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Report for the Human Rights Committee on the List of Issues

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Submitted by the
Mental Disability Advocacy Center (MDAC)

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Introduction

1. The Mental Disability Advocacy Center (MDAC) makes this written submission in response to the List of Issues published by the Human Rights Committee on 27 August 2010, in regard to Slovakia's compliance with the provisions of the International Covenant on Civil and Political Rights (hereinafter "the Covenant"), with a particular focus on the enjoyment of those rights by persons with disabilities. The purpose of the submission is to provide the Committee with additional information on the factual and legal situation in Slovakia with respect to the published List of Issues and its consideration of Slovakia's response to the List of Issues (hereinafter "the Government's response").

2. MDAC is an international human rights organisation which advances the human rights of children and adults with intellectual and psycho-social disabilities. MDAC uses law to promote equality and social inclusion through strategic litigation, advocacy, capacity-building and research. MDAC has participatory status with the Council of Europe.

A. Principle of non-discrimination and rights of minorities (arts. 2, 26, 27)

1. Additional information related to paragraph 7(a) of the List of Issues regarding steps taken to eliminate discrimination against persons with disabilities, especially with regard to access to employment, education and services.

Anti-discrimination law fails to provide for "reasonable accommodation"

1.1. In 2004 the Slovak Parliament adopted Anti-discrimination Law no. 365/2004 Coll. (hereinafter "the Anti-discrimination Law"). The Anti-discrimination Law defined direct and indirect discrimination and also reasonable accommodation. Although Article 7 of the Anti-discrimination law recognises the principle of reasonable accommodation, it does so in a very limited way. Reasonable accommodation is a core concept of the UN Convention on the Rights of Persons with Disabilities (CRPD) – a treaty which Slovakia ratified in May 2010, and whose Article 2 defines it as "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." Discrimination on the basis of a disability, as defined in Article 2 of the CRPD, "means all forms of discrimination, including denial of a reasonable accommodation." Under Slovak law, the definition and thus legal recognition of reasonable accommodation covers only the availability and accessibility of employment for persons with disabilities. By failing to recognize the principle of reasonable accommodation more broadly as the CRPD does, the law fails to recognize other forms of discrimination as discrimination against persons with disabilities.

1.2. This limited understanding of the reasonable accommodation principle in Slovakia's core anti-discrimination law prevents persons with disabilities from enjoyment of the equality principle in all aspects of life and does not obligate State authorities and private sector actors to enable persons with disabilities to enjoy the full spectrum of rights enshrined in the Covenant.

Discrimination against people with intellectual and psycho-social disabilities with regard to legal capacity

1.3. Persons with mental disabilities have faced systematic discrimination for decades in Slovakia. One of the main consequences of this long-standing practise is the deprivation of a person's legal capacity, and their placement under guardianship where their decision-making is substituted by a third party, a guardian. Guardianship is regulated under the 1964 Civil Code (hereinafter "the Civil Code"), without any modification since the code was enacted. Persons with mental disabilities can be deprived or restricted of legal capacity on the grounds of mental disability. Full deprivation of legal capacity and placement under plenary guardianship can be described as a civil death, because a person under plenary guardianship automatically loses the legal capacity to act in all aspects of his or her life. A person under partial guardianship is restricted in the exercise of numerous rights. The Slovak legislation does not provide persons with mental disabilities any gradated possibility of supported decision-making, as is necessary under Article 12 of the CRPD.

1.4. According to the Civil Code, a court's decision on deprivation and restriction of legal capacity can be based exclusively on a diagnosis of a mental disability and thus fundamentally affect a "group" of persons with disabilities. Deprivation and restriction of legal capacity leads to an automatic presumption of incompetency, in, *inter alia*, family matters (restrictions of or completely bars to marriage and parental rights); consenting to medical treatment; contractual matters; and political participation, including prohibition from voting. With respect to guardianship and the right to vote the European Court of Human Rights recently held in the case of *Alajos Kiss v. Hungary* that automatic restrictions on voting based on restrictions on legal capacity were not permissible. The Court stated in its decision in the case of *Alajos Kiss v. Hungary* that:

> … if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (citation omitted). The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion.

> Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (citation omitted). [1]

1.5. The automatic legal consequences of deprivation and restriction of legal capacity, as well as substituted decision making in the form of plenary and partial guardianship represent unreasonable and disproportionate discrimination against persons with mental disabilities, based on the prohibited ground of disability, and as the Human Rights Committee has said with respect to Russia and with regard to Articles 9 and 10 of the ICCPR, there is "a lack of adequate procedural and substantive safeguards against disproportionate restrictions in their enjoyment of rights guaranteed under the Covenant".[2]

Discrimination in education

1.6. According to the Slovak Education Act no. 245/2008 Coll. (hereinafter "the Education Act"), the education of children with intellectual and other disabilities can be provided in special schools, in accordance with special educational plans, or in special classes or in mainstream classes. However, even if a child with a disability is accepted to a mainstream school, this school has no obligation to provide him or her with individualised supports: see the reference above in para. 1.1 of this submission on the State's failure to enshrine in legislative or administrative measures the notion of "reasonable accommodation" in fields other than employment, as defined in Article 2 of the CRPD). Such reasonable accommodation would at a minimum include the availability of personal assistants, modified and individualised curricula, and assistive technologies. Mainstream schools are thus inaccessible and prevent most children with disabilities from enjoying their right to education. Education is provided for the majority of children with mental disabilities in special schools which are segregated from mainstream educational systems and facilities, and the educational attainment of these scholars is lower: thus children with disabilities are denied the right to education on an equal basis with others. The Slovak Education Act as well as the practice of special education thus uphold a paradigm of segregated and isolated education of children with mental disabilities. The UN Special Rapporteur on the Right to Education, Mr. Vernor Muñoz, identified an obligation of the states to transition from the special education paradigm to an inclusive education paradigm with the aim of preventing discrimination. In his 2007 report for the Human Rights Council, Mr. Muñoz emphasised:

> The special schools, often based on the belief that persons with disabilities are uneducable and a burden on the mainstream educational system, often were - and remain - inflexible, non-individual-student specific and they fail to provide or even offer optimum results for their

[1] *Alajos Kiss v. Hungary,* application no. 38832/06, jugment of 20 May 2010, para. 42.
[2] Concluding observations of the Human Rights Committee with regard to the Russian Federation, CCPR/C/RUS/CO/6, 29 October 2009, para. 19.

students. The negative impact of these beliefs is reflected on national and international educative assessments. [...] In addition, the practice of separating students with disabilities can lead to greater marginalization from society, a situation that persons with disability face generally, thus entrenching discrimination. In contrast, inclusive education has been shown to limit marginalization. This marginalization contributes to misconceived stereotyping, prejudice and thus discrimination.[3]

1.7. The Education Act does not reflect an inclusive education paradigm, as set out in Article 24 of the CRPD, and inclusion of education is not recognised as a basic principle and aim. No educational policy or action plan has been adopted at the national or local level to ensure inclusive education of children with intellectual disabilities. Children with intellectual disabilities are educated in segregated schools and this segregated education represents the general norm, not an exception in a limited number of cases. Thus the State policy has failed to take the necessary legislative or administrative measures to prevent and remedy this ongoing discrimination against children with disabilities.

Indirect discrimination of persons with psycho-social and intellectual disabilities

1.8. United Nations committees have recognised that discrimination can take other forms than different treatment between comparable groups or individuals and that eliminating discrimination in practice requires paying sufficient attention to groups of individuals who suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.[4] States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.

1.9. Slovakia adopted a limited national policy for persons with disabilities in 2001,[5] which remains in force and is outdated as it does not reflect the paradigm shift represented by the CRPD, the jurisprudence of treaty bodies or the case law of European courts and quasi-judicial bodies or well-recognised good practices. It is limited in scope as it ignores important issues of the right to legal capacity, the right to participate in political life, the right to live in the community, and the right to inclusive education. Further, it has limited impact on discriminatory practices as it fails to guarantee information and education of the general public and practising professionals, e.g. judges, attorneys, teachers and academia, especially on the rights of persons with disabilities. This obligation to provide awareness-raising of the rights of persons with disabilities is set out in

[3] Muñoz, V. The right to education of persons with disabilities, Report of the Special Rapporteur on the right to education, 2007, A/HRC/4/29, para. 11.

[4] General Comment no. 20. Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), E/C.12/GC/20, para. 8.

[5] Národný program rozvoja životných podmienok občanov so ZP zdravotným postihnutím vo všetkých oblastiach života [National program of living conditions development for citizens with disabilities in all aspects of life], adopted by the Government's decision no. 590, of 27 June 2001.

detail in Article Slovakia has thus failed to adopt and implement all necessary measures to prevent de facto discrimination.

Conclusion

1.10. The Slovak government in its response to the List of Issues of 13 January 2011 omitted to elaborate on the improper definition of discrimination in Anti-Discrimination law; on the crucial question of guardianship and the automatic consequences of deprivation and restriction of legal capacity which deeply marginalise persons with mental disabilities in Slovak society; and on the availability and accessibility of employment for persons with disabilities.

2. Additional information related to paragraph 7(b) of the List of Issues regarding statistical data on the participation of persons with disabilities in the labour force and education

2.1. The Government provided the Committee with data in two tables and with regard to discrimination in education. However, the presented tables on numbers of pupils in special educational facilities and number of pupils with special educational needs "integrated" into mainstream educational system (para. 36 of the government's Response) are limited and unclear. First of all, the statistics show that the number of children educated in segregated settings has been rising over the last few years. With regard to the second table, the definition of "special educational needs" under article 2 (j) of the Education Act is very broad and includes different groups of children, e.g. socially disadvantaged children (under this category mainly Roma children), gifted children, children with all kinds of physical disabilities and also children with psycho-social disabilities and intellectual disabilities. Governmental statistics are totally inadequate and it is impossible both for civil society and for international treaty monitoring bodies to determine which group or groups of children with special educational needs are actually "integrated" into and/and supported within mainstream schools.

2.2. Contrary to the government's assertion, its own data fail to demonstrate any non-discrimination against children with disabilities in education. Similarly, there are no statistical data available on the participation of persons with disabilities in the labour force. A failure to provide this data seriously undermines any attempt to monitor progress (or regress) and should be condemned in the strongest of terms. We urge the Committee to remind the Government of their obligations to collate such data, and request that the Committee cross-refers to Article 31 of the CRPD in relation to the obligation, "to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the [CRPD]."

B. Non-discrimination, freedom from torture and cruel, inhuman or degrading treatment, liberty and security of a person, and the right to a fair trial (Articles 2, 7, 9, 14 and 26)

3. Additional information related to paragraph 16 of the List of Issues regarding whether persons with mental disabilities are systematically heard prior to deciding on their hospitalisation, under Article 6 (9) (d) of Act. No. 576/2004 and whether hospitalized individuals have the right to give informed consent on their treatment.

3.1. Persons with mental disabilities are not systematically heard prior to deciding on their hospitalisation under Article 6 (9)(d) of the of Act on Health Services no. 576/2004 Coll. (hereinafter "the Health Act"). Courts often take a decision on involuntary hospitalisation without a hearing and this decision in often not delivered to the person concerned.

3.2. Under Article 6 (5) of the Health Act, informed consent can be given by the recipient of the health service or his/her legal representative. Persons with psycho-social disabilities and intellectual disabilities who have been deprived of or restricted in their legal capacity have an appointed guardian who is, according to the Civil Code, their legal representative. All persons under guardianship are automatically excluded from the informed consent requirement, both with respect to the hospitalisation and to other medical services. This legal concept represents status exclusion without any factual assessment of competency to give informed consent.

3.3. The Slovak Health Act does not recognise functional ability to give, or refuse, consent to medical treatment. However, functional ability is required by international human rights standards with regard to both: i) medical services and ii) hospitalisation. Functional ability to consent to hospitalisation was emphasised with respect to the right to liberty of a person deprived of legal capacity, in a judgment by the European Court of Human Rights in the case of *Shtukaturov v. Russia*, which dealt with a legal situation which is similar in Slovakia. The Court stated that: "[…] the applicant lacked *de jure* legal capacity to decide for himself. However, this does not necessarily mean that the applicant was *de facto* unable to understand his situation..[6]

3.4. In its response, the Government ignored the fact that persons with mental disabilities are not systematically heard prior to deciding on their involuntary hospitalisation. With respect to the second question, the Government limited itself to domestic legal provisions and failed to provide the Committee with direct answers (paras. 86-90 of the Response). Such issues have been dealt with by the Committee previously, for example with respect to Russia, where the Committee stated with regard to Articles 9 and 10 of the Covenant that people with disabilities

[6] *Shtukaturov v. Russia*, application no. 44009/05, judgment of 27 March 2008, para. 108.

need to be given a right to an effective remedy and that alternatives to confinement in a psychiatric hospital need to be provided.[7]

4. Additional information related to paragraph 16 of the List of Issues regarding whether persons under guardianship in institutions and social care institutions have access to legal recourse to challenge the decision to detain them, as well as have access to means to report ill-treatment or abuse by guardians and/or staff of institutions.

4.1. Under the provisions of Social Service Act no. 448/2008 Coll. (hereinafter "the Social Service Act") all social services are provided on a contractual basis between the provider and the client. Persons under guardianship are considered legally incapable in contractual matters according to the Civil Code, therefore they are represented by a legal representative, the guardian. Neither the Civil Code, nor the Social Service Act require or entitle persons under guardianship to be involved in these contractual negotiations, including entering into, modifying or annulling the contract. All contracts of persons under guardianship with institutions providing social care services are considered as *voluntary*, even in cases where the person may be actively protesting such an arrangement. There is no concept of involuntariness in the Social Service Act, despite the reality that many thousands of persons are de facto detained in social care institutions. There are no data on exactly how many people are so segregated in these institutions, the lack of data again undermining civil society and international treaty monitoring bodies' efforts to track progress. Nevertheless, despite the fact that persons under guardianship are not according to Slovak law *de jure* involuntarily institutionalised, they are involuntarily institutionalised *de facto*.

4.2. There is only one way to challenge institutionalisation for a person under guardianship. If a person does not want to enter into or amend a contract and the guardian disagrees, the person under guardianship can ask the court to appoint an *ad hoc* guardian to resolve this conflict. However, the court has a discretionary power to appoint an *ad hoc* guardian, undermining the notion that this could be considered a safeguard to protect rights. Moreover, the government does not make this procedure easily accessible and thus it is unavailable to the majority of persons under guardianship. The Government did not respond to this question.

[7] Concluding observations of the Human Rights Committee with regard to the Russian Federation, CCPR/C/RUS/CO/6, 29 October 2009, para. 19.

5. Additional information related to paragraph 16 of the List of Issues regarding whether cage- or net-beds continue to be used as a measure of restraint in social care institutions or psychiatric institutions. (State report, para. 151).

5.1. Physical restraints are lawful in both social and health services. Nevertheless, there are considerable differences. Under the provisions of the Social Service Act, cage- or net-beds are prohibited and the use of other restraints is regulated by the law. In healthcare settings, net-beds are lawful and used on a widespread basis, despite international condemnation since 2004.

5.2. In 2009 the Slovak Ministry of Health adopted a methodological order on the use of restrictive measures.[8] According to Article III of this order, restraints cover: (a) placement in a protective (net) bed; (b) placement in an isolated room; (c) strapping the patient to the bed; (d) using barriers (forms of physical restraint other than cages and straps); e) using "physical domination" (e.g. a nurse manually confining the patient using his arms). The Health Code is silent on restrictive measures, thus it is only this normative regulation which recognises net-beds as a form of restraint. Net beds continue to be used in psychiatric facilities as is clear from para. 92 of the Government's Response to the List of Issues.

[8] Odborné usmernenie Ministerstva zdravotníctva Slovenskej republiky k používaniu obmedzovacích prostriedkov u pacientov v zdravotníckych zariadeniach poskytujúcich psychiatrickú starostlivosť *[Methoologicall order of the Slovak Ministry of Health on use of restrictive measures against patients in health facilities providing psychiatric care]*, no. 13787/2009 – OZS, adopted on 27 May 2007.