



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

6 December 2017

Case Document No. 4

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

**RESPONSE FROM INTERNATIONAL FEDERATION FOR
HUMAN RIGHTS (FIDH) AND INCLUSION EUROPE**

Registered at the Secretariat on 14 November 2017

European Committee of Social

Rights

Complaint No. 141/2017

**lodged by the International Federation for Human Rights (FIDH) and Inclusion Europe
against Belgium**

**Complainant organisations' reply to the
submissions filed on 22 September 2017 by Belgium**

15 November 2017

I. Introduction

1. On 12 January 2017, the International Federation for Human Rights (FIDH) and Inclusion Europe lodged a complaint against Belgium, in which they alleged 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, on the contrary, 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.

Belgium submitted its observations on the admissibility of the complaint on 3 March 2017.

On 4 July 2017, the European Committee of Social Rights decided to declare the complaint admissible.

On 22 September 2017, Belgium's submissions in response to the complaint were registered at the Secretariat of the European Social Charter.

2. In accordance with Rule 31, § 2 of the Rules of the European Committee of Social Rights, the complainant organisations submit their observations on the submissions filed by Belgium. These observations relate to Belgium's contention that it is necessary to first exhaust domestic remedies in Belgium before applying to the Committee (II). They then address the main issues concerning the alleged violations (III), starting with a reminder of the actual purpose of the complaint (of which Belgium tends to lose sight in its submissions) (1.), before turning to the central question of whether Belgium is actually – in practice, and not merely theoretically – honouring its obligation to move towards fully inclusive education for children with an intellectual disability (2.).

II. The alleged requirement to first exhaust domestic remedies

3. The complainant organisations note that, in its submissions, Belgium suggests that domestic remedies must first be exhausted before a complaint can be lodged with the European Committee of Social Rights (paragraphs 2.1. to 2.3. of Belgium's submissions). This is a surprising argument given that neither Belgium nor, as far as the complainant organisations are aware, any other State Party to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 58) has raised this argument before. The complainant organisations wish to make three observations in this connection.

4. First and foremost, they submit that the **exhaustion of domestic remedies rule does not apply in the context of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.**

This is because of the specific nature of the collective complaints mechanism.¹ When the protocol was negotiated, States were naturally familiar with the standard practice of including the prior exhaustion of domestic remedies among the admissibility criteria for submissions (or applications) filed with the human rights supervisory bodies set up under Council of Europe or UN instruments designed to protect those rights. The failure to include such a condition for the admissibility of collective complaints was deliberate. It can be explained by the objective and collective nature of the collective complaints mechanism, the purpose of which is not to secure recognition of the rights of particular individuals (or to enable them to obtain redress for any injury caused by the violation of their rights) but rather to have it established that, through its laws and regulations or the policies it pursues, a particular state has not acted in accordance with the commitments entered into under the European

¹ J.-Fr. Akandji-Kombé, « Actualité de la Charte sociale européenne. Chronique des décisions du Comité européen des droits sociaux sur les réclamations collectives (2008-2011) », *Rev. trim. dr. h.*, 91/2012, p. 557 et 560, and the references cited in note 34.

Social Charter.

Among those entitled to submit collective complaints, moreover, are international employers' organisations and trade unions referred to in paragraph 2 of Article 27 of the Charter, as well as other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee (Article 1, a. and b., of the Protocol). These organisations, however, are not able to make use of domestic remedies: if a State Party to the European Social Charter has failed to honour its obligations, the organisations in question are not the ones that are affected, and will have no access to any dispute settlement mechanism at national level.

5. Secondly, the complainant organisations note that the prior exhaustion of domestic remedies rule – where it exists in international human rights treaties – was introduced solely in the interests of States, to protect their sovereignty. States may waive the rule, therefore, but if they do decide to invoke it, they must do so at the initial admissibility stage. **In failing to invoke the failure to comply with this alleged requirement at the admissibility stage, Belgium is presumed to have waived its right to plead inadmissibility on this ground.**

6. Lastly, the complainant organisations note, as an entirely subsidiary point, that they **did not have access in Belgium to effective remedies which would make it possible to ensure that the French Community of Belgium complied with the requirements of Articles 15 and 17 of the revised European Social Charter, taken alone or in conjunction with Article E of the Charter.** The complainant organisations are not deemed to have standing to bring an action for damages under the ordinary law on civil liability (Article 1382 of the Civil Code), the only remedy indicated by Belgium, as Belgium has not granted the associations the right to act in the collective interest (i.e. on the basis of the social purposes which the associations have agreed to pursue). The Belgian courts, furthermore, are generally very reluctant to accept that the rights enshrined in the European Social Charter can be relied on in court, especially in proceedings relating to subjective rights.²

III. The alleged violation of Articles 15 and 17 of the revised European Social Charter, taken on its own or in conjunction with Article E

1. Preliminary remark: the scope of Complaint No. 141/2017

7. The complainant organisations wish to begin with a reminder of the scope of the complaint which they have lodged. In this complaint, it is alleged 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 under the purview of the French Community (Wallonia-Brussels Federation), Belgium is failing to comply with its obligations under 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.

Instead of answering the question put, however, the Belgian Government provides either very general arguments, relating in particular to the “on principle, inclusive” nature of foundation level and secondary education in French-speaking Belgium (paragraphs 4.2.1. to 4.2.6. of the submissions), or specific examples of the efforts which Belgium is seeking to make in order to progress towards realising the right of children with disabilities to inclusive education, but which do not concern children with a mental disability (paragraph 4.2.4., regarding children with visual impairments or specific cognitive disorders, resulting in the associated learning difficulties). In actual fact, **there is hardly any mention in the Government’s submissions of the specific case of children with a mental disability, and in particular children in type 2 education (moderate or severe mental**

² See O. de Broux, in S. Van Drooghenbroeck (dir.), *Le droit international et européen des droits de l'homme* (Larcier, 2014), pp. 187-195.

disability), even though it was lack of access to mainstream education for children in this category that prompted the complaint in the first place.

The complainant organisations attribute this attitude to the fact that, when it comes to access to mainstream education for children in this group, Belgium, instead of moving forward, is regressing. This issue is examined in greater depth below.

2. The allegedly inclusive nature of education in French-speaking Belgium

8. The organisations wish to begin with three general observations.

9. Firstly, they note that in its submissions, Belgium mentions certain political intentions on the part of the Government, which should supposedly pave the way for progress on inclusive education. Intentions are not the same thing as actions, however. Also, **even as Belgium asks for recognition of the progress which it claims to have made, it effectively admits that it has gone backwards in recent years.** The submissions, for example, refer to the Pact for Excellence in Education (in paragraph 4.2.8). This pact does not, as yet, contain a single legal undertaking. It is merely a statement of political intent, which is still to be confirmed and implemented through legal instruments. Most importantly, moreover, in the excerpts cited by the Belgian Government itself in its submissions, it is stated that one intention of the Pact for Excellent should be to:

"promote systemic change so that each pupil can find the place that is right for him or her, thereby reducing the number of pupils in special education in favour of mainstream education. *Our goal is to reduce the percentage of pupils in special education to 2004 levels by 2030.*"

In other words, the Task Force preparing the Pact for Excellence makes no secret of the fact that Belgium's objective is to return to a situation that obtained thirteen years ago, because since then, the situation has deteriorated: in comparison with 2004, a higher percentage of pupils with special needs are being referred to special education, in complete contravention of Belgium's commitments in this area.

This merely confirms what the complainant organisations have been maintaining since they first lodged their complaint, in which they noted that, in terms of access to inclusive education for children with a mental disability, the French Community is moving backwards.³ In support of this view, the complainant organisations cited the 2015 education indicators, according to which "special education's share in each of the levels of education in the French Community has risen steadily over the past 10 years",⁴ the share of pupils in special education at primary level having thus increased from 4.9% in 2004-2005 to 5.3% in 2013-2014.⁵

Far from contradicting this assessment, the Belgian Government's observations confirm it. The 2016 education indicators, which have just been released⁶ (they were not available at the time when the initial complaint was lodged) confirm this very worrying trend, moreover: "For the past ten years, the number of pupils in full-time mainstream primary education has remained relatively stable, contrary to the number of pupils in special primary education, which has been on the rise, in particular since 2008-2009" (p. 18). The figures show that, over the past ten years, the share of pupils in special education at primary level has risen from 4.9% (2005-2006) to 5.3% (2014-2015), and from 3.9% to 4.7% at secondary level:

³ See, in the initial complaint, part III, section 4.2., C (pp. 12-14).

⁴ <http://www.enseignement.be/index.php?page=26998>

⁵ <http://www.enseignement.be/index.php?page=26998>

⁶ See <http://www.enseignement.be/index.php?page=0&navi=2264>

	Mainstream		Special		Share of special
	2005-2006	2014-2015	2005-2006	2014-2015	
primary		317 370 (+5%)	15 469, i.e. 4.9% of pupils	17 656 (+14%), i.e. 5.3% of pupils	Increase (from 4.9% to 5.3% in 10 years)
secondary	345 581	344 235	14 598, i.e. 3.9%	17 538 (+20%), i.e. 4.7%	Increase (from 3.9% to 5.7% in 10 years)

In absolute figures, the increase is also noticeable: since 2005-2006, pupil numbers in special primary education have increased by 14 %, from 15 469 in 2005-2006 to 17 656 in 2014-2015; in special secondary education, pupil numbers have risen by 20%, from 14 598 to 17 538. What is required from Belgium are not promises to do better but tangible progress, yet it is doing the opposite.

10. Secondly, the complainant organisations are concerned that in its submissions, Belgium claims that the continued provision of special education is justified not least because of the need to avoid undermining the right to education of pupils (presumably pupils who do not have disabilities) attending the school in which it is planned to place a child or children with disabilities. Paragraph 4.3.2. of the submissions accordingly states:

“...the gradual integration into mainstream education of pupils with special needs cannot be pursued at any price and *due care must be taken to respect the right to education of mainstream pupils attending the school in question*” (emphasis added)

This line of reasoning is unacceptable for two reasons. Firstly, it is ill-informed: as indicated in the initial complaint, taking in pupils who have special needs, including because of mental disabilities, can benefit mainstream education pupils without disabilities in a number of ways, not least in terms of learning about diversity and tolerance. Secondly, the line of reasoning proposed suggests that the prejudice or even ostracism which continues to affect pupils with disabilities might justify delays in honouring the obligation to move towards truly inclusive teaching. In the view of the complainant organisations, however, such prejudice and ostracism need to be tackled: under no circumstances can they be deemed to constitute justification for government action.⁷

11. Thirdly, the complainant organisations note that Belgium’s arguments are based almost entirely (except for the example of visually impaired persons, which has no relevance in the present complaint) on arguments of a formal nature, which the State draws from the country’s legal provisions (or political commitments entered into by the relevant governments) . The very point of the complaint that has been lodged, however, was to demonstrate **the lack of effectiveness of these formal guarantees**, as reflected in the figures cited above: in this respect, i.e. the actual implementation of the relevant rules for the benefit of the children concerned and their families, Belgium offers virtually no new arguments. The reason for this, in the view of the complainant organisations, is that the instruments in question are not being implemented *in practice*.

12. Belgium’s submissions also call for more specific comments.

13. Belgium points to the fact that, under Belgian law, educational institutions are in principle required to admit those pupils who so request. Article 80 of the decree of 24 July 1997 defining the priority missions of foundation level and secondary education and organising the structures necessary to achieve it (the “missions decree”) states that, where a pupil’s application for admission is refused, the school administration must provide a form stating “the reasons for refusal and indicate the

⁷ See for example ECtHR (3rd section), *Smith and Grady v. United Kingdom* (application nos. 33985/96 and 33986/96), judgment of 27 September 1999, paragraph 97.

administrative agency from which the pupil and his or her parents may seek assistance in enrolling the pupil in a French Community school or other institution ensuring compliance with the compulsory schooling requirement”.

In practice, however, this provision is not being observed. Children who are denied admission are not being given the forms referred to in this provision of the “missions decree”.

14. Belgium further notes that, according to the “missions decree” of 24 July 1997 as amended in 2016, each school must draw up a “management plan” describing the “strategy regarding reasonable accommodation for pupils with recognised special needs” (paragraph 4.2.3. of the Government’s submissions), by 1 September 2018 at the latest.⁸

Belgium fails to point out, however, that in the Decree of 19 July 2017 on the implementation of school management plans, specific assistance for the management in nursery, primary and foundation level education, mainstream and special, and additional educational and administrative staffing in special secondary education⁹ **this move was postponed**, with the result that the requirement to draw up a management plan will only apply to schools from 1 September 2020. For now, these management plans have not yet been adopted. At least this initiative demonstrates an awareness on the part of the French Community that the current situation cannot continue.

15. Belgium notes in its submissions (paragraph 4.3.3., pages ***) that special secondary education “is available in various “forms”, including “forms” 3 and 4 which are vocational and help pupils develop into young adults capable of integrating into society, far more so than if they had been mainstreamed into traditional vocational education”.

The complainant organisations wish to draw attention to the fact that, in fact, **education “forms” 3 and 4 are not available to children in type 2 education**, i.e. children who are found, following a multidisciplinary examination, to have “moderately or severely retarded intellectual development” (Article 8, § 1).

It will be recalled, indeed, that secondary education is divided, depending on the pupil’s potential, into four “forms”: social adjustment (“form” 1), social and vocational adjustment (“form” 2), vocational education (“form” 3) and general, technical, arts and vocational education (“form” 4).

The only “forms” available to pupils in type 2 education, however, are “forms” 1 and 2. As Article 46 of the decree of 3 March 2004 (cited in Belgium’s submissions, paragraph 4.3.3.) makes very clear, these forms of education are only designed to enable pupils to integrate into “sheltered living environments” (“form” 1 special education) or into “sheltered living and work environments” (“form” 2 special education). In other words, **within special education, type 2 children only have access to education that is going to perpetuate their segregation in adulthood, rather than facilitating their inclusion.**

16. In its submissions, Belgium notes that people with disabilities can in theory seek an injunction in cases where they are refused admission, if such refusal appears discriminatory and is therefore prohibited under the decree of 12 December 2008 on measures to combat certain forms of discrimination (Art. 50 of the decree). Scientific literature, however, points to the **difficulties experienced by victims of discrimination in making use of the remedies available to them.**¹⁰ The growth in the number of complaints lodged with Unia since the publication of the brochure “A l’école de ton choix” is an indication of the lack of information for people with disabilities concerning their

⁸ Article 67 § 2, f), of the decree of 24 July 1997, as amended by the decree of 4 February 2016.

⁹ Mon. b., 24.8.2017.

¹⁰ J. Vrielink, « Le droit de l’égalité fait-il la différence ? Les effets du droit antidiscriminatoire à la lumière des recherches en sciences sociales », *Politiques antidiscriminatoires*, sous la direction de J. Ringelheim, G. Herman et A. Rea, Louvain-la-Neuve, de Boeck, 2015, spéc. p. 56 et 57.

rights and, in particular, the right to inclusive education.

It is symptomatic, moreover, that instead of seeking to extend the very principle of inclusive education, the Belgian Government focuses on the steps which, in its view, people with disabilities themselves ought to be taking in order to give effect to this principle. Exercising the right to inclusive education should not require litigation, however: pupils should be able to enjoy it without having to go down this very expensive, and in practice totally ineffective, route.

The fact is that the right to inclusive education is not effective in French-speaking Belgium. It is true that, in principle, as noted by the Legislation Section of the State Council in an opinion given on 7 August 2017 on a proposal for the enactment of a French Community decree on the reception, accompaniment and maintenance in mainstream foundation level and secondary education of pupils with special needs (Opinion 61.230/2/V), "enrolment in special education is based on parental choice. While criteria have been established to ensure that such education is reserved for the pupils for whom it is intended (need for a multi-disciplinary enrolment report specifying the type of special education appropriate to the pupil's needs), there is nothing to prevent any parents who so wish from enrolling their child in a mainstream education institution."¹¹ This "parental choice", however, is only meaningful if proper conditions exist in mainstream education institutions for accommodating the children concerned. Until these conditions improve, parents will continue to feel impelled to keep their child in special education.

In its submissions, moreover, Belgium admits that the current situation is unsatisfactory, when it talks about the risk of reverse discrimination that inclusive education, understood in the absolute sense, could pose to children with disabilities (paragraph 4.2.7, page ***). The Belgian Government states, more specifically, that "It is possible, for example, that the child may feel rejected and "not part of the group". It goes on to say "If the reasonable accommodation is not such as to enable the pupil with special needs to be placed in a mainstream setting while at the same time ensuring he or she receives high-quality teaching, not continuing to provide special education in those circumstances could constitute a form of child abuse". These comments confirm that inclusive education is not a reality. Otherwise, they would not make sense. By providing individualised support tailored to the child's special needs, reasonable accommodation is meant to complement the mainstream education provision which must be structured in such a way as to allow inclusion. Under no circumstances does it absolve us from having to think about inclusion. Otherwise, the best that can be hoped for is an integration approach ("integration" being the term used by the Belgian Government on page *** of its submissions, incidentally), in which children with disabilities, with the help of reasonable accommodation if necessary, are expected to adapt to the norm as embodied by "able-bodied" children, who form the template around which teaching is designed.

¹¹ State Council Opinion No. 61.730/2/V regarding a proposal for a French Community decree on the reception, accompaniment and maintenance in mainstream foundation level and secondary education of pupils with special needs, *Doc. parl.*, sess. 2016-2017, n° 461/2, p.

IV. Conclusion

17. In a report presented in September 2017, the Council of Europe Commissioner for Human Rights Mr Nils Muižnieks mentioned Belgium as one of the Council of Europe member states where “the reluctance to include children with disabilities is exacerbated by the wide margin of discretion schools often enjoy when it comes to providing reasonable accommodation to these children so that they have access to education on an equal footing with others”.¹² On 24 August 2017, he also published an article entitled “Respecting the human rights of persons with psychosocial and intellectual disabilities: an obligation not yet fully understood”, in which he reiterated the importance of inclusive education. In this article, he draws attention to the unacceptable delays that have occurred in this area in Belgium, particularly in the French-speaking part:¹³

“Separate education is at variance with the right of children with disabilities to quality education on the basis of equal opportunity, as it is often characterised by low expectations, sub-standard teaching and worse material conditions. It also reinforces and validates the marginalisation of children with disabilities in the later stages of their lives, including their access to the labour market (as specialised education does not usually provide children with any diploma at the end of their studies). **For their non-disabled peers, teachers, and others in the community, separate education means being deprived of knowledge about human diversity and essential life skills.**

My own work indicates that separate education remains the norm in many member states. In Belgium and the Czech Republic, a high number of children with disabilities are still segregated in schools with little prospect of being reintegrated into mainstream education”.

The complainant organisations share this view. The new Council of Europe Disability Strategy 2017-2023 “Human rights: a reality for all”, adopted on 30 November 2016, takes a similar line. This strategy states that “Persons with disabilities are entitled to have access to and enjoy the full range of human rights safeguarded by the (...) United Nations Convention on the Rights of Persons with Disabilities”¹⁴ and aims to be “in line with the UNCRPD” and the “body of decisions, guidelines and General Comments of the UNCRPD Committee”.¹⁵ Similarly, General Comment No. 4 on Article 24 (Right to inclusive education) of the United Nations Committee on the Rights of Persons with Disabilities states that segregation occurs “when the education of students with disabilities is provided in separate environments designed or used to respond to a particular impairment or to various impairments, in isolation from students without disabilities”.¹⁶

18. In view of the delays on the part of the Belgian Government in reversing the growing trend over the last 10-plus years to segregate children with disabilities, Belgian’s patent inability, in the French-speaking part of the country, to ensure that the repeated political commitments are translated into action, and the lack of will to challenge the prejudice and stereotypes which account for the continued existence of special education (a state of affairs that is due to the lack of sufficiently inclusive mainstream education facilities, which does not excuse it, of course), the complainant organisations ask the European Committee of Social Rights to find that Belgium is not acting in accordance with the obligations incumbent on it under the European Social Charter, as interpreted in the light of the other relevant standards on the human rights of persons with disabilities, as reiterated in the initial complaint, and, in particular, the Convention on the Rights of Persons with Disabilities.

¹² Position paper by the Commissioner for Human Rights entitled “*Fighting school segregation in Europe through inclusive education*” (Strasbourg, Council of Europe, 2017), p. 10. Available at: <https://rm.coe.int/fighting-school-segregation-in-europe-through-inclusive-education-a-positi/168073fb65>

¹³ See the “Human Rights Comment” <https://www.coe.int/en/web/commissioner/-/respecting-the-human-rights-of-persons-with-psychosocial-and-intellectual-disabilities-an-obligation-not-yet-fully-understood?desktop=true>

¹⁴ Council of Europe Disability Strategy 2017-2023 “Human rights: a reality for all”, paragraph 2 <https://rm.coe.int/16806fe7d4>

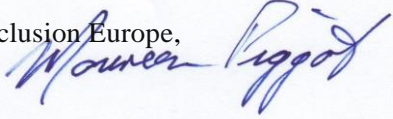
¹⁵ Council of Europe Disability Strategy 2017-2023 “Human rights: a reality for all”, paragraph 23 <https://rm.coe.int/16806fe7d4>

¹⁶ United Nations Committee on the Rights of Persons with Disabilities, General Comment No. 4, paragraph 11, 26 August 2016

Done in Brussels and in Paris, on 15 November

2017.

For Inclusion Europe,

A handwritten signature in blue ink that reads "Maureen Piggot". The signature is written in a cursive style with a large initial 'M'.

Maureen Piggot President

For the International Federation for Human Rights,

A handwritten signature in black ink that reads "Dimitris Christopoulos". The signature is written in a cursive style with a large initial 'D'.

Dimitris Christopoulos
President