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

11 March 2015

**Case Document No. 4**

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

**OBSERVATIONS BY THE INTERFEDERAL CENTRE  
FOR EQUAL OPPORTUNITIES AND OPPOSITION TO  
RACISM AND DISCRIMINATION**

**Registered at the Secretariat on 2 March 2015**



# Collective complaint No. 109/2014

## MDAC v. Belgium

*Submission under Article 32A§1 of the Rules of Procedure of the European  
Committee of Social Rights by the Interfederal Centre for Equal Opportunities  
and Opposition to Racism and Discrimination*

# I. Introduction: complainant organisation and basis for the submission

## A. Complainant organisation

The Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination (hereafter "the Centre") is filing this submission under Article 32A§1 of the Rules of Procedure of the European Committee of Social Rights in its capacity as an independent mechanism tasked with monitoring compliance with the United Nations Convention on the Rights of Persons with Disabilities (hereafter the "CRPD") within the meaning of Article 33§2 CRPD and in its capacity as an independent interfederal public service specialising in equality and non-discrimination policy.

The monitoring mission of the Centre, as an independent mechanism, includes assessing whether regional, Community and federal legislation, policy and practice are in keeping with the CRPD. It seeks to provide an impartial and independent viewpoint, in order to guide the Committee in the performance of its task.

Alongside the focal points (Art. 33§1) and civil society (Art. 33§3), the independent mechanism is part of the system for implementing the CRPD at national level. The United Nations General Assembly unanimously adopted the CRPD on 13 December 2006. Belgium signed the convention on 30 March 2007 and ratified it on 2 July 2009. It came into force in Belgium on 1 August 2009. Lastly, on 8 May 2009, the Flemish Parliament adopted the "Decree assenting to the Convention on the Rights of Persons with Disabilities and to the Optional Protocol to the Convention on the Rights of Persons with Disabilities".

Under the CRPD, each State Party is required to submit to the Committee on the Rights of Persons with Disabilities a report on the basis of which the Committee may make suggestions and general recommendations (Art. 36 CRPD).

Belgium submitted its first periodic report to the UN Committee on the Rights of Persons with Disabilities in July 2011.<sup>1</sup>

The Belgian report was followed by a parallel report from the Centre<sup>2</sup> and shadow reports from civil society. These reports were intended to provide the Committee on the Rights of Persons with Disabilities with a critical insight into the implementation of the rights protected under the CRPD in Belgium.

The Committee on the Rights of Persons with Disabilities issued its concluding observations on Belgium on 1 October 2014.<sup>3</sup>

## B. Basis for the complaint

In this submission, we will look at the application of the fundamental rights of people with disabilities within the meaning of the CRPD, which brings together and firmly reiterates the relevant international standards and principles. These include respect for dignity, autonomy, freedom of

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<sup>1</sup> See [http://sociaalsecurity.fgov.be/fr/nieuws-publicaties/publicaties/vn\\_rechten\\_personen\\_handicap.htm](http://sociaalsecurity.fgov.be/fr/nieuws-publicaties/publicaties/vn_rechten_personen_handicap.htm), last accessed 26 February 2015.

<sup>2</sup> <http://www.diversite.be/rapport-parallele-convention-des-nations-unies-relative-aux-droits-des-personnes-handicapees>

<sup>3</sup> See [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=fr](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=fr), last accessed 26 February 2015.

choice, independence, non-discrimination, full and effective participation in society, respect for difference and equality of opportunity. The CRPD does not enshrine any new basic rights. Following numerous cases of inequality despite the existence of fundamental rights for all human beings, the CRPD clarifies and elaborates on them so that people with disabilities can enjoy and exercise the same rights as everyone else.

In our report, we will focus mainly on the right to education of children with disabilities in Flemish mainstream schools,<sup>4</sup> at primary and secondary level.<sup>5</sup> The right to education, as enshrined in Article 24 CRPD, features prominently in the arsenal of fundamental rights. It is recognised as epitomising "*the indivisibility and interdependence of all human rights*", being "*central to the full and effective realization*" of other rights as well.<sup>6</sup> These other rights pertain, *inter alia*, to social and economic inclusion, full participation in society and access to employment.

Article 24 CRPD recognises inclusive education systems 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, the Convention underscores that "*the right to education is in fact the right to inclusive education*".<sup>7,8</sup>

The letter of this Article 24 CRPD also overlaps with the content of Articles 15.1., 15.3 and 17.2. of the Revised Social Charter, which provide the legal basis for the collective complaint.

With regard to the MDAC's arguments concerning the violation of Article E taken in conjunction with Articles 15 and 17 of the Revised Social Charter, the Centre wishes to draw attention to the obligations entered into by Belgium under Article 24 CRPD and under the general principles that underpin the CRPD as a whole, in particular the principle of non-discrimination, full and effective participation and integration in society, respect for difference and respect for the evolving capacities of children with disabilities (Art. 3 CRPD).

In our report we seek to review inclusive education in Flanders, both in terms of eligibility requirements and in terms of the difficulties encountered when it comes to actually exercising the

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<sup>4</sup> The terms "mainstream schools" and "general education" are normally used to refer to school systems where disabled and non-disabled pupils study alongside one another, in contrast to special schools, which are solely for pupils with disabilities. For the purposes of this submission, the terms are used interchangeably to refer to general education, given that mention is made of these schools in the CRPD.

<sup>5</sup> Since the Special Institutional Reform Act of 8 August 1988, education has been a Community matter.

<sup>6</sup> See Committee on Economic, Social and Cultural Rights, General Comments No. 11 (1999) on Plans of Action for Primary Education and No. 13 (1999) on the right to education.

<sup>7</sup> United Nations General Assembly, Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights*, "Thematic study on the right of persons with disabilities to education", 18 December 2013, pp. 4 and 5, See [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A\\_HRC\\_25\\_29\\_FRE.DOC](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A_HRC_25_29_FRE.DOC), last accessed 27 February 2015.

<sup>8</sup> In its concluding observations, for all countries combined, the Committee on the Rights of Persons with Disabilities has consistently called on the States Parties to secure and implement the right to inclusive education. See in particular the concluding observations on the initial reports submitted by Argentina, CRPD/C/ARG/CO/1 and Spain, CRPD/ESP/CO/1. It has also repeatedly indicated its preference for non-special schools over special ones. See in particular its concluding observations on the initial reports submitted by Paraguay, CRPD/C/PRY/CO/1 (transition from a system of segregated special education to the inclusive model), Argentina CRPD/C/ARG/CO/1 (integration of pupils with disabilities who have been attending special schools), China, CRPD/C/CHN/CO/1 (reallocation of resources from the special education system to promote inclusive education in mainstream schools), and Australia, CRPD/C/AUS/CO/1 (students with disabilities continue to be placed in special schools and many of those who are in regular schools are largely confined to special classes or units).

right to inclusive education. We begin by noting the concerns voiced by the Committee on the Rights of Persons with Disabilities following its review of Belgium, before going on to briefly describe the series of legislative initiatives taken in the Flemish Community to introduce and promote inclusive education. To conclude, we look at the reports received by the Centre and which provide an illustration of the kind of discrimination liable to be encountered by pupils with disabilities in mainstream education in Flanders.

The latest decree adopted by the Flemish Parliament on 21 March 2014 (the “M decree”) follows on from the efforts made in Flanders to ensure that pupils with disabilities have access to mainstream schools. This decree does nevertheless still present a few difficulties, and poses a number of challenges with respect to the CRPD. In section II, we will examine this decree in the light of the convention.

Lastly, by way of conclusion, we will look at the various obstacles encountered by pupils with disabilities in mainstream education as it stands at present and which seriously interfere with the effective exercise of their right to inclusive education.

## II. State of play: respect for the right to inclusive education in Flanders

In this chapter, we take stock of the situation in Flanders as regards inclusive schooling, from three angles: the concluding observations adopted by the Committee on the Rights of People with Disabilities on the initial report of Belgium, gradual developments in the law and the reports received by the Centre.

### A. Concluding observations of the Committee on the Rights of Persons with Disabilities on Belgium

After examining the various reports (state, parallel and shadow reports), the Committee on the Rights of Persons with Disabilities, a body of independent experts which monitors implementation of the CRPD by the States Parties, published its concluding observations on Belgium.<sup>9</sup>

The concluding observations mention both the positive and negative aspects of implementation of the Convention in the States Parties, as well as the various factors hindering observance of the fundamental rights of people with disabilities. The concluding observations are accompanied by recommendations for the signatory state.

Commenting specifically on Article 24 CRPD, the Committee says it is “*concerned at reports 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.*”

Also, in terms of recommendations, 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,*

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<sup>9</sup> Concluding observations on the initial report of Belgium, CRPD/C/BEL/CO/1 see

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=fr](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=fr), last accessed 26 February 2015

*individual learning plans, assistive technology in classrooms, and accessible and adapted materials and curricula (etc.)."*<sup>10</sup>

## B. Legislative initiatives to ensure inclusion within the Flemish education system

It should be noted firstly that of all the Communities in Belgium, Flanders is the one with the highest percentage of children with disabilities enrolled in mainstream schools. Special education, however, remains the leading approach and is extensively organised. In its first periodic report to the Committee on the Rights of Persons with Disabilities, moreover, Belgium itself admitted: *"The development of special education over the past 40 years has meant that pupils with disabilities are usually catered for in a non-inclusive education system: 0.78 per cent (nursery education), 6.79 per cent (primary education) and 4.24 per cent (secondary education)."*<sup>11</sup>

Special education revolves around eight types of education<sup>12</sup> in the case of primary education, and seven types and four forms of education in the case of secondary education.<sup>13</sup> These forms of schooling are based on the same typology as that used for primary education.

Some initial efforts were made to introduce inclusive education with the Act of 11 March 1986 on the organisation and subsidising of integrated special education.

Flanders then introduced an integrated system of education (known as GON) where mainstream schools and special schools work together to enable children with disabilities and/or learning or behavioural difficulties to attend classes and participate in activities in mainstream schools, with the aid of a special programme and with help from the special education sector (teachers, speech therapists, physiotherapists, etc.). It should be noted, however, that integrated education is only available to pupils who are capable of following the common curriculum, and that pupils who have mild intellectual impairments, serious emotional or behavioural disorders or serious learning difficulties (types 1, 3 and 8) must first have completed nine months, on a full-time basis, in special education in order to be eligible for GON.

Referring to integrated education, the periodic report submitted by Belgium states that *"in the last decade the number of such pupils in integrated education (GON) has risen from 1,522 pupils (1999/00) to 10,503 pupils (2009/10)"* but that *"these children continue to account for only a small percentage of*

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<sup>10</sup> Concluding observations on the initial report of Belgium, CRPD/C/BEL/CO/1, p.6.

<sup>11</sup> Initial periodic report submitted by Belgium ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FBEL%2F1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FBEL%2F1&Lang=en)), p.37

<sup>12</sup> Article 10 of the Flemish Community Decree of 25 February 1997 on primary education: mild mental disability (type 1); moderate or severe mental disability (type 2); serious behavioural and/or personality disorders (type 3); physical disabilities (type 4); living in a medical facility (type 5); visual impairments (type 6); hearing impairments (type 7); serious learning difficulties (type 8)

<sup>13</sup>Article 259 of the Flemish Government order codifying secondary-level education:

- education category 1 (types 2, 3, 4, 6, 7): acquisition of general social skills to facilitate integration in a sheltered living environment;
- education category 2 (types 2, 3, 4, 6, 7): acquisition of vocational and social skills to facilitate integration in a sheltered living and work environment;
- education category 3 (types 1, 3, 4, 6, 7): acquisition of knowledge and skills to facilitate integration in a regular living and work environment;
- education category 4 (types 3, 4, 5, 6, 7): acquisition of the same knowledge and skills as pupils in mainstream secondary education.

*total pupils (0.95 per cent)."*<sup>14</sup>

On 12 December 2003, the Flemish Government adopted an order on the integration of pupils with moderate to severe intellectual disability in primary and secondary schools. Such pupils, who are classed as Type 2, do not have access to integrated schools (GON) but can apply for the inclusive education scheme (ION) where the pupil is supported within mainstream education, an integration plan is drawn up and the formal learning objectives do not have to be achieved. The emphasis is on the pupil's social integration. The support provided consists of 5 and a half hours of additional classes taught by a teacher from the Type 2 special education sector and a grant of 250 euros per year. Under the order, the number of pupils who can take part in the scheme is limited to one hundred.

The Flemish Community decree of 10 July 2008 establishing a Flemish policy framework for equal opportunities prohibits discrimination on the grounds of disability in education. The right to non-discrimination also includes the right, for person with disabilities, to benefit from reasonable accommodation, unless it is certified that no such accommodation is possible, or that it would impose a disproportionate burden.<sup>15</sup> The decree stipulates that where an application is made to enrol a pupil with disabilities, an assessment must be carried out to determine whether the school is equipped to meet the pupil's needs. This assessment must be conducted in consultation with the parents and with the Pupil Guidance Centre (Centrum voor Leerlingenbegeleiding - CLB). In determining whether the school has sufficient resources to cater for the pupil's needs, at least five factors must be considered: (1) the parents' expectations; (2) the pupil's support needs; (3) an assessment of the special needs resources available in the school; (4) the support measures available inside and outside the school; (5) the parents' involvement.

Research has shown that in practice, the assessment rarely extends beyond a statement about the school's resources, with no mention being made of any other reasons. The parents and the Pupil Guidance Centre are not involved in the exercise and no attempt is made to determine the child's abilities and limitations, the support needs or the kind of support available.<sup>16</sup> Schools, however, should be encouraged to play an active part in the quest for reasonable accommodation. Only when these efforts fail to produce a solution can it safely be said that accommodation is not an option.<sup>17</sup>

The latest "decree introducing measures for pupils with specific educational needs" (commonly known as the "M" decree, with "M" standing for "measures"), adopted on 21 March 2014<sup>18</sup> by the Flemish Parliament, lays the foundation for inclusive education. Thus, in the case of pupils who have been placed in special schools on the basis of a reasoned report by the CLB, the decree promotes the right to enrolment in mainstream education. Enrolment is open firstly to pupils capable of following the common curriculum provided special measures are taken<sup>19</sup> and secondly, to pupils who require individual curricula along with other forms of accommodation. In the case of the latter, however, enrolment is by no means guaranteed: instead, it is subject to a resolutive condition and the school has the right to refuse to take the pupil if, in its view, the accommodation required is unreasonable. The decree provides for the possibility of appeal (see below).

The "M" decree also contains a series of provisions which likewise mark a shift towards more

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<sup>14</sup> Periodic report submitted by Belgium pp. 37 and 38, see

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FBEL%2F1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FBEL%2F1&Lang=en)

<sup>15</sup> Articles 15, 16 and 20 of the Flemish Community decree of 10 July 2008 establishing a Flemish policy framework for equal opportunities and treatment.

<sup>16</sup> Dupont, M., *Onderzoek naar de barrières die ouders ondervinden bij de zoektocht naar een geschikte school voor hun kind met een beperking*, Licentiaatsverhandeling. Universiteit Gent, 2010.

<sup>17</sup> Advies van het Steunpunt Recht en Onderwijs over de specifieke bepalingen met betrekking tot onderwijs in het VN-Verdrag van 13 december 2006 inzake de rechten van personen met een handicap, 2009.

<sup>18</sup> Due to enter into force on 1 September 2015.

<sup>19</sup> These measures are referred to as "compensatory, differentiating, remedial or dispensatory" (Article 11.1 of the "M" decree).



inclusive schooling. Examples include a tightening of the requirement to give reasons before placing a child in special education (Art. II.5); the fact that special education enrolment reports are now issued centrally by the CLBs (Art. II.4) and that the CLBs are required to involve the individuals concerned (Art. II.4); the fact that the Education Inspectorate has a responsibility to monitor the CLBs' diagnostic practices when it comes to placing pupils in special schools (Art. V.1.), etc.

The decree, however, does not adequately address the requirements of the CRPD, has a number of shortcomings and in some respects could even be seen as a backward step compared with the current situation (see below).

## C. Quantitative and qualitative study of reports received by the Centre

As part of its remit as an independent mechanism, the Centre has been tasked with protecting the fundamental rights of persons with disabilities (Art.33.2 CRPD).

Likewise, as an independent interfederal public service responsible for promoting equal opportunities and combating discrimination, the Centre is qualified *"to receive reports, process them and carry out any steps towards reconciliation or mediation that it deems necessary"* (Art. 6.§2 of the Co-operation Agreement of 12 June 2013 between the Federal Authority, the Regions and Communities for creating an Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination in the form of a joint institution, within the meaning of Article 92*bis* of the Special Institutional Reform Act of 8 August 1980).

Below, the Centre provides an overview of the reports filed in the area of education based on the disability criterion.

Of all the reports received regarding disability, 20% have to do with education. The majority concern discrimination for refusal to provide reasonable accommodation.

The number of reports submitted to the Centre in the area of education based on the disability criterion is increasing year by year (31 reports filed in 2012, 62 in 2013, 87 in 2014). A major factor in this increase has been the distribution of a booklet produced by the Centre entitled *"A l'école de ton choix avec un handicap"* (*"Attending the school of your choice with a disability"*).<sup>20</sup>

Of the 149 cases handled by the Centre over the past two years (2013 and 2014), all Communities combined, 62 specifically concern Flanders (i.e. 27 cases in 2013 and 35 in 2014).

Among the various types of discrimination, the Centre has noted that most of the reports (56.5%) concern the refusal to provide, or absence of, reasonable accommodation: the school refuses to provide support in the classroom, the school refuses to adapt the conditions under which exams are held (e.g. giving the students extra time, etc.), the school refuses to provide the student with a computer (with spell-check).

The second most commonly reported type of discrimination is direct discrimination (16%): the school refuses to enrol a student, or refuses to allow a student to take part in a school trip.

Indirect discrimination accounts for 11% of cases: the school is inaccessible or too far away, the cost is too high for the parents.

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<sup>20</sup> Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination, *A l'école de ton choix avec un handicap*, 2013, see <http://www.diversite.be/lecole-de-ton-choix-avec-un-handicap>, last accessed 27 February 2015. This booklet aims to inform pupils, parents, teaching staff, school administrators and other persons working in the education sector about the legal implications of the term "reasonable accommodation". The booklet also describes the role played by the Centre in protecting the rights of persons with disabilities.

Only a tiny percentage (1%) of the complaints concern insults or harassment alone but such incidents are nevertheless reported in the majority of the cases dealt with.

Most of the complaints stem from a problem in primary school (30%) or secondary school (32%). The rest concern higher education (17%), social advancement (10%) or special education (10%).

It should be noted lastly that 26% of the victims had a physical disability and 24% a mental disability. People with learning difficulties or a sensory disability accounted for 11% of cases, followed by persons with multiple disabilities (8%) and persons with intellectual impairments (4%).

### III. The “M” decree, as viewed in the light of the CRPD

The adoption of the “M” decree represents genuine progress in terms of inclusive schooling.

This decree, however, is merely a first step towards fully inclusive education, as its ambitions do not go far enough and fall far short of what is needed to meet the requirements of the CRPD.

On 7 May 2013, the Centre presented the Flemish Minister for Education, Youth, Equal Opportunities and Brussels Affairs with an opinion on the decree when it was still at the planning stage.<sup>21</sup>

This section provides a general outline of the decree, in the light of the relevant articles of the CRPD.

#### A. “M” decree in the light of Articles 4, 7 and 24, 2, §1 CRPD: Prohibition of discrimination and exclusion

Under Article 4, the States Parties are required to “undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability (etc.).”

Article 7 reiterates this same principle of non-discrimination in the case of children: “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.”

Article 24, 2, §1 contains a clause to the effect that children with disabilities must not be excluded from mainstream education: “States Parties shall ensure that (...) persons with disabilities are not excluded from the general education system on the basis of disability”. Describing this measure as an “*anti-discrimination measure*”, the rapporteur of the Office of the United Nations High Commissioner for Human Rights emphasises that this “no-rejection clause” “*has immediate effect and is reinforced by reasonable accommodation*”.<sup>22</sup>

Under the “M” decree, only “*pupils who are able to follow the common curriculum through the application of appropriate measures*” are afforded the right to enrolment in mainstream education. These appropriate measures are conditional on the pupil still being able to achieve the objectives necessary for the award of the certificate of education or for admission to secondary school (Arts.II.11

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<sup>21</sup> Interfederal Centre for Equal Opportunities and Opposition to Racism, *Opinion on the draft decree on important and necessary measures to support pupils with specific needs in education*, 2013, see [www.diversiteit.be/het-ontwerp-van-decreet-betreffende-belangrijke-en-noodzakelijke-maatregelen-voor-leerlingen-met-een-handicap](http://www.diversiteit.be/het-ontwerp-van-decreet-betreffende-belangrijke-en-noodzakelijke-maatregelen-voor-leerlingen-met-een-handicap), last accessed 24 February 2015

<sup>22</sup> United Nations General Assembly, Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights*, “Thematic study on the right of persons with disabilities to education”, 18 December 2013, p. 9.

and III.6).<sup>23</sup>

In excluding pupils who are unable to follow the common curriculum from the right to inclusive education, the decree reflects a preference for integration over inclusion.

Integration is deemed to occur *"when a student with an impairment is placed in a mainstream school, so long as he or she can adjust to fit the standardized requirements of the school."*<sup>24</sup>

Conversely, the basic principles behind the right to inclusive education presuppose the development of individual learning pathways. Such pathways must take account of the pupil's abilities and educational needs. In stipulating from the outset that the learning objectives must be met, the decree defies the very premise of inclusive education, the ultimate aim of which is to allow the full learning potential of every person to emerge.<sup>25</sup>

In this connection, the Committee on the Rights of Persons with Disabilities commends *"laws that oblige schools to make necessary curricular adjustments and diversifications for pupils with disabilities"*.<sup>26</sup>

## B. "M" decree in the light of Articles 5.3 and 24.2 § 3 CRPD: obligation to provide reasonable accommodation

In order to promote equality and eliminate discrimination, Article 5.3. requires States Parties to take "all appropriate steps to ensure that reasonable accommodation is provided".

Article 24.2 §3 reiterates that the need to ensure that "reasonable accommodation of the individual's requirements is provided" is inherent in the exercise of the right to education.

In its concluding observations on the initial report submitted by Spain, the Committee *"reiterates that denial of reasonable accommodation constitutes discrimination and that the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realization"*.<sup>27</sup>

Similarly, Belgium's anti-discrimination legislation – and in particular the decree of 10 July 2008 establishing a Flemish policy framework for equal opportunities and treatment in the field of education - considers refusal to provide reasonable accommodation to be a form of discrimination based on disability.<sup>28</sup>

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<sup>23</sup> See Article II.1.12 of the "M" decree which defines "dispensatory" measures.

<sup>24</sup> United Nations General Assembly, Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights*, "Thematic study on the right of persons with disabilities to education", 18 December 2013, pp. 3 and 4.

<sup>25</sup> United Nations General Assembly, Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights*, "Thematic study on the right of persons with disabilities to education", 18 December 2013, p. 5.

<sup>26</sup> Concluding observations on the initial report of Spain, CRPD/C/ESP/CO/1 ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=fr](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=fr)), para. 43

<sup>27</sup> See concluding observations on the initial report of Spain, CRPD/C/ESP/CO/1, para. 44

<sup>28</sup> The Flemish Community Decree defines reasonable accommodation ('adaptation') as *"any concrete measure of material or immaterial nature which neutralises the constraining influence of an unsuitable environment for the participation of a person with a disability"*. The Decree considers a denial of reasonable accommodation as discrimination *"when adjustments are rejected even though they do not represent an undue burden or load which can be compensated adequately by existing"*

The Centre is concerned that inadequate safeguards have been put in place to protect the right of pupils with disabilities to enrol in mainstream schools, and in particular pupils who have impairments that prevent them from following the common curriculum.

In the case of the latter, the decree stipulates that enrolment is subject to a “resolutive condition”: enrolment is to be cancelled where the school – after consulting the parents, the class council and the CLB – considers that the accommodation needed to integrate the pupil into mainstream education represents a disproportionate burden (Art. II.6 and Art. III.6). There is concern that it is too easy for schools to claim that the accommodation required is unreasonable, and so evade their obligation to accept pupils with disabilities.

At the same time, in the case of pupils who are capable of following the common curriculum, the decree assigns far too narrow a scope to the concept of “reasonable accommodation” and the possibilities that it affords.

The decree includes in the definition of “reasonable accommodation” the introduction of dispensatory measures<sup>29</sup> and stipulates that such measures may be introduced provided the objectives to be met for award of the certificate of education or for progression to secondary education can be achieved. In imposing such a condition, the decree sets the concept of “reasonable accommodation” within far too narrow a frame and goes against the very principle of inclusive education.

### C. “M” decree and Article 1 of the Convention: social approach to disability

The preamble and Article 1 CRPD explicitly enshrine the social approach to disability – the so-called “social model of disability” – recognising that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.

The preamble expressly refers to barriers which are external to the person and considers them to be key factors in disability. In so doing, the CRPD has taken a major step forward, turning its back on approaches that equate disability with the existence of functional limitations. The CRPD marks a paradigm shift, with the social approach to disability taking the place of a purely medical one.

According to the social model of disability, the participation of people with disabilities in society – whether as regards working, attending school, going to the doctor or voting in elections – is difficult or impossible not because they have an impairment but owing to various barriers which may be physical or cultural in nature, but which may also stem from legislation or policy.

The Office of the UN High Commissioner has published a guide for human rights monitors in which it states that it is important “*for definitions based on a list or a description of impairments or on functional limitations to be revised*”.<sup>30</sup>

Contrary to what the social approach to disability is all about, the “M” decree redefines the existing types of special primary education – admittedly with reference to the pupil’s specific needs – yet continues to use medical criteria as a basis for classification (Art. II.3).

The decree also introduces a new type of special education – type 9 – and in so doing, has taken a real step backwards. This new type of education is intended for pupils with autism spectrum

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measures”

(Articles 15 and 19 of the Decree).

<sup>29</sup> These measures are defined as “*measures by which the school adds objectives to the common curriculum or exempts the pupil from certain objectives of the common curriculum and replaces them, where possible, with equivalent objectives, insofar as either the objectives for the validation of learning according to the purpose of the level of education or the objectives for transition to further education can still be achieved to a sufficient degree*”, (Art. II.1.12°).

<sup>30</sup> United Nations, Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for Human Rights Monitors*, New York and Geneva, 2010, p. 6.

disorders.

Similarly, the draft decree also provides for new opportunities to create additional special education schools offering exclusively form 4 (Art. III.37), which is precisely the form of education where pupils can easily enter mainstream schools and are prepared for higher education.

In the interests of compliance with the CRPD, decisions as to which type of special education children should receive should be based on criteria related to the pupil's support needs, needs which must be met in order to allow effective integration into mainstream education. These needs should therefore be assessed having regard to the various barriers encountered in school rather than to impairments of a medical nature.<sup>31</sup>

#### D. "M" decree and Article 4 CRPD: progressive realisation of economic, social and cultural rights

Article 4 CRPD listing the general obligations of the State Parties enshrines the principle of progressive realisation as regards the exercise of economic, social and cultural rights. The same article also reiterates the requirement for each State Party to "take measures to the maximum of its available resources". The full realisation of economic, social and cultural rights, however, is to be achieved "without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law".

In its observations in reply, the Belgian Government argues that with the adoption of the "M" decree, the Flemish Government is progressively realising the social rights of persons with disabilities as set out in Article 4.2 CRPD and that at the same time, it needs to be kept in mind that this progressive realisation takes account of the Flemish Community's available resources.

Firstly, the Centre wishes to point out that discrimination, including notably discrimination based on disability, remains prohibited, whatever the level of realisation of economic, social and cultural rights. The decision to place children in special education, however, is very often based either on the pupil's impairment which is said to prevent him or her from following the common curriculum, or on the school's refusal to provide reasonable accommodation. Placing a child in special education, where it is contrary to the parents' wishes, very often therefore amounts to discrimination on the ground of disability, the prohibition of which is immediately applicable.

Secondly, the progressive realisation of a right is framed by various principles on which the Committee has already commented in connection with various collective complaints.<sup>32</sup> These principles concern: "(i) a reasonable timeframe, (ii) measurable progress and (iii) financing consistent with the maximum use of available resources".

It is difficult to overlook the fact that the first piece of legislation entitling children with disabilities to education dates from 1986,<sup>33</sup> and that despite having been engaged in the process of realising this right for some thirty years now, Flanders has not made much progress.

Also disappointing is the fact the adoption and implementation of the "M" decree are in no way part of a wider action plan, creating the necessary conditions for effective inclusion. Such a plan should include a time frame for implementing the right, time-bound benchmarks of achievement and indicators of success.<sup>34</sup>

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<sup>31</sup> United Nations General Assembly, Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights*, "Thematic study on the right of persons with disabilities to education", 18 December 2013, p. 9.

<sup>32</sup> See in particular, *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, decision on the merits, 18 October 2006, §37; *Autism Europe v. France*, Complaint No. 13/2000, decision on the merits, 4 November 2003, §53

<sup>33</sup> Act of 11 March 1986 on the organisation and subsidising of integrated special education.

<sup>34</sup> United Nations, Office of the High Commissioner for Human Rights, *Monitoring the Convention on*

Lastly, as regards allocating available resources, the “M” decree makes no mention of providing additional resources to enable schools to cater to the specific needs of pupils with disabilities.

The “M” decree merely provides for budget transfers: any funds not spent on special education over the year 2014-2015 are to be used for the benefit of pupils in mainstream or special education (Arts. II.21 and II.22).

Such a policy is indicative of a reactive, rather than a pro-active, approach to the allocation of resources.

It stands to reason, however, that for there to be any hope of reducing costs in special education, admission to mainstream schools must first have been rendered possible and the necessary resources made available to that end.

Underfunding, furthermore, merely gives these same schools more room – and grounds – to claim that the accommodation required is unreasonable.

Lastly, the Committee has pointed out, in its previous decisions, that people with disabilities are a vulnerable group and that states must pay close attention to the impact of the policies adopted on these groups.<sup>35</sup> Despite severe budgetary pressures, therefore, allocating additional resources for the realisation of such a fundamental right as inclusive education must be a fiscal priority.

## IV. Conclusions

Inclusive education is essential in order to achieve universal observance of the right to education, including for people with disabilities. Only education systems which are inclusive are capable of providing such persons with both high-quality teaching and the opportunity to improve their social position.

In ratifying the United Nations Convention on the Rights of Persons with Disabilities, the Belgian Government pledged to pursue a policy which respects the right to education of children with disabilities in order to enable them to live independently and be included in the community.

With this in mind, on 21 March 2014 the Flemish Parliament adopted the decree “on measures for pupils with specific educational needs”, known as the “M” decree.

While the “M” decree extends the enjoyment of the right to enrolment in mainstream schools to a wider group of children, it does not yet adequately ensure that they are able to exercise that right: the eligibility requirements for admission to mainstream education are based on the notion of integration, rather than inclusion, and there are insufficient safeguards to prevent schools from refusing to provide reasonable accommodation.

Once in mainstream education, pupils with disabilities face numerous barriers which seriously hinder them in the effective exercise of their right to inclusive education.

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*the Rights of Persons with Disabilities, Guidance for Human Rights Monitors*, New York and Geneva, 2010, p. 29.

<sup>35</sup> *Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits, 4 November 2003, §53; *FIDH v. Belgium* No. 75/2011, decision on the merits, 18 March 2013, §216.

School buildings tend not to be accessible (only 9.9% of schools are fully accessible and 20.3% of schools are sufficiently accessible)<sup>36</sup> and schools are not equipped to deal with a diverse range of pupils. As a result, pupils with special needs rarely manage to find a suitable school near their home. In practice, therefore, parents do not really have a choice as to which school their child will attend.<sup>37</sup>

Nor are parents sufficiently informed about their rights – and their child’s rights – as regards education. Special education is still being presented as the best or the only solution, leading parents to opt for it against their initial wishes.<sup>38</sup>

Reasonable accommodation remains a largely misunderstood concept, and is perceived more as a “perk” than as a genuine right.

Teachers in mainstream schools do not have the training needed to cater to the specific needs of children with disabilities and to care for them properly.<sup>39</sup>

Nor is there any legal framework that would specifically allow teaching staff to provide pupils with certain types of medical care without incurring civil liability. This legal vacuum has led to schools barring pupils with special needs from certain activities, or refusing to admit them altogether for fear of being sued.

Lastly, the Centre is disappointed to note that a number of children and young persons, owing to the severity of their disability, are “exempt from compulsory schooling” and attend day centres or remain in care institutions. These children are being denied the enjoyment of the right to education altogether, for no reason other than the fact that they have disabilities.<sup>40</sup>

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<sup>36</sup> AGION, De Schoolgebouwenmonitor, Indicatoren voor de kwaliteit van de schoolgebouwen in Vlaanderen, 2013, p. 61, table 26 see [http://www.agion.be/Portals/Agion/D\\_eindrapport\\_monitor2013\\_finaal.pdf](http://www.agion.be/Portals/Agion/D_eindrapport_monitor2013_finaal.pdf), last accessed 2 March 2015.

<sup>37</sup> Directorate-General for Internal Policies of the Union, Policy Department: Citizens’ Rights and Constitutional Affairs, Country Report on Belgium for the Study on Member States’ Policies for Children with Disabilities, 2013, p.40.

<sup>38</sup> Directorate-General for Internal Policies of the Union, Policy Department: Citizens’ Rights and Constitutional Affairs, Country Report on Belgium for the Study on Member States’ Policies for Children with Disabilities, 2013, p.40.

<sup>39</sup> Directorate-General for Internal Policies of the Union, Policy Department: Citizens’ Rights and Constitutional Affairs, Country Report on Belgium for the Study on Member States’ Policies for Children with Disabilities, 2013, p.40.

<sup>40</sup> GRIP - Gelijke Rechten voor Iedere Persoon met een handicap, mensenrechten en handicapschaduwrapport Vlaanderen (België) 2011 [Human Rights and Persons with Disabilities - Shadow Report Flanders (Belgium) 2011], p. 42, available in English at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fBEL%2f15475&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fBEL%2f15475&Lang=en) (last accessed 24 February 2015).

