NATIONAL LEGAL INNOVATION STRATEGY Belgium (FL)

INNOVATING EUROPEAN LAWYERS TO ADVANCE THE RIGHTS OF CHILDREN WITH DISABILITIES

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mdac mental disability advocacy centre

Coordinator

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Contents

Introduction

Belgium ratified the Convention on the Rights of Persons with Disabilities (CRPD) in July 2009 and it became binding and directly applicable in Belgium in August 2009. The Convention on the Rights of the Child (CRC), which was ratified by Belgium in 1991, is also directly applicable in Belgium.

Belgium is a Federal State with a civil law system. The legal system is based upon a continental system of codification with legislation being the primary source of law. The main fields of law have been codified into specific codes. The Codes are hierarchically superior to Laws, Decrees and Ordinances. The Federal Government issues acts (wet/loi). In Flanders and the Walloon Region, the legislative powers of the Regions are exercised through 'decrees' (decreten and décrets), and in the Brussels Region, via 'ordinances' (ordonnances). Belgium has a monist system of international law. As a result, international agreements ratified by Belgium have primacy over national law and can be invoked before Courts. The judiciary has a power of judicial review. It can annul subsidiary legislation, if it goes beyond the enabling powers stipulated in the legislation.

Flemish disability policy is implemented by the Flemish Agency for Persons with Disabilities (insofar as it concerns assistance to persons with disabilities) but, since 2010, has also formed part of equal opportunities policy (which takes a vertical and cross-cutting approach to disability and accessibility). Under the Flemish Decree of 7 May 2004 establishing the Flemish Agency for Persons with Disabilities and the Decree of 10 July 2008 on the Flemish policy framework for equal opportunities and treatment, disability is defined as "any significant, long-term participation problem experienced by a person that is attributable to the interaction between functional disorders of a mental, psychological or sensory nature, limitations in the performance of activities, and personal and external factors".[1]

The Act of 10 May 2007 on combating certain forms of discrimination (hereinafter referred to as the "Anti-Discrimination Act") prohibits all forms of direct or indirect discrimination and incitement to discriminate or intimidate on the grounds of disability or current or future health status, among other factors. In addition, it requires reasonable accommodation to be provided to persons with disabilities. Denial of reasonable accommodation may also be considered a discriminatory act. The Anti-Discrimination Act is applicable to many areas of public life: employment, the goods and services sector, all economic, social, cultural or political activity, social security and social protection, and references, in official documents or records. It allows victims of discrimination to claim their rights and take their cases to a civil court: a labour court, commercial court or court of first instance. During civil proceedings, victims are entitled to the reversal of the burden of proof, that is, when the victim invokes facts from which it may be inferred that discrimination occurred, it is for the defendant to prove that there was no discrimination. If the judge recognises that the victim was discriminated against, he may grant lump-sum compensation.

[1] Initial reports submitted by Belgium under article 35 of the CRPD Convention, 28 July 2011.

However, the CRPD Committee in 2014, while commending the country for its Anti-Discrimination law, encouraged Belgium to review the remedies provided for by this law to ensure that complainants could seek injunctions and receive damages once their claims for discrimination were proven in court.[2] The Committee also encouraged Belgium to strengthen protection against discrimination, including discrimination by association, through the introduction of positive discrimination measures and awareness-raising and training of public officials at all levels.

Since the 1970s, institutionalisation has been the hallmark of Belgium's policy on children with disabilities.[3] Consequently, Belgium has had, since the mid-2000s, one of the highest percentages of institutionalised children with special needs in Europe.[4] There has been a change in policy direction following the ratification of the CRPD in 2009 with increasingly more emphasis being placed on inclusion. However, public resources are still primarily channelled towards the maintenance of institutional facilities and Belgium continues to have a disproportionally large number of children with special needs in segregated education.[5] The Flemish Action Plan for the Rights of the Child 2011-2014 (Vlaams Actieplan Kinderrechten) laid down specific goals related to children with disabilities.[6] Those goals included ensuring appropriate social services to children in need and strengthening psychiatric counselling, including increasing family support. The Flemish Youth Policy 2010-2014 (Vlaamse jeugdbeleidsplan) also included specific goals to enhance the situation of children with disabilities, such as bringing the situation of children with disabilities living in institutions in line with international requirements.[7] The Flemish Youth and Children's Rights Policy 2015 – 2019 paid far less attention to children with disabilities but identifies some objectives and ongoing activities related, inter alia, to: reducing the number of children with a disability living in poverty, promoting accessibility and the use of universal design, promoting inclusive education and increasing the ability of children with disabilities to communicate and make themselves heard online.[8]

Nevertheless, the CRPD Committee, in 2014, expressed serious concern about the number of children with disabilities in segregated education and expressed further concern that children with disabilities are not systematically included in decisions which affect their lives and do not have the opportunity to express their opinion about issues that affect them directly.[9] Moreover, the Committee recommended that Belgium allocate the necessary resources to support families of children with disabilities, in order to prevent the abandonment and placement of those children in institutions and to ensure their inclusion and participation in the community on an equal basis with other children.[10]

With respect to living independently and being included in the community, Belgium also has a high rate of referral to institutional care for persons with disabilities and lacks any real

[2] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Belgium, 28 October 2014, 2.
[3] Nathalie Meurens Under the supervision of Milieu Ltd., Country Report on Belgium for the Study on Member States' Policies for Children with Disabilities, 11.
[4] Belgium is the only Western European country in the top 8 countries with the highest levels of institutionalisation – the other countries are all Central and Eastern European countries. Ibid.
[5] Ibid.
[6] Ibid. 12.
[7] Ibid.
[8] Vlaams Jeugd- en Kinderrechtenbeleidsplan 2015 – 2019.
[9] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Belgium, 28 October 2014, 3.
[10] Ibid.

deinstitutionalisation plans.[11] There is insufficient information on opportunities to continue living in society and the community, since institutional care is too often seen as the only lasting solution.[12] Moreover, there are very few opportunities for persons with disabilities to live independently owing to a lack of investment and the inadequacy of personal assistance services.[13] The CRPD Committee recommended that Belgium work towards deinstitutionalisation by reducing investment in collective infrastructure and promoting personal choice.[14] The Committee also encouraged Belgium to implement a disability action plan at all levels to guarantee access to services and an independent life for persons with disabilities so that they are able to live in the community.[15]

With respect to work and education, 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. Inclusive education is not guaranteed and so the special education system remains a frequent option for children with disabilities.[16] Furthermore, there is a low number of persons with disabilities in regular employment. The Committee requested that Belgium 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.

Methodology of legal strategy development

On 25 and 26 January 2017, DLA Piper organised and ran a training for local Belgian lawyers and NGOs on how to provide legal support and conduct legal advocacy in support of children with mental disabilities with two partner organisations; Mental Disability Advocacy Centre (MDAC) and Gelijke Rechten voor Iedere Persoon met een handicap (GRIP – Equal Rights for Each Person with a Disability)[17]. The training was also attended, *inter alia*, by leading academics (including Annelies D'Espalier), representatives of Ouders voor Inclusie, Fevlado, lawyers from a constitutional law firm, Demos, representatives from DCI Belgique and the European Association of Service Providers for Persons with Disabilities. The training aimed to develop legal strategies in support of inclusive education in Flanders and, consequently, resulted in the legal strategy set out here.

Selection of the right

The education of children with special needs in segregated institutions is a unique challenge in Belgium and in Flanders in particular. This is highlighted not only by the Concluding Observations of the CRPD Committee highlighted above but also by the most recent data available from the European Agency for Development in Special Needs (EADSN).

According to data published by the EADSN, in 2008-2009 there were 871,920 pupils in primary and secondary school in Flanders, including 54,336 pupils with special needs (32,068 children

[11] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Belgium, 28 October 2014, 5.
[12] Ibid. 5.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid. 6.
[17] www.gripvzw.be.

in primary school, 22,268 in secondary school).[18] The great majority of pupils with special needs - 46,091 pupils (almost 85%) - were in special schools (27,543 children in primary education and 18,548 pupils in secondary school, mainly in private special schools). Only 8,245 children with special needs (15%) were in mainstream education: 4,525 in primary school and 3,720 in secondary school.

The data for school year 2012-2013 show that of 58,089 children identified as having special needs, 47,974 were in segregated schools (82%) and 10,140 in mainstream schools, including tertiary education (4,905 in primary school and 5,235 in secondary and tertiary education).[19] Thus, although the overall number of children with disabilities in mainstream schools increased, the percentage of children with special needs in mainstream versus segregated schools remained virtually unchanged. These statistics demonstrate that the percentage of pupils in segregated special education in the Flemish community is among the highest in Europe. In the Flemish community alone, there are more children with special needs in segregated education than in all of Spain or all of Hungary and almost as many as in the whole of France.[20]

A 2013 report from UNICEF Belgium reveals that children with mild intellectual disabilities are 8 times more likely than their peers to find themselves in segregated education.[21] The same report (which relied on a survey of 12 to 18 year olds) found that children with disabilities expressed the desire for a meaningful opportunity to choose the school they would attend (between mainstream and special schools).[22] While some children preferred to attend a mainstream school, others preferred to attend a special school, where they could receive attention tailored to their needs and share their experience with other children going through similar experiences.[23] However, they encountered difficulties in identifying schools equipped and willing to admit them. In addition, they felt there was not enough interaction between children with and without disabilities leading to less integration and to cases of bullying from children not used to children with disabilities.[24]

On this basis, the project team has concluded that inclusive education is a priority for legal advocacy efforts in the context of disability rights in Belgium.

1. Definition of the problem

Far too many children with intellectual disabilities are being unnecessarily institutionalised in Flanders. Although this might not always be strictly against the will of the parents, it is often a result of misinformation in relation to their options and rights (including rights of appeal), the application of subtle pressure on parents to select and accept segregated schooling, the lack of *effective and enforceable remedies,* a lack of procedural accommodations and a lack of targeted funding for the implementation of inclusive education policies (and a disproportionate amount of spending on segregated facilities).

[18] Mental Disability Advocacy Centre, Mental Disability Advocacy Center (MDAC) v. Belgium Complaint No.109/2014, 27 May 2014, 12.
[19] European Agency for Development in Special Needs, Special Needs Education, Country Data 2012.
[20] Ibid.
[21] UNICEF Belgium, What do you think? project, 'We are first and foremost youth', Report of young people with a disabilities on the enjoyment of their rights in Belgium, available in French and Dutch at http://www.unicef.be/nl/page/project-what-do-you-think (last accessed on 5 July 2017), 20.
[22] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Belgium, 28 October 2014, 13 - 14.
[23] Ibid.
[24] Ibid.

Of critical concern are:

a) the continued and disproportionate government investment into segregated institutions at the expense of inclusive models of education;
b) the failure or inability of schools to deliver with respect to reasonable accommodations to which students are entitled; and
c) there have been very few (just two that we are aware of) attempts by parents to pursue their rights and secure access to justice through the courts.

There are several underlying reasons:

a) Firstly, parents are often persuaded that segregated education is in the best interest of their child and that integrating their child into an ordinary school in his/her condition is not a good idea. Parents are subtly dissuaded and discouraged from even considering mainstream education. Even though parents have a right to inclusive education and reasonable accommodation (subject to a few caveats) in Flanders, schools, other parents and medical and pedagogic specialists convince and pressure parents not to take advantage of this right.
b) Secondly, children with disabilities and their parents are structurally conditioned to avoid seeking legal redress. There is a lack of available resources for children with disabilities in mainstream education, a lack of funding for reasonable accommodations and, accordingly, due to a fear of foreclosing opportunities, a fear that their child may be stigmatised and the desire not to antagonise the school, public administrators or medical, psychiatric and pedagogical experts, parents or legal guardians of children with disabilities seem to systematically avoid pursuing legal redress in the face of denials of the right to education.
c) Thirdly, there are insufficient resources made available to schools for the purposes of providing reasonable accommodations and pursuing policies of inclusive education.

Change needed:

a. Public resources need to be redirected away from institutionalised forms of education and directed towards inclusive models of education.
b. Schools, local and regional authorities need to be both supported and compelled to provide or make available resources for reasonable accommodations and, in turn, support parents desiring to have their child educated in a mainstream school (through both the provision of information and practical support).
c. Parents need to be informed of their rights and encouraged and supported to pursue claims for reasonable accommodations through the court system.

2. Goal of the litigation

The litigation would centre on point (c) above (encouraging and supporting parents to pursue claims for reasonable accommodations through the court system). Building on existing progressive jurisprudence from the Court of Appeals,[25] we would seek to create a body of jurisprudence (largely in the courts of first instance) confirming (and potentially elaborating on) the right to reasonable accommodation in Flanders in compliance with the requirements under the CRPD.

[25] Court of Appeal Ghent (13e k.), nr. 2009/AR/2440, 7 September 2011.

In a 2011 Court of Appeals (Ghent) case[26] the claimants (three deaf and hearing-impaired students) requested more hours of support from a sign-language interpreter in mainstream secondary education. The Court of Appeal ruled that the refusal by the school of the requested additional hours of support from a sign-language interpreter was a denial of reasonable accommodations and discriminatory on disability grounds. A period of five months granted to the Flemish Government by the lower court judge to ensure a minimum of 70% support by sign interpreters was confirmed.

This judgment is highly important since the Court set forth certain guidelines in the assessment of the proportionality of a relevant measure. The Court found that the offered accommodation (i.e. in contrast to 70% support by interpreters) could not be considered sufficient. Furthermore, the Court indicated that the Flemish Government as a public entity can rely on a large amount of resources and that it cannot easily invoke the criterion that the financial consequences of the measure would be too high. The argument of the Flemish Government that it could not offer the accommodation needed due to a deficit in qualified interpreters was also rejected, since the Flemish Government could take appropriate measures to enhance the status of interpreters and to make this specific profession more attractive.

As the CRPD Committee has confirmed, there can be no "one size fits all" approach to reasonable accommodation.[27] Moreover, the availability of accommodations should, as the Court of Appeal indicated, be considered in respect of the larger pool of educational resources available in the system, and not limited to resources available in the particular school in question.[28] To this end, States should ensure that the transfer of resources within the system (between schools) is possible,[29] and that reasonable accommodation does not entail additional costs for learners with disabilities.[30] We would seek to firmly establish these points in the body of jurisprudence we hope to create by building on the existing progressive case law. This body of jurisprudence would provide a touchstone for judges, lawyers, the Commission for Pupils' Rights (CLR) and the regional administration in determining questions of reasonable accommodation.

3. Legal and policy background context for the litigation

Overview of Education System and Policy Context

The Belgian Flemish Community's school system is divided into three levels: primary school, secondary school and higher education, with compulsory education between the ages of 6 and 18. Both primary and secondary education are further divided into regular education and special education, special education being targeted at children with a disability and categorised under one of 9 types, depending on the disability.[31]

In March 2014, the Flemish Parliament passed the so-called M-decree,[32] taking a significant step forward in meeting the expectations set by Article 24 of the CRPD. The "M-Decree",[33] which

[26] Ibid.
[27] United Nations Committee on the Rights of Persons with Disabilities (CRPD), General Comment no. 4 (2016), Article 24: Right to inclusive education, 2 September 2016, CRPD/C/GC/4, para 29.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] http://data-onderwijs.vlaanderen.be/onderwijsaanbod/default.aspx/so/buso
[32] Decreet van 21 maart 2014 betreffende maatregelen voor leerlingen met specifieke onderwijsbehoeften (hereafter: "M-decree").
[33] "Decreet betreffende maatregelen voor leerlingen met specifieke onderwijsbehoeften"

came into force on 1 September 2015, entitles children with disabilities to enrol in mainstream schools if the necessary accommodation to their needs can be considered reasonable. This is known as "Integrated Education" or "GON" ("geïntegreerd onderwijs").

The Department of Education has also piloted another type of education known as "inclusive education" or "ION" ("Inclusief onderwijs"), which allows 50 students with intellectual disabilities the temporary opportunity to attend regular schools, without needing to follow the general curriculum.

The Right to Inclusive Education

Under the "Integrated Education" model, the Belgian Flemish Community falls short of the requirements of Article 24 of the CRPD[34] to provide inclusive education, as enrolment in mainstream education is limited to students capable of following the common curriculum with the application of appropriate measures (such as remedial, differentiating, compensating and dispensing measures). There are therefore two central qualifying conditions for a child with a disability to attend a mainstream school: the child must be capable of following the common curriculum subject to appropriate accommodating measures; and such accommodating measures must be reasonable and not a disproportionate burden on the school.

With regard to the first condition, the Pupil Guidance Centre ("CLB")[35] is mandated to carry out educational assessments. However, the primary task of the CLB, in this respect, is to determine which children are eligible for *special* schools by issuing them with a certificate (report card). Therefore, those children *not* issued with a report card are deemed capable of following the common curriculum (subject to appropriate accommodating measures). Meanwhile those children who have been issued with a report card may still attend mainstream schools but only at the discretion of the school. However, schools have discretion not only in relation to children who have been issued report cards from the CLB but also with respect to those children with disabilities who have not been issued report cards. Relevant schools (this is the second qualifying condition referred to above), having consulted with the parents, the class council and the CLB may then determine to what extent any appropriate accommodating measures are disproportionate. The school organises a consultation with the parents, the class council and the CLB regarding the adjustments necessary to bring the pupil into the common curriculum or to let the pupil make academic progress based on an individualised curriculum. If after consultation, the school reaffirms the disproportionality of the necessary adjustments, the enrolment will be dissolved. When the school deems the adjustments proportionate, the pupil will be eligible for additional financing or funding as applicable in the context of integrated education.

In practice, due to a lack of support measures and little guidance as to how these measures are to be interpreted, students with disabilities may easily be deprived of their right to inclusive education by schools claiming that such measures would be disproportionate. Moreover, the M-Decree has limited the right to be enrolled in mainstream education to primary and secondary education, whereas the CRPD stipulates this right at all levels of education.

The Right to Reasonable Accommodation

[34] United Nations, "Convention on the Rights of Persons with Disabilities", article 24, paragraph 1, available at http://www.un.org/disabilities/convention/conventionfull.shtml

[35] CLB: "Centrum voor leerlingenbegeleiding".

The M-Decree establishes the following possible measures for students with disabilities:[36]

- remedial measures: measures whereby the school provides effective forms of adapted learning support;

- differentiating measures: measures whereby the school, within the standard general curriculum, introduces a limited variation in the learning process to better meet the needs of individual students or groups of students;

- compensating measures: measures whereby the school offers remedial educational aids, amongst others technical aids, as a result of which the goals from the standard general curriculum can be achieved or the goals that have been determined for the student after dispensing measures;

- dispensing measures: measures whereby the school adds goals to the standard general curriculum or exempts the student from certain goals in the standard general curriculum which are, where possible, replaced with alternative goals, to the extent either that they function in a sufficient manner towards completion of the structural part of the curriculum in question or evolve towards the expected continuation course or job market.

In sum, the school is obliged to apply one or all of the aforementioned measures insofar as they are appropriate and reasonable and the child with a disability is capable of following the standard general curriculum.

The assessment as such must be done in practice and for each individual student. A national court, if so possessed, would have to apply the proportionality test to assess whether or not the requested accommodation could be considered "*reasonable*". The refusal to implement reasonable accommodation will be considered discriminatory. In order to objectify this proportionality criterion, scholars (amongst which Annelies D'Espalier) have developed the following method:

1. Is there a legitimate aim? (This condition will mostly be considered fulfilled)
2. Is the requested accommodation suitable and appropriate?
3. Is the requested accommodation necessary?
4. Proportionality *sensu strictu*: comparison of the costs and benefits/comparison of the capacity of the institution at stake and the additional costs that the accommodation implies.

If these conditions are not fulfilled, the accommodation or measure will be considered disproportionate. Hence, the non-discrimination principle will not have been breached. Article II.1 and III.2 of the M-Decree also includes a definition of disproportionality:

> "*unreasonableness of adjustments shown after a process of deliberation including the criteria mentioned in article 2, §2 and §3 of the Protocol of July 19, 2007 regarding the concept of reasonable adjustments in Belgium*[37] *in accordance with the law of February*

[36] Article II.1 and III.3 of the M-Decree and Article 3 of the Primary Education Decree and Article 3 of the Secondary Education Code.

[37] "§2. The adjustment must be: - effective in order that the disabled person can actually participate; - enable an equal participant of the disabled person; - ensure that the disabled person can participate independently; -

25, 2003 to combat discrimination and amend the law of February 15, 1993 to establish a Center for equality and antiracism".

It will need to be further assessed how strictly the proportionality threshold will be applied and interpreted by the national courts in practice. It is to be expected that the proportionality threshold will be further nuanced through specific case law (so far, the case law on this specific topic is rather limited).

4. Overview of the administrative process and rights of appeal/route to court

In case of dispute between parents and a school regarding either registration or the provision or reasonable accommodation (and refusal to register or de-registration), there are two possibilities: mediation through the Local Consultation Platform (LCP) or a complaint to the Commission for Pupils' Rights (CLR[38]). If parents opt for mediation, and no agreement is reached within ten days then the LCP must submit the dossier to the CLR. Parents and other interested parties may also directly file a complaint with the CLR.

In case of disagreement between the parents, the school and the CLB on the delivery of the educational assessment report, an appeal can be made to a Flemish Mediation Commission (FMC), on the initiative of one of the parties.[39] The Flemish Government determines the composition and powers and the operating principles of this fixed Commission.[40] The chairman of the committee is a mediator accredited by the Federal Mediation Commission. The committee is assisted by a secretary of the Agency for Educational Services. The committee members are representatives of the representative organisations of the CLB, the representative associations of governing bodies (school) or GO! education of the Flemish Community[41] and parents' associations. The request for mediation can be submitted to the Commission by means of a simple form which can be found on the website of the Mediation Commission.[42] It is also possible to e-mail or call the Commission for more information.[43]

If mediation proves insufficient, parents can also contact the CLR to file a complaint. Parents can file a complaint in relation to the non-registration of their child in a school or the de-registration of their child from a school (*see point b refusal to inscribe in a school).* Both scenarios will often result from the inability of the school to provide reasonable accommodations. The Commission

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guarantee the safety of the disabled person. A mere partial realisation in the field of equal or independent participation, however, may not be an excuse for the non-realisation of the reasonable adjustment.
§3. The feasibility of a reasonable adjustment is judged in view of, amongst others, the following indicators: - the financial impact of the adjustment, taking into consideration * potential supportive financial subsidies; * the financial supporting capacity of the person receiving the adjustments; - organisational impact of the adjustment; - the expected frequency and duration of the use of the adjustment by persons with disabilities; - the impact of the adjustment on the quality of life of (an) actual or potential user(s) with a disability; - the impact of the adjustment on the surroundings and on the other users; - the lack of equal alternatives; - the absence of obvious or mandatory standards."

[38] CLR: "Commissie inzake leerlingenrechten".

[39] Art. 15, §7 Decree on Primary Education as amended by art. II.4 M-decree; art. 294, §8 Secondary Education Codex as amended by art. III.47 M-decree.

[40] Art. 15, §7 Decree on Primary Education as amended by art. II.4 M-decree; art. 294, §8 Secondary Education Codex as amended by art. III.47 M-decree; Decision of the Flemish Government of 10 July 2015 on the execution of the M-decree.

[41] "GO! education of the Flemish Community" is the Flemish State school system.

[42] https://onderwijs.vlaanderen.be/nl/vlaamse-bemiddelingscommissie.

[43] bemiddelingscommissie.onderwijs@vlaanderen.be, tel.: 02 553 99 31 (basisonderwijs), tel.: 02 553 87 18 (secundair onderwijs).

will examine the merits of the reasoning of the school. However, the decisions of the CLR are not binding.[44]

Importantly, the M-decree expands the Commission for Pupils' Rights to include members who have expertise in the practical realisation of reasonable accommodation (i.e. specialists and persons from disabled persons' organisations).[45] This body is the only body (other than the court) with a mandate to review the reasonableness of decisions to de-register students on the basis that accommodations cannot be provided. However, at the end of 2016, the CLR had still not been expanded as envisioned under the M-decree.

The problem with respect to securing remedies from the CLR is the non-binding nature of the decisions of that body, the absence of an (administrative) appeal against decisions of the CLR and the uncertainty as to whether the CLR will systematically engage with questions of the reasonableness or unreasonableness of required/requested accommodations (which is unclear from the legislation).

There are no other specific judicial remedies provided in the decree. The only alternative left for parents is to go to court. The competent Tribunal is the Tribunal of First Instance. An action can be initiated on the ground of discrimination such as the refusal to enrol a child due to his/her disability or the refusal to provide for reasonable accommodation. For a faster procedure, the case can be introduced through emergency interim proceedings to the President of the Tribunal. The victim's claims can include requests for an injunction and penalties.

5. Challenges arising from the administrative and legal context

Unfortunately, the M-decree offers few guarantees for parents and pupils. Since no additional funds are provided under the M-decree, schools can easily conclude that an adjustment is unreasonable because of its financial implications. Moreover, the M-Decree allows a margin of appreciation for the school meaning that schools are likely to argue that the meaning of proportionality of measures and reasonable accommodation varies from school to school (even though the CRPD Committee has said that these questions should be viewed in light of the broader pool of resources available in the education system as a whole). Moreover, judges in Flanders are in general not specialised in disability-based claims, and it won't always be in the best interests of the pupil to "force" a school to enrol a pupil.

Case selection

To make the client intake process and litigation as effective as possible, the following criteria were developed to identify characteristics of a prospective client.

1. Relevance

Selected cases must involve either:

[44] http://www.agodi.be/commissies/commissie-inzake-leerlingenrechten.
[45] Art. IV.7 §4 Decree on equal educational opportunities as amended by art. VII.3 M-decree.

a) A refusal to register a student or the de-registration of a student by a school on the grounds that the requested or recommended accommodations are not reasonable; or
b) The failure of a school or the regional administration to provide reasonable accommodations which have formally been granted/pledged.

In addition, cases should only be taken following an initial assessment, based on comparative international best practices, as to whether the requested or recommended accommodations are indeed reasonable in the context.

Moreover, cases must have the potential to create progressive jurisprudence (expanding the limits) related to the proportionality test for determining the reasonableness of accommodations.

2. Potential

Although, as has been discussed, there is progressive jurisprudence from the Flemish courts on the right to reasonable accommodation, there is still confusion, largely created by the M-Decree but also stemming from the inexperience of schools and the regional government (and the CLR) in providing and deliberating on questions of reasonable accommodations. However, the CRPD Committee, in General Comment 4, has provided clear guidance.

As noted above, the Committee has made it clear that there can be no "one size fits all" approach to reasonable accommodation[46] and that the availability of accommodations should be considered in respect of the larger pool of educational resources available in the system, and not limited to resources available in the particular school in question.[47] The Committee has suggested that States should ensure that the transfer of resources within the system (between schools) is possible,[48] and that reasonable accommodation does not entail additional costs for learners with disabilities.[49] The Committee has even set out examples of what might constitute reasonable accommodations for children with disabilities, including:

- changing the location of a class
- allowing quiet time away from the class
- providing a teaching assistant to help the child
- allowing a student more time, or replacing an element of the curriculum with an alternative element

Finally, the Committee has suggested that, in line with the CRPD's emphasis on a human rights model of disability, the provision of reasonable accommodation *may not be conditional on a medical diagnosis of impairment* but rather should be based on the evaluation of social barriers to exclusion.[50]

Therefore, the "potential" of cases under consideration should be assessed by reference to the ability of those cases to extend and/or confirm the body of jurisprudence on reasonable accommodations in line with the recommendations of the CRPD Committee. In particular, cases

[46] United Nations Committee on the Rights of Persons with Disabilities (CRPD), *General Comment no. 4 (2016), Article 24: Right to inclusive education,* 2 September 2016, CRPD/C/GC/4, para 29.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.

must have the potential to confirm and/or clarify how courts, the Flemish Ministry of Education, the CLR and schools should determine whether requested accommodations are proportionate (i.e. by reference to objective criteria) and to establish firmly that there is an expectation on the Ministry of Education and the Flemish Government in general to transfer resources from other parts of the education system (in particular, away from segregated education) towards supporting an inclusive education system.

3. Strength

A strong case presents many advantages for litigation. The following qualities, when met in a case, make it stronger and safer, and hence, ensure that litigation is beneficial for the target group and the individual client:

- The motivation of the client is compatible with the legal strategy, i.e. the client's wish is to advance the rights and protection of rights of children with disabilities and is not seeking primarily a solution to his/her particular problem (e.g. the client will prefer finishing the litigation even if settlement offer is available)
- The client's situation is stable, i.e. the client is not currently facing any substantial risks regarding their family life, which can be worsened by litigation
- The client is well connected within the network of other parents of children with disabilities and support NGOs
- The evidence in the client's case is feasible to collect and convincing for the court.

4. Resources

Another important criterion is that DLA Piper in fact has the resources to undertake the litigation of the selected case. Resources needed are identified below. An advantage to the case is if there are other actors (NGOs/parents' organisations/specialists) already engaged with the case and the workload can be shared with them, or if there are other organisations willing to cover part of the costs.

5. Ethical considerations

Naturally, during litigation, several issues can come up which can compromise a client's situation and in some cases even put them in danger.

- The most important consideration is whether the client's and client's family's situation is stable, i.e. the client and the family have adequate support (both formal and informal) to carry out a long-term litigation.
    - In case such support (non-formal) is not available, it should be sought within the network and parents' support groups, and considered together with the client whether undergoing litigation is possible.
    - In case formal support, i.e. community based services, are not available and accessible, the litigation effort must be accompanied by research of available services and their contracting methods;
    - If no services are available, a request to ensure such services in the community will be filed with the regional government. The client will be consulted on whether or not litigation should be carried out.

6. Added value

Apart from the above described strengths of the case, the following qualities will be looked for either on the part of the client or the partners who might be involved in the case:

- The client is vocal about his/her wishes and comfortable with media attention.

Litigation plan

- Client intake processes
  - Potential clients will be identified via NGO partners (especially GRIP) and parents' associations.

- Litigation route
  - We will select cases where both mediation and a complaint to the CLR have been unsuccessful in producing the desired reasonable accommodations and the only remaining option is to pursue litigation at the Court of First Instance.

- Support activities
  - Support: ensuring both formal and informal support to the client and the family during litigation (see ethical considerations above);
  - Research: to map the situation in Flanders is already underway.

- Key partners (legal experts; psychological/medical/other experts; NGOs to provide support to client, help identify clients, submit amicii etc.)
  - Legal experts will support the litigation team in framing the argument from the point of UN CRPD standards;
  - NGOs and parents' organisations will help identify clients, support the clients in the process and cooperate in related advocacy activities;
  - Media will help map the situation and popularise stories of children who have been denied the right to reasonable accommodation.

- Estimated timeframe
  - TBC

Risk management

- Identified risks

1. We will not be able to find a suitable client due to parents' fears of antagonising schools and public authorities and jeopardising the educational opportunities of their child;
2. The parents of the client or the client will not be able to handle the pressure of litigation;
3. The litigation can negatively affect children, their families and their education;
4. The client will end the litigation prematurely;
5. We will not be able to provide evidence necessary for the court;
6. There will be negative media coverage for suing schools or the Flemish Government;
7. Positive decisions will not be implemented due to lack of resources.

- Mitigation of risks

1. The client will be referred to us by a cooperating NGO partner or parents' association and we will seek a client whose educational future does not rest on the resolution of the case, but is already determined.
2. We will find a client whose motivation is closely aligned with our legal strategy, i.e. reaching an important decision with potential impact.
3. We will ensure adequate support for the client by other organisations or a psychologist. A child/client protection policy will be developed and implemented.
4. See above – preferred client's motivation will be the strategic issue itself, not an individual solution.
5. The case we choose will be supported by strong evidence.
6. A media strategy will be adopted to cover the case from a positive perspective. We will ensure the client is able and ready to speak about the issue openly.
7. An implementation strategy will be adopted to make sure a positive decision contributes to the desired outcome.

Follow up activities

After either successful or unsuccessful litigation, follow-up activities must be implemented in order to ensure the goal of litigation is reached. Therefore, the follow-up activities must respond to the goals of litigation described above.

Most likely follow up activities will be the following: advocacy (ensuring the goal is implemented), education (ensuring the implementation is effective) and media/communications (ensuring the issue is widely known and understood).

a. Advocacy:
   - Schools and the Flemish Ministry of Education to ensure the awards of reasonable accommodation are fully and effectively implemented.

b. Education:
   - Schools, CLR and the regional administration to educate them on the jurisprudence emanating from the courts.
   - Lawyers and judges to educate and empower them in relation to the jurisprudence emanating from the courts.

c. Media/communications:
   - To help spread awareness about the right to reasonable accommodation and how children with disabilities can be supported to pursue education in mainstream education.

Resources

Resources must be identified prior to carrying out litigation to ensure long-term litigation is sustainable. Both human and financial resources are identified below.

A. Human Resources

a. Local organisation of parents of children with disabilities
    i. Information about the lives of families with children with disabilities, challenges they faced with available services

b. Local NGO of social workers
    i. Information about the type of services, known good practices on cooperation between social workers and hospitals
    ii. Supporting the clients, cooperating with the lawyer and parents of children with disabilities
    iii. Conducting research
    iv. Supporting and organising education, communications and media
    v. Organising advocacy activities

c. Local lawyer
    i. Searching for clients in cooperation with the NGOs
    ii. Conducting domestic litigation
    iii. Cooperating on advocacy activities

d. International NGO
    i. Supporting advocacy and communications activities
    ii. Supporting litigation at domestic level
    iii. Supporting litigation at international level
    iv. Helping disseminate the outcomes of the research, litigation and advocacy efforts

B. Financial
    a. Court fees
        i. Will be covered by DLA Piper;
        ii. The cases can be litigated by pro bono lawyers.

    b. Related cost of litigation (lawyers' fees, postal costs, transport costs to get to the trial court, printing, research, etc.)
        i. These can all be covered by DLA Piper.