



**Mandate of the Special Rapporteur on the rights of persons with disabilities**

REFERENCE:

17 October 2017

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of persons with disabilities, pursuant to Human Rights Council resolution 35/6, and to express appreciation for the opportunity to make a third-party intervention, as provided in Article 36 § 2 of the European Convention for Human Rights and Fundamental Freedoms, in the case of Stefan-Moshe Stoian and Luminita Stoian against Romania (Application no 289/14).

In this connection, I would like to bring to your Excellency's attention the principles of the Convention on the Rights of Persons with Disabilities (hereinafter the Convention) which are applicable to the case, as communicated on 11 July 2014 and 14 June 2017. The Convention is the first binding international legal instrument that introduces the human rights model of disability and an explicit reference to the right to inclusive education. It is one of the most widely ratified human rights treaties in the world and, it is important to recall that, 44 out of the 47 member States of the Council of Europe are also States Parties to the Convention on the Rights of Person with Disabilities.

As the highest international standard, the Convention expands the previous human rights standards to respond to the particular challenges faced by persons with disabilities and ensure that they can effectively enjoy equal access to education. It does so by clarifying what needs to be done to foster inclusion of all children and adults with disabilities in formal and informal education at all levels, as well as to achieve a quality education for all. The present written submission will contextualize the right of persons with disabilities to education within the broader concept of inclusion, the guarantees of non-discrimination, accessibility and the States' obligation to provide support services and personal assistance. It will also touch upon the pivotal importance of providing remedy and reparations in cases of violations.

The right to education is explicitly referenced at Article 24 of the Convention. The first paragraph reiterates the aims of education in line with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, that education must be directed to:



- developing the full human potential and sense of dignity and self-worth of all students, including students with disabilities;
- strengthening the respect for human rights and human diversity;
- enabling the effective participation of persons with disabilities in a free society.

The subsequent, second and third paragraphs of Article 24, break the holistic right to education into its constituent elements. On this basis, learners with disabilities have a right to:

- access free and affordable education at all levels, from pre-schools to tertiary education, vocational training and lifelong learning, extracurricular and social activities;
- receive education in regular classrooms and mainstream settings;
- go to schools which are located as close as possible to their homes and in the communities in which they live;
- enjoy personal assistance and other professional support services aimed at securing their inclusion and participation in the classroom and in out-of-school activities;
- benefit from reasonable accommodation to overcome barriers which compromise their full and effective participation in education;
- enjoy an accessible learning environment, including buildings and infrastructure, accessible transport services, information and communication, textbooks and learning materials which are provided in accessible formats and languages;

States have the correlated obligations to put in place legislative and policy frameworks and to deploy a process of structural transformation aimed to:

- guarantee that students with disabilities have access to free and high quality primary and secondary education and affordable technical, vocational and tertiary education;
- prohibit and sanction the exclusion of persons with disabilities from mainstream classrooms on the basis of their disability;
- phase out all practices of segregation on the basis of disability or provision of education in isolation from students without disabilities;

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- ensure that students with disabilities are enrolled and provided education in the community schools, located within safe physical reach, and prohibit the placement of students with disabilities in residential institutions;
- deliver essential support services and forms of live assistance that would enable persons with disabilities to study in a manner conducive to achieving their fullest potential;
- ensure that reasonable accommodation, responsive to the differing requirements of individual students with disabilities, is provided;
- render the education system accessible, including buildings, information and communication;

At the same time, States must be concurrently fulfilling their duties under Article 4 of the Convention on general obligations. To this end, in their efforts to secure inclusive and quality education, States shall ensure that:

- students with disabilities have access to and can use new technologies, including information and communications technologies, mobility aids, devices and assistive technologies;
- teachers and other professional staff are trained and knowledgeable of the rights of persons with disabilities so as to better provide the assistance and services guaranteed by those rights;

In their General Comment No.4 on education, the Committee on the Rights of Persons with Disabilities draws States' attention to another deterrent which prevents students with disabilities from accessing education, namely the experience of violence and abuse, including physical and humiliating punishments, and bullying by others. Therefore, States are urged to give effect to Article 16 on freedom from exploitation, violence and abuse and take all appropriate measures to:

- ensure that all students with disabilities are free from any form of violence and other non-physical forms of humiliation within schools;
- provide safe, timely, and accessible complaint mechanisms and avenues for seeking redress and remedies for students with disabilities that faced violations of their right to education.

Additional provisions of particular relevance to safeguarding the effective exercise of the right to education by persons with disabilities are set down in Article 5 on Equality and non-discrimination, Article 9 on Accessibility, Article 19 on Living independently and being included in the community, and Article 13 on Access to justice. Moreover, I would like to underline that the specific articles of the Convention mentioned

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above should be read in conjunction with Article 7 on Children with disabilities, which sets forth that States must adopt measures to ensure their exercise of human rights on an equal basis with others. This entails implementing equality measures in the area of education and providing disability and age-appropriate assistance for this purpose.

Article 5 of the Convention sets forth a strengthened vision of substantive equality for persons with disabilities. It provides a robust protection against discrimination on the basis of disability and introduces the duty of States to provide reasonable accommodation in order to promote equality. It is worthy of note that the obligation to eradicate all forms of discrimination, including the denial of reasonable accommodation, which hinder persons with disabilities from enjoying access to education in inclusive environments, is of immediate realization. Therefore, States cannot use financial constraints and lack of resources as a justification for failing to deliver on their respective obligations.

Reasonable accommodation is defined as the “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>1</sup>

Reasonable accommodation is individualized, which means that the school and the student should engage in an interactive dialogue in order to identify the necessary accommodations that fulfil the goal of enjoying the right to inclusive quality education.

Also, as the name conveys it, the requested accommodation must stand the test of reasonableness. In order to make a case for denying reasonable accommodation, the school would have to prove that: the requested accommodation is not necessary; that alternatives have been considered but proved ineffective; that the accommodation requested is not feasible or possible to secure for reasons beyond the control of the institution; that it has no financial means to provide for the accommodation requested, including after requesting public and private funding; and that the implementation of such accommodation jeopardizes the existence of the school or that it substantially jeopardizes the performance of its core functions.

The education facility has the obligation to ensure that the accommodation is provided from the moment it was requested. If the institution does not have the necessary resources readily available, it must engage with the educational authorities at higher levels of administration to determine together what would be an appropriate way to redirect the resources available elsewhere in the system. The financial burden of providing reasonable accommodation should in no case be placed on the students with disabilities or their parents, caregivers or other family members.

The right to inclusive education is closely interconnected with the obligation of States to identify and eliminate all obstacles and barriers to accessibility as provided under Article 9 of the Convention. Accessibility is a requirement for barrier-free and inclusive

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<sup>1</sup> Article 2 of the Convention on the Rights of Persons with Disabilities

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societies. Persons with disabilities cannot effectively enjoy their right to education without an accessible environment, including schools and all other places of education, and without accessible public transport, services, information and communications technologies.

While States should be kept accountable for how much gradual progress they have achieved in making all education settings and the surrounding environment accessible to all students with disabilities, they have an immediate obligation to provide reasonable accommodation from the moment it was requested. In this sense, reasonable accommodation can be used as a temporary solution for an individual when accessibility is lacking. Examples of reasonable accommodations in education include providing mobile ramps to enable access to the facilities; changing the location of a class; customizing the timing of studies; adapting or acquiring equipment necessary for enabling persons with disabilities to attain and maintain maximum independence, including full physical, mental ability; allowing support persons to accompany them and assist during the lessons etc.

Just as important, is the State's obligation to provide support services to persons with disabilities aimed at increasing their independence and assisting individuals to realize their potential and achieve development through education. States should plan and allocate budgets to ensure that support for persons with disabilities attending mainstream educational settings is available from the start.

As States are progressively moving towards embedding the provision of supports into the education system, transient solutions must be available for those students who need support right away. In such situations, the availability of supports should be considered with respect to a larger pool of resources available in the education, social protection and health systems and not limited to resources available at the education institution in question.

Provision of support is a cross-cutting obligation which can be derived from a number of articles of the Convention; however, personal assistance is explicitly referenced at Article 19. Personal assistance, being one of the support measures, encompasses a broad range of arrangements designed to assist a person with disabilities to perform daily activities, including getting ready for school, using the bathroom facilities, preparing the work place for studying activities etc. Persons with disabilities may require to be accompanied by a personal assistant for different lengths of time throughout the day depending on their individual needs.

When personal assistants may not be readily available, reasonable accommodation may function as a means of providing support in a particular case. Persons with disabilities must be provided the opportunity to be accompanied to school by a person of their choice, including one of the parents. Moreover, the personal assistant enjoys protection against discrimination by association on the basis of another person's status or protected characteristics, such as disability.

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Lastly, I would like to refer your attention to the importance of effective redress mechanisms and access to justice in cases of violations in the context of education. As the practice has shown, in some cases, procedures before national courts can be lengthy and costly, complex and demoralizing. And even in the event of a satisfactory decision, the practical implementation risks to remain challenging and poorly managed. Therefore, securing a timely remedy that can help the applicant get immediate access to education and avoid any drop out or gap years is essential. Relevant domestic laws on education and non-discrimination should clearly identify the body mandated to review complaints and recommend enforceable remedial measures, including sanctions. Ultimately, if non-judicial mediation fails, the State must secure the right of all persons with disabilities to follow an appeal procedure before the national courts in full compliance with Article 13 of the Convention on the Rights of Persons with Disabilities on access to justice.

For a more elaborate explanation of the concepts of inclusion, reasonable accommodations and support for persons with disabilities in the context of education, I would like to recommend that the Court looks into the General Comment No. 4 on the right to inclusive education of the Committee on the Rights of Persons with Disabilities (see CRPD/C/GC/4). The provision of rights-based forms of support for persons with disabilities, including in the area of education, is further addressed in the report of the Special Rapporteur on the rights of person with disabilities to the Human Rights Council (see A/HRC/34/58).

In the concluding part of my submission, I would like to draw your Excellency's attention that, a decade after the Convention has entered into force, many States fail short of their obligation to ensure that persons with disabilities can enjoy their right to inclusive education without discrimination and on the basis of equal opportunities.

Persons with disabilities around the world continue to be prevented from attending the same educational facilities as their peers without disabilities and are compelled to attend segregated schools or classrooms or to receive home-schooling, in isolation from all other students.

Access to regular schools remains conditioned on the student's capacity to fit within the system without being provided assistance and support. Accessibility is widely missing and the practical implementation of the duty to provide reasonable accommodation remains a challenge.

In spite of the fact that the practice of institutionalization, including for the purposes of providing education, is legally recognized as a severe human rights violation, persons with disabilities continue to face an increased risk of separation from their families and placement in residential institutions.

I would also like to draw attention to the alarming number of reports indicating that students with disabilities can be disproportionately affected by violence and other

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non-physical forms of humiliation rooted in and fuelled by discrimination on the basis of disability. Victims of such violence and abuse are often denied justice and left without adequate remedies.

The States have an imperative obligation to ensure expeditiously and as effectively as possible that students with disabilities can attend mainstream schools together with their peers without disabilities and to ensure that all investments in education are made with students with disabilities in mind as well. To this end, national and international courts can play an essential role. Through their decisions courts can propel States to eradicate educational laws, policies and practices that undermine the right of persons with disabilities to access education or perpetuate their exclusion and isolation from the broader society. Similarly, court decisions in line with the general principles and normative provisions of the Convention can expedite the introduction of system wide reforms related to the advancement of the rights of persons with disabilities in the area of education.

I express my gratitude to the President of the Court for granting me the opportunity to make this submission as a third party intervenor, independent from the plaintiffs and defendants in this case. This brief is provided on a voluntary basis for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials, and experts on missions, including the individuals listed above, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Please accept, Excellency, the assurances of my highest consideration.



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