failure of the provisions contained in Chapter X of the decree of 3 March 2004, which seek to enable the integration of children or young persons who have initially been oriented towards special education. The efforts made in this regard by the French Community are clearly inadequate, as can be seen from the fact that indicators show that it is losing ground: **a constantly growing share of children and young persons have been placed in special education facilities, in breach of the principle of equality, which recognises that all children have the right to inclusive education, including disabled children.**

It is true that, overall, the resources dedicated to education are constantly increasing: in 2006 the French Community of Belgium allocated **5.7 billion euros** to its education system, whereas in 2014 this figure amounted to **7.3 billion euros**. However, this is not enough if the authorised expenditure is not sufficiently focused on the situation of certain disadvantaged groups.

According to the Committee,

“When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings”. (ECSR, *Autism-Europe v. France*, complaint No. 13/2002, decision on the merits of 4 November 2003, para. 53).

In the situation to which this complaint relates, not only has progress been insufficient but it appears that the French Community has lost ground in the integration of disabled children into the school system. The general increase in education budgets cannot conceal the fact that these efforts are not benefiting disabled children. The complainant organisations moreover note that, in its General Comment No. 4 on the right to inclusive education, the Committee on the Rights of Persons with Disabilities “urges States parties to achieve a transfer of resources from segregated to inclusive environments. States parties should develop a funding model that allocates resources and incentives for inclusive educational environments to provide the necessary support to persons with disabilities (...)” (§ 68).

## ***The constraint resulting from the failure to provide speech therapy***

The concentration of pupils within special education is of even greater concern as it is favoured, among other things, by the ineligibility for reimbursement by mandatory federal health insurance of mono-disciplinary speech therapy, intended for children with a language development difficulty, who suffer from dysphasia or who have an intellectual quotient (IQ) lower than 86.<sup>8</sup>

Indeed, it appears that the existence of specific facilities intended to receive persons who have been excluded from the mainstream system, namely special education institutions, within which the pupil receives speech therapy, has been one of the arguments used in support of such exclusion. This is unacceptable for two reasons:

1. The argument put forward as justification for the failure to reimburse speech therapy in respect of children falling within the above category is based on the presumption that this type of pupil attends a special education institution. This presumption runs counter to the principle of inclusion within mainstream education, enshrined in particular in the European Social Charter and the United Nations Convention on the Rights of People with Disabilities. For the complainant organisations, there is a risk that, being guided by financial considerations and not by the best interests of the child, parents may be led to enrol their children in special education institutions in order to offer them speech therapy which they are unable to finance themselves.<sup>9</sup> In other words, **in failing to reimburse speech therapy, and given the absence of any alternative solution,<sup>10</sup> parents who are unable to cover the cost themselves are forced to place their child in a special education institution.** This is unacceptable.

2. The current approach does not take account of the importance of early intervention to deal with the language difficulties faced by the child. **The failure to provide speech therapy creates conditions where, far from preventing or facilitating its avoidance, there is a risk that the child's placement within special education may become inevitable.** Indeed, it is partly because they have difficulty in accessing language and communication that these children tend to score low results in IQ tests. Conversely, if it were guaranteed, improved access to speech therapy would enable them to improve their cognitive and communication skills and therefore to increase their IQ test results. Numerous studies have shown that the level of language is a "good predictor" of future difficulties, whether in terms of behaviour or learning.

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<sup>8</sup> Cf. Article 36(2)(b)(2) and (f) of the Annex to the Royal Decree of 14 September 1984 establishing the nomenclature of healthcare services in the area of mandatory health insurance and allowances, covered by the nomenclature of healthcare services in the area of mandatory health insurance and allowances (in force since 1 September 2013).

<sup>9</sup> See, in particular, Christelle Maillart, Trecy Martinez Perez, and Anne-Lise Leclercq, "La guidance parentale : Un outil pour soutenir le développement langagier », ULG UCL university project, 2012-2014, available for consultation on the website

[http://www.google.be/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCQqFjAA&url=http%3A%2F%2Fwww.one.be%2Ffileadmin%2Fuser\\_upload%2Fprofessionnels%2FRecherche%2Frapport\\_final\\_recherche\\_langage\\_15\\_janvier\\_web\\_ONE.pdf&ei=4zOeVevfHsrSU6TRlpAL&usq=AFQjCNEYAyy2Vm9goEk8QqwJL82fVs0m0w&sig2=Hum-PvTKqQpDj7lfgQ7Kiw](http://www.google.be/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCQqFjAA&url=http%3A%2F%2Fwww.one.be%2Ffileadmin%2Fuser_upload%2Fprofessionnels%2FRecherche%2Frapport_final_recherche_langage_15_janvier_web_ONE.pdf&ei=4zOeVevfHsrSU6TRlpAL&usq=AFQjCNEYAyy2Vm9goEk8QqwJL82fVs0m0w&sig2=Hum-PvTKqQpDj7lfgQ7Kiw) and Parisse, C. & Maillart, C., "Nouvelles propositions pour la recherche et l'évaluation du langage chez les enfants dysphasiques." In C. Gruaz & C. Jacquet-Pfau (eds), France, 2010 available for consultation on the website

[http://www.google.be/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CCkQFjAB&url=http%3A%2F%2Forbi.ulg.ac.be%2Fjspui%2Fbitstream%2F2268%2F9964%2F1%2Ftsdl-dysphasie-parisse-maillart.pdf&ei=4zOeVevfHsrSU6TRlpAL&usq=AFQjCNGi-5NTw-g0Cl\\_5dddGY6nRNvIhHg&sig2=HRpRmtWb7LHzVS2JqK8Epg&bvm=bv.96952980,d.d24](http://www.google.be/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CCkQFjAB&url=http%3A%2F%2Forbi.ulg.ac.be%2Fjspui%2Fbitstream%2F2268%2F9964%2F1%2Ftsdl-dysphasie-parisse-maillart.pdf&ei=4zOeVevfHsrSU6TRlpAL&usq=AFQjCNGi-5NTw-g0Cl_5dddGY6nRNvIhHg&sig2=HRpRmtWb7LHzVS2JqK8Epg&bvm=bv.96952980,d.d24) (last accessed on 9 July 2015).

<sup>10</sup> The existence of outpatient rehabilitation centres is not a solution susceptible of satisfying the objections raised by the complainants: first, these centres are too widely dispersed or even non-existent in some provinces; secondly, there are long waiting lists for registering with these centres.

### ***The budgetary argument***

The complainant organisations are aware of the budgetary constraints with which the French Community is faced. However, the budgetary argument cannot be regarded as a justification for the current situation.

The complainant organisations note first and foremost that it is more expensive to accommodate children in special education institutions than in mainstream education. According to the [2015 education indicators](#) (3- The cost of schooling by the Wallonia-Brussels Federation), the average annual cost of a pupil in special education is estimated at **€ 15,300**, whereas the average annual cost of a pupil in mainstream education is between **€ 3,300 and € 7,300** (depending upon whether the education is at nursery or secondary level). Furthermore, the gap has grown over time: over the period 2004-2014, the cost (in real terms) per pupil in mainstream secondary schooling increased by 3.9%, whereas the cost per pupil in special education increased by 8.3%. Although the figure for the cost per pupil in mainstream education does not cover pupils with special needs, for whom measures of reasonable accommodation may be required (including, as the case may be, services (“support periods”) provided by educational staff seconded from a special education establishment), it would be highly unlikely that far more systematic recourse to permanent full integration into mainstream education would result in costs exceeding those resulting from the growth in the rates of admission to special education, as is currently to be observed.

Furthermore, the complainant organisations would find it incomprehensible that, although education budgets have increased in recent years, Belgium should invoke the budgetary constraints of the French Community in order to justify the lack of supplementary efforts to guarantee the right of intellectually disabled children to inclusive education.

#### **A. Discrimination on the ground of the nature of the disability**

As will be seen below (2.3, B, b), children classified in education “type 2” (moderate or severe mental retardation) are even more disadvantaged than disabled children in general, as regards the right to inclusive education.

The complainant organisations note that, according to the 2015 education indicators, the majority of integration projects relate to education types 1 (minor mental retardation) and 8 (learning difficulties such as dyslexia). In 2013-2014, out of the 2,121 integration projects that were put in place (1,361 at primary level and 760 at secondary level), almost 65% concerned the integration of a pupil from special education types 1 or 8 (1,361).

Children falling under education type 2 (moderate or severe mental retardation) are massively under-represented in mainstream education, with respectively 34 and 13 pupils benefiting from an integration project at the nursery and primary levels in 2014, according to the figures provided by the Office of the Minister of Education in 2015. In other words, **the integration measures provided for under the decree of 3 March 2004 are not only insufficient in order to ensure the inclusion of disabled children and young persons in general, but are even more clearly insufficient to cover children or young persons who have been diagnosed with a moderate or severe intellectual disability.**

### C. Discrimination on the ground of socio-economic origin

Finally, the complainant organisations are concerned about the fact that *de facto* discrimination may exist in access to integration measures on the basis of the socio-economic condition of the families concerned. A commentary, based on the statistics of the French Community itself, notes in this regard that:

“(…) children from poorer areas are over-represented in special education. There is a correlation here between the social origin of pupils and the average socio-economic level of their place of residence. In the least affluent districts, 6% of children are enrolled in special institutions. In the more affluent districts, the figure is only 1.5% of children, i.e. four times lower [...] It is even more surprising that this over-representation of children from poorer districts can be observed for practically all types, and that it is greatest for classes of children who have been diagnosed as suffering from “mental retardation” – difficulties that are not, in principle, related to the social environment”.<sup>11</sup>

The author of this commentary argues that this situation can be accounted for mainly by the manner in which children are oriented towards special education:

“The definitions of the *types* are subject to interpretation, and decisions taken by teachers and the CPMS involve a significant degree of subjectivity. The regulations do not always clearly preclude the possibility of orienting a child towards special institutions simply because he or she has a significant schooling delay. Practical examinations carried out by the CPMS [Social Psycho-Medical Centres] for the purpose of deciding on placement have often been criticised [see for example the FAPEO analysis (2012), “QI = intelligence ?” at <http://www.fapeo.be/wp-content/analyses/analyses2012/QI.pdf> or the remarks by Denis Verheulpen, a paediatric neurologist, in the article <http://www.lejim.info/spip/spip.php>]. The examinations carried out often include an IQ test, and it has been demonstrated on numerous occasions that this tests the knowledge and social positioning of individuals rather than the operation of “cognitive machinery” [M. Deleau, Dictionnaire encyclopédique de l’éducation et de la formation (ed. Retz)].

Thus, by orienting children towards special institutions, mainstream schools exclude children whom they should not be excluding. A large number of children are considered to be unsuited to mainstream education for cultural, social and emotional reasons. For example, a child whose learning is delayed due to a family situation that is difficult to deal with, or because his or her native language is not French, may be excluded from mainstream education even though he or she does not suffer from any permanent disorder.

The social composition of special education classes is also influenced by the fact that parents react in different ways when confronted with the orientation recommended by the CPMS. The choice of whether or not to accept placement in a special institution ultimately falls to the parents. However, families from more affluent backgrounds have both the cultural means to object to the orientation recommended and the financial resources to find alternatives (private speech therapy, etc.). Children from less affluent backgrounds are therefore more often *oriented* towards special institutions by the CPMS, whilst their parents also more often accept their *effective* placement.

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<sup>11</sup> A. Romainville, “Le spécialisé en Communauté française, un enseignement spécial... pour les pauvres” (10 April 2015), website of the Belgian Inequalities Observatory: <http://inegalites.be/Le-specialise-en-Communaute>

[However,] orientation towards special education has significant consequences for children and their families. Such a decision has an emotional impact on the parents, who are led to consider that their child is confronted with an insurmountable “difficulty”. The move to special education is also often experienced as stigmatic by families. The child is in fact marginalised, which may translate into additional learning difficulties.

However, the figures also show that a move to special education at primary level significantly affects children’s future schooling: when they move on to secondary education, the vast majority of children who have been through special primary schooling are oriented towards special secondary schooling or towards vocational streams of mainstream education. In both cases, these routes lead to disadvantaged positions on the labour market. It is thus the entire school career and also the child’s future occupational and social path which may be signed and sealed by an examination carried out without sufficient precautions, often around the age of 7 or 8.”

The complainant organisations point out in this regard that, according to the European Committee of Social Rights, “Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all” (ECSR, *Autism-Europe v. France*, collective complaint No. 13/2002, decision on the merits of 4 November 2003, § 52).

### **3. The positions adopted by the European Committee of Social Rights**

The European Committee of Social Rights has on several occasions established that the situation in Belgium does not comply with Articles 15§1 and 17§1 of the European Social Charter.

In its 2007 conclusions in relation to Belgium (at a time when the decree of 3 March 2004 on special education was already in force),

“the Committee recalls that under Article 15§1, it considers necessary the existence of non-discrimination legislation as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated education systems ... The Committee recalls that states must take measures (such as the support of teachers and the accessibility of premises) in order to enable integration and must demonstrate that tangible progress is being made in setting up education systems which exclude nobody. ... In addition, the Committee asks the following questions about the modalities of mainstreaming:- whether and how the normal curriculum is adjusted to take account of disabilities ... The Committee concludes that the situation in Belgium is not in conformity with Article 15§1 of the Revised Charter on the ground that there is no sufficient anti-discrimination legislation covering education for persons with disabilities.”

In 2008 the Committee concluded once again:

“that the situation in Belgium is not in conformity with Article 15§1 of the Revised Charter on the ground that, during the reference period, the anti-discrimination legislation covering education and training for persons with disabilities was inadequate”.

Lastly, in 2012 (i.e. after the adoption of anti-discrimination legislation in 2007 and 2008 transposing the European directives), the committee indicated that:

“In its previous conclusions (2007 and 2008), (it) had asked for figures on attendance by children with disabilities in mainstream and special compulsory and upper secondary education, for all communities. ... The Committee recalls that where it is known that a certain category of persons is, or might be, discriminated against, it is the national authorities’ duty to collect data to assess the extent of the problem (European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational policy (European Roma Rights Centre v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §23). The Committee had also requested information on integration into mainstream primary education, on qualifications obtained at the end of schooling and on the success rate for children with disabilities as regards access to vocational training, further education and entry into the ordinary labour market. The Committee notes that not all the information requested has been supplied and therefore reiterates its request and, in the meanwhile, concludes that it has not been established that mainstreaming of persons with disabilities is effectively guaranteed in education ... The Committee concludes that the situation in Belgium is not in conformity with Article 15§1 of the Charter on the ground that it has not been established that people with disabilities are guaranteed an effective right to mainstream education and training.”

In addition, in its 2007 conclusions in relation to Belgium concerning Article 17§1 of the Charter:

“The Committee recalls that under Article 17§1 equal access to education must be ensured for all children, in particular attention should be paid to children from vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty, etc. Children belonging to these groups must be integrated into mainstream educational facilities and ordinary educational schemes. Where necessary special measures should be taken to ensure equal access to education for these children ... The Committee concludes that the situation in Belgium is not in conformity with Article 17§1 of the Revised Charter on the ground that domestic law does not penalise all form of violence against children in the family.”

#### **4. Positions adopted by other bodies monitoring compliance with human rights**

The European Committee of Social Rights is not the only body to have criticised the situation in Belgium concerning inclusive education under a reporting system. In its concluding observations on the initial report by Belgium, the **Committee on the Rights of Persons with Disabilities** stated its concern with regard to information that:

“many students with disabilities are referred to and obliged to attend special schools because of the lack of reasonable accommodation in the mainstream education system. As inclusive education is not guaranteed, the special education system remains an all too frequent option for children with disabilities. The Committee is also concerned about poor accessibility in schools”.<sup>12</sup>

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<sup>12</sup> Doc. UN CRPD/C/BEL/CO/1 (3 October 2014), § 36.

Its recommendation in this regard was as follows:

“The Committee requests that the State party implement a coherent inclusive education strategy for children with disabilities in the mainstream system and ensure the provision of adequate financial, material and human resources. It recommends that the State party ensure that children with disabilities receive the educational support they need, in particular through the provision of accessible school environments, reasonable accommodation, individual learning plans, assistive technology in classrooms, and accessible and adapted materials and curricula, and guarantee that all teachers, including teachers with disabilities, receive comprehensive training on the use of Braille and sign language with a view to improving the education of all children with disabilities, including boys and girls who are blind, deaf-blind, deaf or hard of hearing. The Committee also recommends that inclusive education should form an integral part of teacher training at university and during continuing professional development” (§ 37).

The inadequacy of the measures taken in the French Community for the purposes of compliance with Article 24 of the Convention on the Rights of People with Disabilities is even more apparent since, regardless of the progress which remains to be made in the Flemish-speaking part of the country, the Flemish Community has adopted a decree introducing measures for pupils with specific learning requirements (Decree of the Flemish Community of 21 March 2014, known as the “M decree”). This decree establishes as a principle the right of every disabled child to enrol in mainstream education. No comparable measure has been adopted in the French-speaking part of the country.

In the report drawn up following his visit to Belgium on 14 to 18 September 2015,<sup>13</sup> the **Commissioner for Human Rights of the Council of Europe**, Mr Nils Muižnieks, also expressed his concern at the “high number of children with disabilities who are educated separately from other children in specialised schools in Belgium”:<sup>14</sup> this is the case for 94% of disabled children in the French Community, according to the figures contained in the 2014 report of the Inter-Federal Centre for Equal Opportunities and Combating Racism (UNIA). The Commissioner for Human Rights concluded in this regard:

“During the Commissioner’s visit to Belgium, the authorities insisted on the high quality of education provided to children enrolled in specialised schools. However, the Commissioner believes that, irrespective of the quality of education provided in specialised schools, separate education leads to a lack of equal opportunities that has long-lasting detrimental effects on the lives and possibilities to be included in society of persons with disabilities. He notes in particular that specialised education does not provide children with any diploma at the end of their studies [<sup>15</sup>]. He was also informed that freedom of choice in secondary education is limited for children with disabilities as scarce options are available in the few schools adapted to each type of disability. Additionally, most children must spend a long time in transportation to attend school due to the geographical distribution of specialised schools. Despite the lack of comprehensive data, the Commissioner also notes with concern that few children enrolled in specialised education manage to reintegrate mainstream education” (§ 103).

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<sup>13</sup> CommDH(2016)1 (Strasbourg, 28 January 2016).

<sup>14</sup> § 101 of the Report.

<sup>15</sup> However, the complainant organisations would like to nuance this finding. One form of special secondary education, form 4, results in the issue of certificates and diplomas equivalent to those of ordinary secondary education. However, this only applies to a very limited proportion (around 5%) of pupils in special education.

The Commissioner for Human Rights correctly finds that a major obstacle to the integration of disabled pupils into mainstream education in the French Community is the absence of a specific financial mechanism for providing improved support to the mainstream education institutions that take in children from special education institutions:

“[N]o specific funding mechanism has been set up to cover the costs of inclusion in mainstream education. Additional funding to support integration into mainstream education will be transferred from specialised education only as the number of pupils in, and costs of, specialised education decrease. He is afraid that a lack of funds for reasonable accommodation might result in schools finding the required accommodation to be disproportionate, and thus refusing enrolment to children with disabilities”.<sup>16</sup>

The replies to the recommendations of the Commissioner for Human Rights are silent concerning this aspect of the recommendations.

## 5. Positions adopted by the internal body monitoring compliance with human rights

The fears expressed by the Committee on the Rights of Persons with Disabilities and by the Commissioner for Human Rights of the Council of Europe are shared by the **independent Belgian bodies** that have examined the question of access to education by disabled children and young persons. In its 2015 annual report, the **Inter-Federal Centre for Equal Opportunities (UNIA)** stated that:

“It still too frequently occurs that disabled children are oriented towards special education. The United Nations Convention on the Rights of People with Disabilities, which was ratified by Belgium in 2009, however guarantees their right to an inclusive education and for reasonable accommodations to be made by the school in order to enable them to participate ‘on a footing of equality with others’.” (p. 9)

The UNIA also notes that the number of pending files relating to education is constantly increasing (169 in total in 2015, or 11% of the total number of complaints received by the UNIA), and that 50% concern discrimination on the ground of disability.<sup>17</sup> It states in this regard that:

“The increase in files relating to disability since 2013 is probably a result of the dissemination of the brochure ‘Going to the school of your choice with a disability’. The cause is normally the refusal or failure to apply reasonable accommodations: in some cases, such accommodations are purely and simply refused; in other cases, a school agrees to accept them but does not honour its commitment; such arrangements are often lacking in transparency and are never recorded in writing.” (p. 36 of the 2015 Report)

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<sup>16</sup> § 108 of the report.

<sup>17</sup> P. 36 of the 2015 UNIA Annual Report.

Other reported incidents concern the refusal, often on a discriminatory basis, to enrol children with learning difficulties or with an intellectual or physical disability in mainstream education institutions. The UNIA stresses that:

“Children who are disabled or suffer from an illness do not always feel welcome in mainstream schools, which still do not take sufficient account of the fact that a standardised approach creates barriers to learning. They refuse to enrol disabled children or orient them too quickly towards special education. This also occurs for Roma and Traveller children, who are not allowed to enrol in educational institutions.” (p. 37 of the 2015 Report)

Again at national level, other operators have been calling for an inclusive schooling approach that takes account of the obligation to integrate disabled pupils. In its opinion No. 151 “Towards inclusive schooling”, issued on 9 March 2016, the **High Council for Special Education (CSES)** defended the idea of one single education system in Belgium, following the abolition of the divide between special education and mainstream education, enabling all children to attend local schools. Special education would then become a “mobile” squad that would move between schools to take action in a support capacity. This squad would be made up of a multi-disciplinary team that would fulfil the various needs in each individual case, and which could be asked to intervene at specific moments, depending upon the needs of the child, with the possibility of reviewing these needs at regular intervals.

## V. DEVELOPMENTS

The complainant organisations firstly reiterate the reasons in favour of inclusive education (1.). They then set out the proposed reading of the revised European Social Charter within the framework of international human rights law (2.). Finally, in the light of that context, they address the requirements flowing from Articles 15 and 17 of the revised European Social Charter, read either in isolation or in conjunction with Article E (3.).

### 1. Arguments in favour of inclusive education

**The complainant organisations would underline the benefits that result for disabled children and young persons from fully integrated access to education.** Numerous empirical studies have shown, in particular, that even children with a severe intellectual disability can benefit from such access, not only on a social level (in terms of their relations with others), but also in terms of their intellectual development,<sup>18</sup> although for children with the most severe intellectual disabilities progress above all concerns social skills and less so academic learning.<sup>19</sup> One study concerning the United Kingdom has, for example, demonstrated the benefits in relation to academic learning and language that may result from inclusive education for children with Down Syndrome.<sup>20</sup>

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<sup>18</sup> Cole & Meyer (1991): Social integration and severe disabilities: A longitudinal analysis of child outcomes. *The Journal of Special Education* 25(3): 340-351. See also for a study relating to the Netherlands, Peetsma, Vergeer, Roeleveld & Karsten (2001): Inclusion in education: Comparing pupils' development in special and regular education. *Educational Review* 52(2): 125-135; and, for a study of the experience in Switzerland, Dessemontet, Bless & Morin (2011): Effects of inclusion on the academic and adaptive behaviour of children with intellectual disabilities. *Journal of Intellectual Disability Research*, pp 1-9.

<sup>19</sup> Freeman & Alkin (2000): Academic and social attainments of children with mental retardation in general education and special education settings. *Remedial and special education* 21(1): 3-18.

<sup>20</sup> Buckley, Bird, Sacks & Archer (2002): A comparison of mainstreaming and special education for teenagers with Down syndrome: implications for parents and teachers. *Down syndrome News and Update* 2(2): 46-54.

In addition, contrary to an idea sometimes heard, **the inclusion of children with intellectual disabilities in mainstream education not only does not slow down the learning of children without special needs, but may even favour the learning process of such peers.**<sup>21</sup>

**Lastly, it is important to note the positive effects of inclusive education at the level of society as a whole.** Inclusive education is the condition for an inclusive society, drawing strength from the differences of each individual. When children are confronted from the youngest age – according to an approach that respects individuals’ differences – with other children who are different in all respects, instead of keeping them behind closed doors, they become responsible citizens. Studies have moreover corroborated the evidence that engagement with people who are different eliminates prejudice and received thinking.

These three arguments in favour of inclusive education – which the Belgian State has moreover undertaken to implement by ratifying legally binding treaties – are advanced by the **Committee on the Rights of Persons with Disabilities**. In its recent **General Comment No. 4**, cited above, on the right to inclusive education, it notes that:

“Inclusive education is central to achieving high quality education for all learners, including those with disabilities, and for the development of inclusive, peaceful and fair societies. Furthermore, there is a powerful educational, social, and economic case to be made. The OHCHR Thematic Study of the Rights of Persons with Disabilities to Education (2013) affirms that only inclusive education can provide both quality education and social development for persons with disabilities, and a guarantee of universality and non-discrimination in the right to education (...). Barriers that impede access to inclusive education for persons with disabilities can be attributed to multiple factors, including (...) c) lack of knowledge about the nature and advantages of inclusive and quality education, and diversity, including regarding competitiveness, in learning for all; lack of outreach to all parents and lack of appropriate responses to support requirements, leading to misplaced fears, and stereotypes, that inclusion will cause a deterioration in the quality of education, or otherwise impact negatively on others (...) f) Learning-friendly environment: Inclusive learning environments must create an accessible environment where everyone feels safe, supported, stimulated and able to express themselves, with a strong emphasis on involving students themselves in building a positive school community. Recognition is afforded to the peer group in learning, building positive relationships, friendships and acceptance (...) the Universal Design for Learning (...) is a set of principles, providing teachers and other staff with a structure to create adaptable learning environments and develop instruction to meet the diverse needs of all learners. It recognizes that each student learns in a unique manner and involves developing flexible ways to learn: creating an engaging classroom environment; maintaining high expectations for all students, while allowing multiple ways to meet expectations; empowering teachers to think differently about their own education; and focusing on educational outcomes for all, including those with disabilities.” (extracts from §§ 2, 4, 12 and 25)

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<sup>21</sup> Kalamouka, Farrell, Dyson & Kaplan (2007) : The impact of placing pupils with special educational needs in mainstream schools on the achievement of their peers. *Educational Research* 49(4): 365-382; Cushing & Kennedy (1997): Academic effects of providing peer support in general education classrooms on students without disabilities. *Journal of Applied Behavior Analysis*, 30(1): 139-151; Ruis, Van der Veen, Peetsma (2010): Inclusive education and students without special educational needs. *Educational Research* 52(4): 351-390; Dessemontet & Bless (2013): The impact of including children with intellectual disability in general education classrooms on the academic achievement of their low-, average-, and high-achieving peers. *Journal of Intellectual and Developmental Disability* 38(1), pp 23-30. On the learning of reading from peers, see also Gandhi (2007): Context matters: Exploring relations between inclusion and reading achievements of students without disabilities. *International Journal of Disability, Development and Education* 54(1): 91-112.

The thematic study on the right of persons with disabilities to education brought out by the **Office of the United Nations High Commissioner for Human Rights**, and dated 18 December 2013, confirms that:

“Inclusive education is essential to achieving universality of the right to education, including for persons with disabilities. Only inclusive education systems can provide both quality of education and social development for persons with disabilities. Inclusive education implies more than placing students with disabilities in mainstream schools; it means making them feel welcome, respected and valued. Inclusive education is built on values that enhance a person’s ability to achieve their goals and embrace diversity as an opportunity to learn (...)” (§ 68).

## 2. The relevant international law

### The various sources of international human rights law concur in recognising the right to inclusive education of disabled persons.

This right entails the admission of all children to the same schools and the adaptation to their needs of infrastructure, methods and teaching material as well as educational teams. In order to make gradual progress towards fully inclusive education, corresponding to the “Universal design for learning” (an education that enables all pupils “to participate in school life without supplementary individual planning”), it is necessary in the meantime for the State to agree to **reasonable accommodations** under certain circumstances, without which the **principle of equality** could not be assured.<sup>22</sup> The right to inclusive education is premised on the social model of disability, which places emphasis on the causes of disability within social organisation: it thus falls to society to remove the obstacles so as to enable disabled persons to become fully-fledged citizens who are capable of exercising their fundamental rights in full autonomy, in the same manner as all other persons.<sup>23</sup>

The relevant provisions of international human rights law and the positions adopted by human rights protection bodies are such as to clarify the nature of the rights enshrined in the revised European Social Charter. Within its practice, the committee moreover draws heavily on such outside sources in order to interpret the provisions of the European Social Charter, compliance with which it monitors.<sup>24</sup> The following paragraphs will merely set out a sample of the external sources that the complainant parties consider to be sufficiently representative, starting with the universal law of human rights (2.1.) before moving on to the principal European sources of fundamental rights law (2.2.).

### 2.1. At a universal level

Disabled persons did not have to await the Convention on the Rights of People with Disabilities (a) in order to benefit from the entitlements vested in them by fundamental rights, including in particular the right to inclusive education. The International Covenant on Economic, Social and Cultural Rights (b) and the United Nations Convention on the Rights of the Child (c), as interpreted by their respective monitoring bodies, already guaranteed these rights to them.

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<sup>22</sup> On the scope of the right to inclusive education, see *inter alia*: UNIA (Inter-Federal Centre for Equal Opportunities), “Going to the school of your choice with a disability: reasonable accommodations in education”, p. 2 (<http://unia.be/fr/publications-et-statistiques/publications/lecole-de-ton-choix-avec-un-handicap-les-amenagements-raisonnables-dans-lenseignement>).

<sup>23</sup> On the social (as opposed to medical) model of disability, see *inter alia* M. Vanderstraeten, “Définir, c’est exclure : le cas du handicap”, R.I.E.J., 2015/74, in particular p. 94 to 99.

<sup>24</sup> See in particular in this regard: decision of 18 March 2013 on the merits of complaint No. 75/2011 (International Federation for Human Rights (FIDH) v. Belgium), § 43; decision of 11 September 2013 on the merits of complaint No. 81/2012, *European Action of the Disabled (AEH) v. France*, § 17).

### **a. The United Nations Convention on the Rights of People with Disabilities**

The Convention on the Rights of People with Disabilities (CRPD) was adopted in New York on 13 December 2006 and entered into force on 3 May 2008. It was ratified by Belgium on 2 July 2009 and entered into force in relation to it on 1 August 2009.

The CRPD enshrines an inclusive approach to disability. According to the Committee on the Rights of Persons with Disabilities, which is charged with monitoring compliance with the obligations entered into by states, the Convention constitutes a “paradigm shift (...) whereby persons with disabilities are recognized as basic rights holders taking part in decisions affecting them and asserting their rights in society”.<sup>25</sup> With that aim in mind, the Convention guarantees to them both civil and political rights as well as economic, social and cultural rights (such as the right to education), it being understood that the approach to disability focused on human rights essentially imposes positive obligations on the states parties, which are both substantive and procedural.<sup>26</sup>

This inclusive approach manifests itself in the first place through the right to inclusive education for disabled children on an equal footing with other pupils.

In this regard, the CRPD stipulates in its preamble that persons with disabilities should have full enjoyment of fundamental, cultural and social rights on an equal basis with others. The Convention moreover pays particular attention to the circumstances of disabled children: “children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children (...)”.

Article 7 of the CRPD, which focuses on access to rights by disabled children, provides:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

Article 24 of the CRPD for its part guarantees the right to education of disabled persons in the following terms:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:
  - a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
  - b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
  - c) Enabling persons with disabilities to participate effectively in a free society.

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<sup>25</sup> Concluding observations of the Committee on the Rights of Persons with Disabilities of 28 October 2014 on the initial report of Belgium, adopted at its twelfth session (15 September - 3 October 2014), § 17.

<sup>26</sup> Cf. in this regard Article 4 of the Convention, and in particular § 2 thereof, which has been drafted according to a model similar to Article 2 of the International Covenant on Economic, Social and Cultural Rights. On the justiciability of the rights enshrined by the Convention – which does specifically depart from the general theory of human rights – see in particular: A. D'ESPALLIER, S. SOTTIAUX and J. WOUTERS, *De doorwerking van het VN-Verdrag inzake de rechten van personen met een handicap*, Antwerpen, Intersentia, 2014, 141 p. ; D. CUYPERS and S. VAN DAMME, “Het VN-Verdrag inzake de rechten van personen met een handicap. Bron van inspiratie voor het Unierecht en het Belgisch sociaal recht?”, *Rev. dr. soc.*, 2014/1, p. 70 et seq.

2. In realizing this right, States Parties shall ensure that:

- a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- c) Reasonable accommodation of the individual's requirements is provided;
- d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
- e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion. (...).

In guaranteeing the right to inclusive education, the CRPD takes on board an approach developed on the sidelines of the legally binding instruments since the early 1990s. This is apparent from the Report of the United Nations High Commissioner for Human Rights of 18 December 2013:<sup>27</sup>

The shift towards an inclusive approach to education was reflected at the 1990 World Conference on Education for All, with which the problem of the exclusion of students with disabilities from school systems was acknowledged. The need for integration in mainstream schools was recognized in the Warnock Report as early as 1978. The adoption in 1993 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities provided for integration, but it was not until 1994 that the Salamanca Statement, signed by 92 Governments, called for inclusive education. The Statement required mainstream schools to provide quality education to all students, including students with disabilities, without discriminating on the basis of the higher requirements of support that they may need (...). The Dakar Framework for Action on Education for All of 2000 stressed that education systems must be inclusive and respond flexibly to the circumstances and needs of all learners. The United Nations Educational, Scientific and Cultural Organization (UNESCO) Guidelines for Inclusion of 2005 emphasize that at the core of inclusive education is the human right to education. In 2006, building on these precedents, in the Convention on the Rights of Persons with Disabilities legally binding status was given to the concept of "inclusive education systems", which were recognized as the only means to ensure the right to education to all students, including persons with disabilities, without discrimination and on equal terms with others. In other words, in the Convention it was underscored that the right to education is in fact the right to inclusive education.

In the wake of the adoption of the CRPD, the Committee on the Rights of Persons with Disabilities, which monitors compliance with it, recently published a General Comment No. 4 on the right to inclusive education.<sup>28</sup> In particular, paragraph 18 concerning Article 24(2)(a) of the Convention on the Rights of People with Disabilities reads as follows:

Paragraph 2 (a) prohibits the exclusion of persons with disabilities from the general education system, including any legislative or regulatory provisions that limit their inclusion on the basis of their impairment or its "*degree*", such as by conditioning their inclusion "*to the extent of the potential of the individual*", or by alleging a disproportionate and undue burden to evade the obligation to provide reasonable accommodation. General education means all regular learning environments and the

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<sup>27</sup> Thematic study on the right of persons with disabilities to education (A/HRC/25/29), pp. 4 and 5, § 6.

<sup>28</sup> CRPD/C/GC/4, 2 September 2016, 24 p.

education department. Direct exclusion would be to classify certain students as ‘*non-educable*’, and thereby ineligible for access to education. Non-direct exclusion would be the requirement to pass a common test as a condition for school entry without reasonable accommodations and support. In line with Article 4 (b), all legislation and policy must be reviewed to ensure that it is not discriminatory for persons with disability and in violation of Article 24, and where necessary repealed or amended in a systematic and time-bound manner.

In its previous case law, the European Committee of Social Rights already had the opportunity to assert the importance of the CRPD as a source of inspiration for the provisions of the European Social Charter concerning the integration of disabled persons or the prohibition on discrimination:

With regard to international law, the Committee notes that the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006 (...) reflects existing trends in comparative European law in the sphere of disability policies” (decision on the merits of complaint No. 75/2011, § 112).

### ***b. The International Covenant on Economic, Social and Cultural Rights***

According to Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR):

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 13 of the Covenant enshrines as follows the right of every person to an education:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that 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. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

a) Primary education shall be compulsory and available free to all;

b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.

In its General Comment No. 5 on persons with disabilities,<sup>29</sup> the Committee on Economic, Social and Cultural Rights clarified, in 1994, in relation to the right to education that:

School programmes in many countries today recognize that persons with disabilities can best be educated within the general education system. Thus the Standard Rules provide that “States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings”. In order to implement such an approach, States should ensure

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<sup>29</sup> E/1995/22.

that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers (...) (§ 35).

The interpretation given to Articles 13 and 14 ICESCR in Comment No. 5 was subsequently enriched by that provided in Comment No. 13, which was expressly dedicated to the right to education. The Committee on Economic, Social and Cultural Rights clarified therein that:

education in all its forms and at all levels shall exhibit the following interrelated and essential features: availability, accessibility, acceptability and adaptability. Accessibility means more specifically that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party". It has three "overlapping dimensions": non-discrimination ("education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds"), physical accessibility and economic accessibility (§ 6(b) of the General Comment, cited above).

The General Comment goes on to state in § 31 that:

The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination (...).

Again in relation to non-discrimination and equal treatment:

The Committee affirms paragraph 35 of its General Comment 5, which addresses the issue of persons with disabilities in the context of the right to education (...) (§ 36).

Within its practice, the European Committee of Social Rights has already had the opportunity to consider General Comment No. 13 of the Committee on Economic, Social and Cultural Rights. It thus concluded in its decision on the merits of complaint No. 41/2007 that:

... all education provided by states must fulfil the criteria of availability, accessibility, acceptability and adaptability. (The European Committee of Social Rights) notes in this respect General Comment No. 13 of the Committee on Economic, Social and Cultural Rights of the United Nations International Covenant on Economic, Social and Cultural Rights on the right to education (document E/C.12/1999/10 of 8 December 1999, §6). In the present case, the criteria of accessibility and adaptability are at stake, i.e. educational institutions and curricula have to be accessible to everyone, without discrimination and teaching has to be designed to respond to children with special needs (§ 37).

### ***c. The United Nations Convention on the Rights of the Child***

Having been opened for signature on 20 November 1989, the United Nations Convention on the Rights of the Child entered into force in Belgium on 15 January 1992.

It contains various provisions that are relevant to the issue under consideration here:

Article 2(2): States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures (...).

Article 23: 1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. (...)

Article 28: 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- a) Make primary education compulsory and available free to all;
- b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (...)

Article 29: 1. States Parties agree that the education of the child shall be directed to:

- a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (...).

The Committee on the Rights of the Child has also dedicated a General Comment to the rights of disabled children.<sup>30</sup> On the subject of budget allocations, the Committee clarified in relation to Article 4 of the Convention that:

many States parties not only do not allocate sufficient resources but have also reduced the budget allocated to children over the years. *This trend has many serious implications especially for children with disabilities who often rank quite low, or even not at all, on priority lists. For example, if a State party is failing to allocate sufficient funds to ensure compulsory and free quality education for all children, it will be unlikely to allocate funds to train teachers for children with disabilities or to provide for the necessary teaching aids and transportation for children with disabilities. (...) it is the State Party's ultimate responsibility to oversee that adequate funds are allocated to children with disabilities along with strict guidelines for service delivery. Resources allocated to children with disabilities should be sufficient – and earmarked so that they are not used for other purposes – to cover all their needs, including programmes established for training professionals working with children with disabilities such as teachers, physiotherapists and policymakers; (...) Furthermore, funding must also be ensured for other programmes aimed at including children with disabilities into mainstream education, inter alia by renovating schools to render them physically accessible to children with disabilities.* (§ 20; emphasis added).

The Committee also went on to state:

43. In addressing the issue of violence and abuse, States parties are urged to take all necessary measures for the prevention of abuse of and violence against children with disabilities, such as (...) e) Ensure that schools take all measures to combat school bullying and pay particular attention to children with disabilities *providing them with the necessary protection while maintaining their inclusion into the mainstream education system* (§ 43; emphasis added)

Under the heading “Inclusive education”, the Committee notes further that:

Inclusive education should be the goal of educating children with disabilities. The manner and form of inclusion must be dictated by the individual educational needs of the child, since the education of some children with disabilities requires a kind of support which may not be readily available in the regular school system. *The Committee notes the explicit commitment towards the goal of inclusive education contained in the draft convention on the rights of persons with disabilities and the obligation for States to ensure that persons including children with disabilities are not excluded from the general education system on the basis of disability and that they receive the support required, within the general education system, to facilitate their effective education. It encourages States parties which have not yet begun a programme towards inclusion to introduce the necessary measures to achieve this goal.* However, the Committee underlines that the extent of inclusion within the general education system may vary. A continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future (§ 66; emphasis added).

The movement towards inclusive education has received much support in recent years. However, the term inclusive may have different meanings. At its core, inclusive education is a set of values, principles and practices that seeks meaningful, effective, and quality education for all students, that does justice to the diversity of learning conditions and requirements not only of children with disabilities, but for all students.

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<sup>30</sup> General Comment No. 9 of 27 February 2007, CRC/C.GC/9.

This goal can be achieved by different organizational means which respect the diversity of children. Inclusion may range from full-time placement of all students with disabilities into one regular classroom or placement into the regular class room with varying degree of inclusion, including a certain portion of special education. It is important to understand that *inclusion should not be understood nor practiced [sic.] as simply integrating children with disabilities into the regular system regardless of their challenges and needs. Close cooperation among special educators and regular educators is essential. Schools' curricula must be re-evaluated and developed to meet the needs of children with and without disabilities. Modification in training programmes for teachers and other personnel involved in the educational system must be achieved in order to fully implement the philosophy of inclusive education* (§ 67; emphasis added).

**d. Thematic study on the right of persons with disabilities to education, Report of the Office of the United Nations High Commissioner for Human Rights, 18 December 2013**

Alongside the treaties cited above, as interpreted by the respective monitoring bodies, mention must be made of the thematic study on the right of persons with disabilities to education of the United Nations High Commissioner for Human Rights,<sup>31</sup> which states in particular:

On the basis of the Salamanca Statement, inclusive education systems are those with schools using “a child-centred pedagogy capable of successfully educating all children, including those who have serious disadvantages and disabilities” (Framework for Action, para. 3). The Statement also calls for a change in social perspective. As stated by the former Special Rapporteur of the Commission for Social Development for monitoring the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, “all children and young people of the world, with their individual strengths and weaknesses, with their hopes and expectations, have the right to education. It is not our education systems that have a right to certain types of children. Therefore, it is the school system of a country that must be adjusted to meet the needs of all children” (...) (§ 5).

Inclusion is a process that recognizes: (a) the obligation to eliminate barriers that restrict or ban participation, and (b) the need to change culture, policy and practice of the mainstream schools to accommodate the needs of all students, including those with impairments. An inclusive education implies transforming the school system and ensuring interpersonal interactions based upon core values which allow for the full learning potential of every person to emerge. It also implies effective participation, individualized instruction and inclusive pedagogies. Some key values of inclusive education are equality, participation, non-discrimination, celebrating diversity and sharing good practices. The inclusive approach values students as persons, respects their inherent dignity and acknowledges their needs and their ability to make a contribution to society. It also acknowledges difference as an opportunity for learning, and recognizes the relationship between the school and the wider community as grounds for creating inclusive societies with a sense of belonging (not only for students but for teachers and parents too) (§ 7).

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<sup>31</sup> 18 December 2013, A/HRC/25/29, 20 p.

## 2.2. At European level

At the European level, particular mention should be made of the European Convention on Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights (a), along with a 2006 Recommendation of the Committee of Ministers of the Council of Europe (b).

### **a. The European Convention on Human Rights and its additional protocols**

In its *Glor v. Switzerland* judgment of 30 April 2009, the European Court of Human Rights invoked for the first time the Convention on the Rights of People with Disabilities, alongside a recommendation of the Parliamentary Assembly of the Council of Europe, in order to establish the existence of “a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment” and in doing so to recognise that “the scope of (Article 14 of the European Convention on Human Rights) includes discrimination based on disability” (§ 80).

In its *Çam v. Turkey* judgment of 23 February 2016, the European Court of Human Rights held – after recalling, amongst the relevant international texts, Article 15 of the European Social Charter and the CRPD (§§ 37 and 38, 53, 64 and 65) – that Article 14 of the European Convention on Human Rights, in conjunction with Article 2 of Protocol No. 1, had been violated on the ground that “the refusal to enrol the applicant in the Music Academy was based solely on the fact that she was blind and that the domestic authorities had at no stage considered the possibility that reasonable accommodation might have enabled her to be educated in that establishment” (§ 69).

It is also necessary to consider the case law of the European Court of Human Rights on the schooling of Roma children in special schools or separate classes.<sup>32</sup> On the basis of Article 14 of the Convention, in conjunction with Article 2 of the First Additional Protocol, the Court held that the difference in treatment to which these children had been subject constituted indirect discrimination. Commenting on this case law, Mathias El Berhoumi and Laurence Vancrayebeck write that “the Court took care to examine the issue of education separately to privilege inclusive education incorporating all groups into the same schooling system”.<sup>33</sup> By analogy, this education is of such a nature as to promote the interpretation of the right to inclusive education of disabled children.

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<sup>32</sup> ECtHR (Grand Chamber), judgment in *D.H. and others v. Czech Republic* of 13 November 2007; ECtHR, judgment in *Sampanis and others v. Greece* of 5 June 2008; ECtHR (Grand Chamber), judgment in *Orsus and others v. Croatia* of 16 March 2010; ECtHR, judgment in *Sampani and others v. Greece* of 11 December 2012; ECtHR, judgment in *Horváth and Kiss v. Hungary* of 29 January 2013; ECtHR, judgment in *Lavida and others v. Greece* of 30 May 2013

<sup>33</sup> M. EL BERHOUMI and L. VANCRAYEBECK, *Droit de l'enseignement en Communauté française*, Répertoire pratique du droit belge, Brussels, Bruylant, 2015, p. 68 No. 41

***b. Recommendation on the Action Plan of the Council of Europe to promote the rights and full participation of people with disabilities in society***

In its 2006 recommendation on the Action Plan of the Council of Europe to promote the rights and full participation of people with disabilities in society,<sup>34</sup> the Committee of Ministers stressed in relation to education that:

Education is a basic factor in ensuring social inclusion and independence for all people, including those with disabilities. Social influences, for example from families and friends, also contribute, but for the purposes of this action line education shall cover all stages of life, including pre-school, primary, secondary, high school education and professional training, as well as life-long learning. *The creation of opportunities for disabled people to participate in mainstream education is not only important for disabled people but will also benefit non-disabled people's understanding of human diversity.* Most education systems provide access to mainstream education and specialised educational structures for disabled people, as appropriate. Mainstream and specialised structures should be encouraged to work together to support disabled people in their local communities, *but this should be consistent with the goal of full inclusion* (paragraph 3.4.1).

**3. The relevant standards: Articles 15, 17 and E of the revised Social Charter**

Reference will be made first to the provisions of the Charter that lie at the heart of this complaint (A) before considering their justiciability (B).

**A. Scope**

The complainant organisations allege that the situation described in part III of this complaint shows that the situation in Belgium is not compliant with the requirements of Articles 15, 17 and E of the revised European Social Charter.

***a. Article 15 of the revised European Social Charter***

Article 15 of the revised European Social Charter provides:

“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”

The European Committee of Social Rights has had occasion to declare that Article 15 “applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age. It thus also covers both children and adults who face particular disadvantages in education, such as persons with intellectual disabilities” (cf. *inter alia* the conclusions adopted by the Committee in 2007 concerning Article 15-1 in relation to Belgium. See also the decision on the merits of complaint No. 81/2012, § 75 *in fine*).

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<sup>34</sup> Recommendation Rec(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, adopted by the Committee of Ministers on 5 April 2006 at the 961<sup>st</sup> meeting of the Ministers' Deputies.

Apart from the persons it covers, the scope of this provision has also been clarified on various occasions.

As the European Committee of Social Rights recalled in its decision of 11 September 2013 on the merits of complaint No. 81/2012 (European Action of the Disabled v. France),

The Explanatory Report to the revised European Social Charter clarifies as follows the new scope of Article 15: (...) '64. Under this provision Parties must aim to develop a coherent policy for people with disabilities. The provision takes a modern approach to how the protection of the disabled shall be carried out, for example by providing that guidance, education and vocational training be provided whenever possible in the framework of general schemes rather than in specialised institutions, an approach which corresponds to that of Recommendation No. R (92) 6 of the Committee of Ministers of the Council of Europe. It not only provides the possibility, but to a large extent obliges Parties to adopt positive measures for the disabled. (§ 27)

In the same decision, the Committee stresses the fact that:

... Article 15 reflects and takes forward the shift in values that has occurred in Europe with regard to persons with disabilities, in which ideas of welfare and segregation have given way to an approach centred on inclusion and choice (Conclusions 2003, General Introduction, p. 10). As it stated in its decision of 4 November 2003 on the merits of the Autism-Europe v. France complaint, the underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly therefore, the primary rights are those of "independence, social integration and participation in the life of the community". Securing a right to education for children and others with disabilities plays a patently important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education "in the framework of general schemes, wherever possible" (§ 75).

And it adds that:

... Article 15§1 of the Charter makes it an obligation for States Parties to provide education for persons with disabilities (...) in one or other of the pillars of the education system, in other words mainstream or special schools. It adds that *the priority to be given to education in mainstream establishments*, which is referred to explicitly in the article, is subject to a conditionality clause, which if interpreted as it ordinarily would be and with due regard for the context and purpose of the provision, indicates to the public authorities that in order to secure the independence, social integration and participation in the life of the community of persons with disabilities through their education, they must take account of the type of disability concerned, how serious it is and a variety of individual circumstances to be examined on a case-by-case basis. Consequently, 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 (§ 78; emphasis added).

For its part, the Secretariat of the European Social Charter clarifies, in the information document concerning the rights of disabled persons under Article 15, that:

In the area of education, all discrimination based on disability must be prohibited, *the maintenance of special or separate education can only be justified by overriding reasons (...)* The education (...) of disabled persons (children, young persons and adults) must be organised within the mainstream and special institutions may only be used where this proves to be impossible. States must take action (such as teaching support and the accessibility of facilities) in order to allow the progressive and tangible integration of disabled persons into the education system. (emphasis added)

#### **b. Article 17 of the revised European Social Charter**

Article 17 of the revised European Social Charter provides:

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

1. 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 by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose

(...)

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

This provision applies to all children, including therefore intellectually disabled children (see also: decision on the merits of complaint No. 41/2007, § 34). “States need to ensure a high quality of teaching and to ensure that there is equal access to education for all children, in particular vulnerable groups” (Conclusions 2005, Bulgaria, Article 17§2, cited in the decision referred to above, § 34).

In its decision of 4 November 2003 on the merits of complaint No. 13/2002 (*Autism-Europe v. France*), the Committee stated:

Article 17 is predicated on the need to ensure that children and young persons grow up in an environment which encourages the “full development of their personality and of their physical and mental capacities”. This approach is just as important for children with disabilities as it is for others and arguably more in circumstances where the effects of ineffective or untimely intervention are ever likely to be undone. The Committee views Article 17, which deals more generally, *inter alia*, with the right to education for all, as also embodying the modern approach of mainstreaming. Article 17§1, in particular, requires the establishment and maintenance of sufficient and adequate institutions and services for the purpose of education (decision of 8 March 2004 on the merits of complaint No. 13/2002, § 49)

The decision of 3 June 2008 on the merits of complaint No. 41/2007 (*Mental Disability Advocacy Centre v. Bulgaria*) stipulates:

Firstly, as regards taking special account of children with disabilities, the Committee points out that, while it is acceptable for a distinction to be made between children with and without disabilities in the application of Article 17§2, *the integration of children with disabilities into mainstream schools in which arrangements are made to cater for their special needs should be the norm and teaching in specialised schools must be the exception* (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §49) (§ 35; emphasis added).

**c. Article E of the revised European Social Charter**

According to Article E of the revised European Social Charter, “The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status”.

As the European Committee of Social Rights has clarified:

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” (Autism-Europe v. France, cited above, §51)” (decision on the merits of complaint No. 81/2012, § 132. In this regard see also: decision on the merits of complaint No. 41/2007, § 49 ; decision on the merits of complaint No. 13/2000, § 51).

The Committee recalls that, since the wording of Article E is very similar to that of Article 14 of the European Convention on Human Rights, within the framework of the Charter it has reflected the interpretation given to this provision of the Convention by the European Court of Human Rights in its *Thlimmenos v. Greece* judgment of 2000 by stipulating that Article E entails that, in a democratic society, not only should persons who are in the same situation be treated equally and persons whose situations differ be treated differently, but all responses should show sufficient discernment to ensure real and effective equality. On the same basis, the Committee considers that Article E also prohibits all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all (Autism-Europe v. France, cited above, §52) (decision on the merits of complaint No. 81/2012, § 133. In this regard see also: decision on the merits of complaint No. 13/2002, § 52; decision on the merits of complaint No. 41/2007, § 50 ).

## B. Justiciability

The prohibition on violating the principle of equality has immediate effect: it consists in a negative obligation for the state to refrain from violating it.<sup>35</sup> In this regard, the refusal to make reasonable accommodations amounts to discrimination on the ground of disability, which must be prohibited outright.

On the other hand, it appears clear that, due to the financial resources that it may necessitate, the right to inclusive education may only be implemented gradually. Nonetheless, the internal measures adopted with the aim of implementing it may be evaluated in the light of the commitments entered into by the states parties which, in ratifying the revised European Social Charter, have committed to establishing and maintaining the rights guaranteed.<sup>36</sup> In this context, the European Committee of Social Rights performs a “classic” compliance review, consisting in a check of the compliance of the contested domestic legislation with the provisions of the European Social Charter, supplemented by the statements of interpretation it has adopted and, more generally, by the external sources mentioned above. As part of its scrutiny, the Committee may also compare the legal situations prevailing at different points in time within the states parties with a view to assessing progress made in implementing the rights proclaimed by the Charter which, we recall, are essentially distinguished by their programmatic character.<sup>37</sup>

In its decision of 11 September 2013 on the merits of complaint No. 81/2012, the European Committee of Social Rights reiterated in this regard the following finding from its case law:

... when the achievement of one of the rights protected by the Charter is exceptionally complex and particularly expensive to resolve, the measures taken by a State to achieve the Charter’s objectives must meet the following three criteria: “(i) a reasonable timeframe, (ii) measurable progress and (iii) financing consistent with the maximum use of available resources” (*Autism-Europe v. France*, cited above, §53). The Committee reiterated this requirement in decisions on subsequent complaints, particularly those concerning the rights of persons with disabilities (*Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, decision on the merits of 3 June 2008, §39; *FIDH v. Belgium*, Complaint No. 62/2010, decision on the merits of 21 March 2012, §113) (§ 79).

The Committee also stated that:

... in general, states have a wide margin of appreciation in the way in which they implement the Charter (*European Council of Police Trade Unions (CESP) v. Portugal*, Complaint No. 37/2006, decision on the merits of 3 December 2007, §14). However, *where the persons affected by the priority to be given to mainstream schools*, as the

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<sup>35</sup> See in particular in this regard in relation to the International Covenant on Economic, Social and Cultural Rights: the thematic study on the right of persons with disabilities to education, Report of the Office of the United Nations High Commissioner for Human Rights, 18 December 2013, in particular § 13: “13. While in the Covenant progressive realization is provided for and the constraints placed by limited available resources recognized, there are general and specific legal obligations contained in article 13 thereof that take immediate effect, including the elimination of discriminatory provisions and the provision of primary education for all. The failure to comply with these obligations constitutes a direct violation of the right to education”.

<sup>36</sup> Cf. for example, *Decision on the decision* of 23 May 2012 on the merits of collective complaint No. 65/2011 (*GENOP-DEI and ADEDY v. Greece*), § 18.

<sup>37</sup> In two decisions of 23 May 2012 on the merits of complaints Nos. 65/2011 and 66/2011, the European Committee of Social Rights preceded its assessment of the various violations alleged with opening remarks in which it extended in these terms to the right to work the findings that it had previously made concerning the repercussions of the economic crisis on social rights: “the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries most need the protection” (respectively § 16 and § 12).

means most liable of securing the independence, integration and participation of persons with disabilities, are children and adolescents with autism, Article 15§1 implies that states are required to provide the human assistance needed for the school career of the persons concerned. The margin of appreciation applies only to the means that states deem most appropriate to ensure that this assistance is provided, bearing in mind the cultural, political or financial circumstances in which their education system operates (see, *mutatis mutandis*, ECHR Grand Chamber judgment of 22 May 2012, *Scoppola v. Italy*, application No. 126/05, §83). *However, this is subject to the provision that, at all events, the choices made and the means adopted are not of a nature or are not applied in a way that deprives the established right of its effectiveness and turns it into a purely theoretical right* (European Federation of National Organisations working with the Homeless (FEANTSA) v. France, Complaint No. 39/2006, decision on the merits of 5 December 2007, §55) (§81; emphasis added).

In doing so, the Committee confirmed another traditional finding, which it shares with the European Court of Human Rights:

As regards the respect for the right to education of intellectually disabled children residing in HMDCs, the Committee takes note of the efforts made by the Government, particularly through the adoption of legislation and the setting up of action plans. It considers this to be a necessary first step but one that is insufficient to bring a situation into conformity with the Revised Charter. It reiterates that “*the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact*” (International Commission of Jurists v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32). Consequently, the manner in which this legislation and these action plans are implemented is decisive (decision of 3 June 2008 on the merits of complaint No. 41/2007, § 38; emphasis added).

These findings can moreover be usefully considered together with those made by the Committee on the Rights of Persons with Disabilities in its General Comment No. 4:

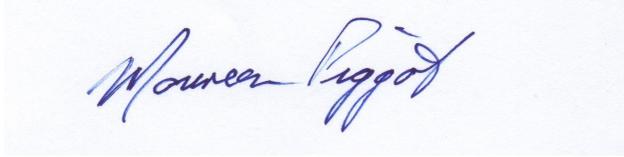
Article 4.2 requires that States parties undertake measures to the maximum of their available resources regarding economic, social and cultural rights, and, where needed, within a framework of international cooperation, with a view to achieving progressively the full realisation of those rights. *Progressive realization means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 24.* This is not compatible with sustaining two systems of education: mainstream and special/segregated education systems. Progressive realization must be read according to the overall objective of the Convention to establish clear obligations for States parties in respect of the full realization of the rights in question. Similarly, States parties are encouraged to redefine budgetary allocations for education, including transferring budgets to develop inclusive education. *Any deliberately retrogressive measures in that regard must not disproportionately target learners with disabilities at any level of education.* They must be only a temporary measure limited to the period of crisis, be necessary and proportionate, not be discriminatory and comprise all possible measures to mitigate inequalities (§ 39; emphasis added).

## VI. Conclusion

The complainant organisations request the European Committee of Social Rights to rule that, in view of the lack of progress achieved in promoting access to mainstream education for children with an intellectual disability in the French Community, and by conversely allowing the situation to deteriorate, in breach of its commitments under the revised European Social Charter, Belgium has failed to comply with Articles 15 and 17 of the European Social Charter, read in isolation or in conjunction with Article E of the revised European Social Charter.

Done in Brussels and Paris on 12 January 2017.

For Inclusion Europe,



Maureen Piggot  
President

For the International Federation for Human Rights,

Dimitris Christopoulos  
President