

UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

OBSERVATIONS ON THE DRAFT
GENERAL COMMENT NO 4 ON
ARTICLE 24 OF THE UN
CONVENTION ON THE RIGHTS OF
PERSONS WITH DISABILITIES

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CONTENTS

- EXECUTIVE SUMMARY 5
- GENERAL OBSERVATIONS 5
 - Proportion of Out of School Children 5
 - Access to Justice..... 6
 - Access to Sexuality Education..... 6
- OBSERVATIONS BY AREA OF APPLICATION 7
 - Removal of Full Range of Financial Barriers (Paragraphs 17, 23) 7
 - Opt-out Mechanisms (Paragraph 18) 8
 - Reasonable Accommodation (Paragraphs 18, 28) 8
 - Deliberately Retrogressive Measures (Paragraph 39)..... 9
 - Restraint, Seclusion, and Aversive Interventions (Paragraph 50)..... 9

EXECUTIVE SUMMARY

Following the call from the United Nations Committee on the Rights of Persons with Disabilities (the Committee) for submissions on its draft General Comment No. 4 on article 24 of the Convention on the Rights of Persons with Disabilities (the Convention), Amnesty International welcomes this opportunity to provide the following observations on the right to inclusive education. This submission aims to inform the general discussion by commenting on key aspects of the right to inclusive education, as well as providing the organization's main observations regarding specific aspects of the draft General Comment. These observations follow, to the maximum extent possible, the order of the draft and therefore should not be seen as implying an order of prioritisation of the issues commented on.

This submission focuses on the following issues: (i) out of school children with disabilities; (ii) access to justice; (iii) access to sexuality education; (iv) financial barriers to education; (v) opt-out mechanisms; (vi) the meaning of "undue burden"; (vii) deliberately retrogressive measures; and (viii) the use of restraint, seclusion, and aversive interventions.

GENERAL OBSERVATIONS

Amnesty International commends the Committee for explicitly interpreting article 24 as the right to inclusive education and for noting that the duty to provide reasonable accommodation is not subject to progressive realization. These observations focus on areas which the organization encourages the Committee to elaborate on in its General Comment.

PROPORTION OF OUT OF SCHOOL CHILDREN

Amnesty International notes with concern that the global number of children not enrolled in school is rising.¹ UNESCO estimates that 124 million children and young adults between the ages of 6 and 15 have either never started school or have dropped out.² According to UNICEF, at least one third of the world's children who are not in school have a disability.³ Determining the proportion of out of school children who have a disability is particularly challenging given that, until recently, only data on the most visible or severe disabilities has been reported.⁴

Amnesty International encourages the Committee to acknowledge the disproportionate number of children around the world who do not attend school due to disability. The

¹ United Nations Educational, Scientific and Cultural Organization, "A growing number of children and adolescents are out of school as aid fails to meet the mark" (July 2015) Policy Paper 22, Fact Sheet 31.

² *Ibid.*

³ United Nations General Assembly, *Report of the Secretary-General on the status of the Convention on the Rights of the Child* (3 August 2011) UN Doc A/66/230 at para 29.

⁴ United Nations Children's Fund, *Fixing the Broken Promise of Education for All: Findings from the Global Initiative on Out-of-School Children* (Montreal: UNESCO Institute for Statistics, 2015) at 36.

organization also recommends that the General Comment specify that States' national education strategies, which the Committee references at paragraph 40, include measures to increase enrolment and retention of children with disabilities in schools.

ACCESS TO JUSTICE

For the right to inclusive education to have meaning, effective remedies must be available to redress violations so that persons with disabilities have access to justice in accordance with article 13 of the Convention. Persons who experience interference with their right to education must have the opportunity to challenge such interference, on their own behalf or with legal representation, and to defend their rights in court.⁵

Amnesty International also notes that access to quality education is essential to the realization of the right of access to justice. Persons with disabilities who are educated in environments that maximize academic and social development will be better able to understand and use the justice system. For those who are denied the right to inclusive education, participation in the justice system may be difficult or impossible.⁶

Amnesty International encourages the Committee to address the link between the rights to access to justice and education in its General Comment, and the need for States Parties to provide effective recourse for persons with disabilities to challenge decisions that affect their right to inclusive education.

ACCESS TO SEXUALITY EDUCATION

Children with disabilities are much less likely to have access to comprehensive education on sex and sexuality than their peers. Families and school administrators often deliberately restrict access to sexuality education that is available in schools.⁷ Lower literacy levels and a lack of materials available in accessible formats, such as Braille, make it more difficult for persons with disabilities to acquire basic knowledge about sexuality.⁸ These barriers leave persons with disabilities vulnerable to abuse, at a higher risk of certain health issues, and less prepared for adult life.⁹

Persons with disabilities may also be excluded from access to sexuality education because they are falsely assumed to be at a lower risk of pregnancy and sexually-transmitted diseases due to stereotyped and prejudiced beliefs that they are not sexually active or should not be

⁵ People with disabilities must also be recognized as persons before the law with equal standing in courts and tribunals. As this Committee has stated, the recognition of legal capacity is inextricably linked to the enjoyment of the right to access justice. United Nations Committee on the Rights of Persons with Disabilities, "General Comment on Article 12: Equal Recognition Before the Law" (11 April 2014) UN Doc CRPD/C/GC/1 at para 31. See also Nicholas Caivano, "Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention" (2014) 4:1 *Western Journal of Legal Studies* 1.

⁶ Stephanie Ortoleva, "Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System" (2011) 17:2 *ILSA Journal of International and Comparative Law* 281 at 286.

⁷ Holly Anne Wade, "Discrimination, Sexuality and People with Significant Disabilities: Issues of Access and The Right to Sexual Expression in the United States" (2002) 22:4 *Disability Studies Quarterly* 1.

⁸ *Supra* note 4 at 36.

⁹ *Supra* note 7.

engaged in sexual activity.¹⁰ The HIV infection rate of persons with disabilities, however, is up to three times as high as people without disabilities.¹¹ Persons with disabilities are also at an increased risk of sexual violence.¹² Women with disabilities, in particular, are up to three times more likely to be raped than non-disabled women.¹³

Amnesty International recommends that the General Comment note the importance of providing access to comprehensive, accurate, and inclusive education on sexual and reproductive health and related rights. The organization also encourages the Committee to recognize the link between access to sexuality education and article 25 of the Convention, on the right to the enjoyment of the highest attainable standard of health without discrimination.

OBSERVATIONS BY AREA OF APPLICATION

Paragraph numbers from the draft are used to place Amnesty International's comments in context within this section of the present submission.

REMOVAL OF FULL RANGE OF FINANCIAL BARRIERS (PARAGRAPHS 17, 23)

Amnesty International notes that, as part of States' duties to ensure that children are not excluded from free and compulsory primary education or from secondary education on the basis of disability, they must address the full range of financial barriers that impede access to inclusive education. Children with disabilities should not have to pay for their own supports or accommodations in order to participate in mainstream classrooms.¹⁴ Reports have shown that some States require children with disabilities attending inclusive schools to pay for their own classroom assistants and sign language interpreters as a condition of staying in mainstream classes, as well as other fees that children without disabilities do not incur.¹⁵

Amnesty International encourages the Committee to specify that subjecting children with disabilities to additional financial burdens that children without disabilities do not incur can amount to discriminatory conduct in the absence of objective justification. States Parties

¹⁰ *Supra* note 7.

¹¹ Barry Levy & Victor Sidel, eds, *Social Injustice and Public Health* (New York: Oxford University Press, 2013) at 151.

¹² World Health Organization, "Disability and HIV Policy Brief" (April 2009) online: <http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf>.

¹³ Nora Groce, "HIV/AIDS and Individuals with Disability: Findings from the World Bank/Yale Global Survey" 8:2 *Health and Human Rights* 215 at 218.

¹⁴ As OHCHR has stated, "primary education for all implies that accessibility measures should also be free of charge" and that secondary and higher levels of education must be "equally accessible to all by the progressive introduction of free education." Office of the United Nations High Commissioner for Human Rights, *Thematic Study on the Rights of Persons with Disabilities to Education: Report of the United Nations Office of the High Commissioner for Human Rights* (13 December 2013) A/HRC/25/29 at paras 11, 37.

¹⁵ See e.g. Human Rights Watch, "*Complicit in Exclusion*": *South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities* (2015) online: <https://www.hrw.org/sites/default/files/report_pdf/southafrica0815_4up.pdf> at 2; Maruah Singapore, "Contribution to the Study on the Right to Education of Persons with Disabilities" (2013) online: <<http://www.ohchr.org/Documents/Issues/Disability/StudyEducation/NGOs/Singapore%20MARUAH.pdf>> at 3.

must remove the full range of financial barriers that children with disabilities and their families face to provide meaningful access to education.

OPT-OUT MECHANISMS (PARAGRAPH 18)

Amnesty International is concerned about the existence of policies that allow schools to unilaterally opt-out of educating students with disabilities in mainstream classrooms on the grounds that attempts have been made to include them without success.¹⁶ Such opt-out mechanisms are in principle inconsistent with the no-rejection clause enshrined in article 24(2)(a) of the Convention, which specifies that States Parties must ensure that students with disabilities are not rejected from general education on the basis of disability.¹⁷

Amnesty International recommends that the Committee clarify the need for schools to operate non-categorically and eliminate opt-out mechanisms that allow school administrators to make unilateral determinations about whether to remove a child from the general education system.

REASONABLE ACCOMMODATION (PARAGRAPHS 18, 28)

Article 2 of the Convention defines “reasonable accommodation” as “modification and adjustments not imposing a disproportionate or undue burden.” Paragraph 18, however, interprets article 24 as prohibiting any legislative provisions that place limits on the inclusion of persons with disabilities “by alleging a disproportionate and undue burden to evade the obligation to provide reasonable accommodation.” In the absence of further explanation this language is potentially confusing and unclear in light of the definition of “reasonable accommodation”, which provides that accommodation may be denied if it would impose an undue burden on the duty bearer.

The absence of consistent definitions of what constitutes an “undue burden” in international law, a term found in a large body of doctrine and jurisprudence across numerous jurisdictions,¹⁸ has often led to minimalist definitions of the extent of accommodation required to admit children with disabilities in educational settings. Accommodation is not an ancillary service, but rather the manner by which meaningful access to education on an equal basis with others can be achieved. Recognizing the critical role of accommodation in the realization of the right to education, OHCHR has stated that if it is to be denied, “the duty bearer must prove that the implementation of such accommodation jeopardizes the existence

¹⁶ In Italy, for example, researchers documented the use of special rooms for children who were identified as unable to benefit from ordinary teaching in mainstream classrooms, where support teachers provide services in segregated settings. See Simona D’Alessio, “Integrazione scolastica and the Development of Inclusion in Italy: Does Space Matter?” (2012) 16:5-6 *International Journal of Inclusive Education* 519 at 528; Michael Giangreco et al, “Demographic and Personnel Service Delivery Data” (2012) 15:1 *Life Span and Disability* 97 at 101; Arlene Kanter et al, “The Right to Inclusive Education Under International Law: Following Italy’s Lead” (2014) 17:1 21 at 28.

¹⁷ OHCHR has stated that the no-rejection clause “is applicable on individual basis, and is not subjected to reasonableness tests.” Facundo Chavez Penillas, “Presentation of the Human Rights and Disability Advisor, Office of the High Commissioner for Human Rights: Day of General Discussion on the Right to Education of Persons with Disabilities” (15 April 2015) at 2.

¹⁸ United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, “The Concept of Reasonable Accommodation in Selected National Disability Legislation: Background conference document prepared by the Department of Economic and Social Affairs” (7 December 2005) UN Doc A/AC.265/2006/CRP.1.

of the duty bearer or that it substantially jeopardizes the performance of its core functions.”¹⁹

Amnesty International encourages the Committee to clarify the meaning of “undue burden” by recognizing that a lack of resources cannot be used to deny accommodations unless the State Party has demonstrated that all other practical measures to meet the school’s budgetary needs have been fully explored and that meeting the accommodation request would jeopardise the school’s core functions.

DELIBERATELY RETROGRESSIVE MEASURES (PARAGRAPH 39)

Amnesty International notes that where States Parties must make fiscal decisions to meet budgetary constraints, cutbacks must not target students with disabilities. Paragraph 39 of the draft, which states that deliberately retrogressive measures “require the most careful consideration,” should specify that the effect of any cutbacks should be borne equally by all students with the most vulnerable being prioritised for protection, in line with the approach adopted by other treaty bodies.²⁰ Schools that cut funding to inclusive practices must demonstrate that they have investigated all other feasible approaches and that they could not have taken any other reasonable or practical measure to avoid the negative impact on students with disabilities.

Amnesty International encourages the Committee to clarify that deliberately retrogressive measures must not disproportionately target students with disabilities and that they should be prioritised for protection against budget cuts.

RESTRAINT, SECLUSION, AND AVERSIVE INTERVENTIONS (PARAGRAPH 50)

Amnesty International is concerned that, even in States with inclusive education policies, the use of restraint, seclusion, and aversive interventions undermines efforts to realize the protections enshrined in article 24. In Canada, for example, a 2013 investigation revealed the use of restraint and seclusion in schools, reporting that children with disabilities were being kept in small spaces—including closets and stairwells—for up to three hours when judged to be disruptive.²¹ Nearly half of all students surveyed as part of the investigation reported that physical injury or obvious signs of pain occurred during restraint, and more than three quarters reported emotional trauma.²²

Amnesty International recommends that States prohibit the use of restraints, seclusion and aversive interventions as part of their inclusive education policies. The Committee should also emphasize the use of positive behaviour supports developed within a comprehensive, professionally-developed plan of behavioural accommodations and interventions.

¹⁹ *Supra* note 17.

²⁰ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties’ Obligations (Art 2, para 1, of the Covenant)* (14 December 1990) UN Doc E/1991/23 at para 12.

²¹ Inclusion BC, *Stop Hurting Kids: Restraint and Seclusion in BC Schools: Survey Results and Recommendations* (November 2013) online: <<http://www.inclusionbc.org/sites/default/files/StopHurtingKids-Report.pdf>>.

²² *Ibid* at 5, 7.

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