

## **Resolution CM/ResChS(2014)2**

### ***Action européenne des handicapés (AEH) v. France, Complaint No. 81/2012***

*(Adopted by the Committee of Ministers on 5 February 2014  
at the 1190th meeting of the Ministers' Deputies)*

The Committee of Ministers,<sup>1</sup>

Having regard to Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints;

Taking into consideration the complaint lodged on 3 April 2012 by the *Action européenne des handicapés* (AEH), against France;

Having regard to the report transmitted by the European Committee of Social Rights containing its decision on the merits, in which it concluded:

***- unanimously, that there is a violation of Article 15§1 of the Charter with regard to the right of children and adolescents with autism to be educated primarily in mainstream schools.***

WHO regards autism not as a temporary disease, which could therefore be cured, but as a disability. If it is assumed that the stable and permanent nature of all disabilities (whether mental, cognitive – as is the case here – or somatic) means that the person concerned must be educated in citizenship, then human assistance must be arranged for all or part of their schooling.

In general, States have a wide margin of appreciation in the way in which they implement the Charter (European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 37/2006, decision on the merits of 3 December 2007, §14). However, where the persons affected by the priority to be given to mainstream schools, as the means most liable of securing the independence, integration and participation of persons with disabilities, are children and adolescents with autism, Article 15§1 implies that States are required to provide the human assistance needed for the school career of the persons concerned.

According to the figures from government sources which are given in the complaint and the complainant organisation's response, the number of children with autism in school decreases significantly at each stage of compulsory schooling: 87% of children with autism attend primary school, 11% lower secondary school and 1.2% upper secondary school. At the very last level of schooling, for the 2011-2012 academic year, the figure in absolute terms was 553 pupils.

Assistance at school is a particularly important means of being able to keep children and adolescents with autism in mainstream schools. However, the school assistants (AVSs) that were regularly recruited by the Ministry of Education for the 2010-2011 academic year onwards had insecure employment contracts, particularly single integration contracts (CUIs). This clearly undermines the substance of the work of assisting children and adolescents with disabilities and, in this specific case, with autism.

The alleged shortcomings, particularly the shortage of AVSs and the failure to provide a continuous service throughout the school life of the children concerned, are such as to

hamper the school careers of children and adolescents with autism in mainstream schools and amount to a process of driving such pupils away from mainstream schools.

The learning difficulties which pupils with autism often experience throughout their school careers frequently prevent them from obtaining the qualification that they would usually acquire by the end of their compulsory schooling. Thus, 90% of young persons with autism between the age of 16 and 19 do not continue to attend school.

The denial, in practice, of the right of children and adolescents with autism to continue attending school beyond compulsory school age despite the fact that this is the legal right of all pupils, amounts to a missed opportunity for the persons concerned to attain their potential in the mainstream school environment.

The fact that the proportion of 20% of children and adolescents with autism in mainstream schools had been achieved when the complaint was filed constitutes a step forward. The pendant to the 20% of children with autism in schools is the 80% of children who do not attend school, who are in practice excluded from the enjoyment of a social right enshrined in and guaranteed by the Charter (FIDH v. Belgium, cited above, §113).

France has undoubtedly made a noteworthy effort to rationalise its policy for the schooling of children and adolescents with autism through the two successive plans covering the periods 2005-2007 (1st Autism Plan) and 2008-2010 (2nd Autism Plan). The overall timeframe of five years, resulting from the two successive plans, is not too long, bearing in mind the margin of appreciation enjoyed by States Parties. However, only half of the measures provided for in the 2nd Autism Plan have been more or less completed and some measures were not even initiated, while a 3rd Autism Plan has been launched in 2013 following a three-year break between plans, meaning that the deadline for achieving the newly assigned objectives is prolonged to 2017. This prolongation is unreasonable and exceeds the margin of appreciation allowed to States Parties.

Concerning the criterion of maximum use of available resources, the margin of appreciation that States Parties enjoy in allocating financial resources is taken into account. However, the maximum use is not being made of resources for the schooling of children with autism while France subsidises travel to Belgium by children and adolescents with autism of French nationality, who are then accommodated and educated in specialised institutions functioning according to appropriate educational standards, rather than financing the implementation of these standards within specialised institutions active in French territory.

***- unanimously, that there is a violation of Article 15§1 of the Charter with regard to the right of young persons with autism to vocational training.***

Vocational training, in the strict sense, means the provision of initial instruction to individuals to help them to acquire the knowledge and skills they need to enter the labour market and hence to achieve personal fulfilment and integration into the community. It cannot be assessed in isolation. It forms part of a full range of education and training activities for individuals and is closely linked to general education. Furthermore, workers retain a fund or a deficit of training from their school lives and their educational background shapes their opinion on training.

The number of adolescents with autism who succeed in following the successive stages of their schooling declines as they get older and reaches the insignificant figure of 1.2%

attending upper secondary school. Therefore, no difference can be expected in the result where it comes to access to vocational training for adolescents with autism after the end of compulsory schooling (age 16) or the access of adults with autism until at least the age generally required to complete a vocational training course (between 25 and 27).

In this context, the natural consequence of the violation of the Charter found because of the defective schooling of children and adolescents is a lack of measures designed to achieve the objectives of the Charter where it comes to promoting the vocational training of these persons when they become adults.

***- unanimously, that there is a violation of Article 15§1 of the Charter, because the work done in specialised institutions caring for children and adolescents with autism is not predominantly educational in nature.***

The predominance of guidance, education and vocational training in the overall system provided for by Article 15 to secure the citizenship rights of persons with disabilities would be rendered void of all meaning if the specialised institutions referred to in paragraph 1 of Article 15 failed to ensure, through their internal organisation and/or their working methods, that guidance, education and vocational training were given priority over the other functions and duties that they may be required to perform under national law.

The relevant legislation provides for the care by the community of any person suffering from an autistic spectrum disorder or a related condition, which should be suited to his or her age or state, and may be educational, instructional, therapeutic or social in nature (Article L. 246-1 of the Social Welfare Code). This care is provided by medico-educational institutes (IMEs) or day-hospital units, which form part of regular hospitals.

However, France is not fulfilling its obligation, under Article 15§1, to ensure that, in the context of care provision for children and adolescents suffering from autism within specialised institutions such as IMEs or day-hospital units, the work done by these institutions and the working methods they utilise are predominantly of an educational nature.

In this respect, the Law (Article L112-1, §7) only foresees educational provision within these institutions as a subsidiary element amongst a number of other activities (pedagogical, psychological, social, medical and paramedical).

During the Autism Plan for 2008-2011, some 30 institutions caring for children and adolescents suffering from autism were established, in which the cognitive behavioural therapy method (“ABA”) was used. These institutions were, however, set up on an experimental basis and, in any case, their creation was not followed by action to consolidate the method and bring it into systematic use.

France has not taken sufficient measures capable of ensuring that the work done by institutions caring for children and adolescents suffering from autism and the working methods they utilise are predominantly educational in nature.

***- by 9 votes to 4, that there is a violation of Article E taken in conjunction with Article 15§1, because families have no other choice than to leave the national territory in order to educate their children with autism in a specialised school, which constitutes a direct discrimination against them.***

Article E prohibits discrimination on the ground of disability. Although disability is not explicitly listed as a prohibited ground of discrimination under Article E, it is adequately covered by the reference to “other status” (Autism-Europe v. France, cited above, §51).

Article E entails that, in a democratic society, not only should persons who are in the same situation be treated equally and persons whose situations differ be treated differently, but all responses should show sufficient discernment to ensure real and effective equality. On the same basis, the Committee considers that Article E also prohibits all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all (Autism-Europe v. France, cited above, §52).

There is no evidence or other information concerning a cross-border flow – from France to Belgium – of children, adolescents and young adults in good intellectual and physical health, so as to undergo schooling or vocational training, which would, in addition, require supervision and monitoring measures on the part of the competent authorities in their home country.

The fact families have no other choice than to go abroad, notably to Belgium, in order to educate their children with autism in a specialised school arises from the failure of France to take into account the specific learning and communication needs at school within its own national territory and constitutes for this reason a direct discrimination against them.

***- by 8 votes to 5, that there is a violation of Article E taken in conjunction with Article 15§1, because the limited funds in the State’s social budget for the education of children and adolescents with autism indirectly disadvantages these persons with disabilities.***

As an illustration of the modest public funding provided for the education of children and adolescents with autism is the fact that the 2008-2010 Autism Plan earmarked €170 million for the creation of 4 100 additional places for persons with autism – comprising 2 100 places for children (1 500 in medico-educational institutes [IMEs] and 600 in special education and home care services [SESSADs]) and 2 000 places for adults (in special residential care establishments [MASs], residential care establishments for adults with disabilities [FAMs] and newly created medical and social services for adults with disabilities [SAMSAHs]). However, to date, only 52% of the planned places have been set up, amounting to funding for only 2 120 places in various establishments and services for a total budget of €78.5 million. Furthermore, AEH maintains – which is not contradicted by the government – that 17 of the 30 measures provided for in the plan have not been implemented.

Moreover, since 2007, 65 400 posts have been abolished in the State education system and the budget for 2012 provides for another 14 000 to be abolished. This has led to overcrowding in classrooms and, in turn, a need for even more adjustment and training for teachers having to cope with children and adolescents suffering from autism and already finding it difficult to compromise and adapt.

Budget restrictions can legitimately and logically be seen to account for circumstances already referred to, such as the low number of school assistants assigned to children and adolescents with autism, their appointment under precarious, low-paid contracts, the lack of access for young adults suffering from autism to vocational training in specialised

institutions for the occupational and social rehabilitation of persons with disabilities and the few institutions effectively applying the educational care methods.

The limited public funding allocated to social protection is liable to affect everyone who is supposed to be covered by this protection equally, regardless of whether they are with disabilities. It cannot therefore be claimed that this conduct on the part of the State gives rise to a difference in treatment of persons with disabilities, including children and adolescents with autism attending school, which is founded directly on what makes them distinct from other disadvantaged persons.

However, in the specific field of disability, the Committee considers that indirect discrimination can be taken to occur where an apparently neutral provision, criterion or practice would put persons having a disability at a particular disadvantage compared with other persons, unless it can be justified (see, *mutatis mutandis*, the judgment of the Court of Justice of the European Union (Second Chamber) of 11 April 2013, joined cases C-335/11 and C-337/11, Jette Ring and Lone Skouboe Werge, not yet published in the Reports of Cases, §§76 and 77).

Accordingly, a person with a disability is more likely to be dependent on community care, funded through the State budget, in order to live independently and in dignity, as compared with other persons in receipt of community care. Budget restrictions in social policy matters are therefore likely to place persons with disabilities at a disadvantage and thus result in a difference in treatment indirectly based on disability.

Having regard to the document distributed at the request of the Representative of France at the meeting of the Rapporteur Group on Social and Health Questions (GR-SOC) of 26 November 2013,

1. takes note of the observations made by the respondent government indicating that France will maintain its efforts in the field at issue (cf. Appendix to the present resolution);
2. looks forward to France reporting, on the occasion of the submission of the next report concerning the relevant provisions of the Revised European Social Charter, on the implementation of the measures announced and progress made.

*Appendix to Resolution CM/ResChS(2014)2*

### **Decision of the European Committee of Social Rights in Complaint No. 81/2013, AEH v. France**

#### **Observations of French Government before the Committee of Ministers**

The government takes note of the report by the European Committee of Social Rights concerning Complaint No. 81 AEH v. France, in which it concludes that there is a violation of Article 15§1 (right of persons with disabilities to independence, social integration and participation in the life of the community) on the ground of the schooling conditions for young people with autism in France and a violation of Article E taken in conjunction with Article 15§1 on the ground of the resulting discrimination against young people with autism.

First of all, the government would underline that it is compulsory in France for all children between the ages of 6 and 16 to go to school. Moreover, the Law of 11 February 2005 on equal rights and opportunities, participation and citizenship of disabled people (“the Disability Act”) provides that precedence should be given to mainstream schooling. Article L. 351-2 of the Education Code does

not allow a school head or the director of another establishment to refuse to enrol a child. The same applies to teachers and if, for example, they objected to the presence of a child with a disability in their lessons, they would be failing in their duties and liable to disciplinary sanctions. In truth, as is emphasised in report No. 2012-100 of September 2012 by the State education inspectorate on the implementation of the Act of 11 February 2005, refusals to enrol pupils remain exceptional.

In addition, legal action may be brought and penalties imposed in the administrative courts if schools refuse to enrol children. The Conseil d'Etat has held that the State's obligation to provide schooling for disabled children must be considered an obligation of result; it ruled that "the State's failure constitutes a fault such as to incur its liability, without it being possible for the authorities to rely on the arguments that there is a shortage of educational facilities and that the parents of children with disabilities receive compensatory benefits." In a judgment of 16 May 2011, the Conseil d'Etat applied this case law to provision for autistic persons. Families therefore have an effective remedy if schools refuse to enrol their children.

Lastly, the government has made considerable financial and practical efforts to provide and promote education and vocational training for persons with autism and other pervasive development disorders (PDDs). These efforts have had a positive impact, as acknowledged by various independent authorities. For instance, in September 2011, there were 20 375 pupils with autism or a PDD. This figure was in the region of 12 000 to 13 000 in 2008-2009, so it can be seen that there has been an increase in numbers of 60% since then (between 7 000 and 8 000 additional children now attend school).

The complainant organisation does not dispute these facts. Moreover, the ECSR acknowledges in paragraph 95 that "France has undoubtedly made a noteworthy effort to rationalise its policy for the schooling of children and adolescents with autism", but holds that the postponement of some assigned objectives constitutes an unreasonable delay in implementation and exceeds the margin of appreciation allowed to States Parties.

The finding of a violation which the ECSR arrived at cannot therefore obscure the significant progress made since the Committee's previous decision on the same subject on 7 November 2003.

The government reasserts its determination to continue the efforts made in this area as part of a genuinely consistent and comprehensive policy in co-operation with the associations concerned.

The government is pursuing a proactive policy to provide facilities and support for people with autism. This policy has resulted in successive "autism plans" for the periods 2005-2007 and 2008-2010. Following a review of the plan in 2011, it was agreed that the momentum must continue and be applied in particular to epidemiology, research and access to somatic treatment. It was with this goal in mind that autism was declared the National Cause of the Year in 2012.

The third autism plan developed in partnership with the associations concerned demonstrates the government's willingness to pursue a proactive policy in this area. The 2013-2017 autism plan presented on 2 May 2013 by the Minister for Social Affairs and Health and the Minister responsible for People with Disabilities and Combating Exclusion involves the development of a new stage in the policy to support people with pervasive developmental disorders and, in particular, autism.

The proposals in the plan seek to boost the co-operation between the research, health, medico-social and education sectors. It is being implemented at interdepartmental level under the auspices of the Secretary General of the Interdepartmental Disability Committee, with the regular involvement of

all the stakeholders represented on the National Autism Committee (CNA). There are five main strands in the plan:

- 1) The earliest possible detection and diagnosis (from 18 months);
- 2) Strengthening and adaptation of support on a lifelong basis;
- 3) Support for families;
- 4) Continued research;
- 5) Awareness raising and training for all professionals involved in caring for and supporting people with autism.

In addition to the funding provided for completing the creation of places under the second autism plan, the 2013-2017 autism plan involves a financial commitment, in terms of new measures, of around 195 million euros upon completion.

This is a specific financial commitment which must not obscure the sums spent on policies for people with disabilities, from which people with autism also benefit in addition to the specific measures aimed at them.

The third plan already provides a response to some of the criticisms made by the European Committee of Social Rights in its report of 11 September 2013. For instance, in paragraphs 118 and 119 of the decision, the ECSR criticises the lack of action to consolidate the ABA method employed in 30 new institutions on an experimental basis. Action sheets 7 and 8 of the third autism plan (Cross-sectoral external review of experimental facilities) make provision for such action with funding of 600 000 euros. In paragraph 97, the Committee notes that only half of the measures provided for in the second autism plan have been completed, constituting an “unreasonable” delay. Additional funding of 93 million euros is planned (on top of the funding of 195 million euros planned for the measures under the third plan). Lastly, in paragraph 139, the Committee criticises the fact that only 52% of the planned places have been provided. The third plan makes provision for the completion of the planned places for a sum of 93 million euros on top of the new places to be created. Overall, for the period from 2008 to 2016, 5 270 new places will therefore be provided in the medico-social sector under the second autism plan, i.e. 1 170 more than the 4 100 initially planned.

The government nevertheless finds it unfortunate that the Committee’s decision does not take full account of the support facilities for people with disabilities and, in the case of young people with disabilities, that the co-operation between schools and the medico-social sector does not seem to be properly reflected in the decision. In particular, the Committee concludes that education always plays a secondary role there. It also seems to consider that young people in “institutions” do not receive schooling, thereby ignoring both the existence of “education units” with Education Ministry teaching staff in medico-social establishments and services and also the operating methods of the medico-social services, which in fact operate in the living environments of those concerned and support pupils with disabilities, in particular at school: most children aged 6 to 16 years receiving support from a special education and home care service (SESSAD) are in mainstream schools (96%).<sup>2</sup> Moreover, the relevant services are expanding rapidly (+30% between 2006 and 2010).

In addition, the government is bound to point out that the reasoning which leads the Committee to conclude that there is a violation of Article E taken in conjunction with Article 15§1 is at least questionable, if not open to challenge. The Committee holds that “the fact families have no other choice than to go abroad, notably to Belgium, in order to educate their children with autism in a specialised school arises from failure of France to take into account the specific learning and communication needs at school within its own national territory and constitutes for this reason a

direct discrimination against them”. The claim that the need to go to Belgium applies only to young people with autism and therefore amounts to discrimination is disproved by the wide range of cross-border flows between France and Belgium (university and paramedical training, cross-border exchanges). As is rightly stated in the dissenting opinion, “cross-border flows of persons with and without autism or other disabilities alone can neither establish nor confute whether there has been a disadvantage due to disability”.

Lastly, in paragraph 144 of its decision, the Committee considers that “a person with a disability is more likely to be dependent on community care, funded through the State budget, in order to live independently and in dignity, as compared with other persons in receipt of community care. The Committee takes the view that budget restrictions in social policy matters are likely to place people with disabilities at a disadvantage and thus result in a difference in treatment indirectly based on disability.” In the government’s view, this very general reasoning is tantamount to considering that all policies to reduce public expenditure are in principle discriminatory towards vulnerable groups, which involves a very broad and questionable interpretation of the concept of discrimination. Moreover, budgetary constraints have not prevented specific measures to support young people with autism from being taken under the second plan, even though not all the objectives have been achieved.

The government takes note of the ECSR’s decision finding a violation of Articles 15§1 and E of the Social Charter and reiterates its commitments under the third autism plan. Without calling the Committee’s conclusions into question, it nevertheless notes with regret that the reasoning followed to arrive at the finding of a violation of Article E does raise certain questions and also that this point was the subject of differences of opinion within the ECSR itself.

<sup>1</sup>In accordance with Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints the following Contracting Parties to the European Social Charter or the revised European Social Charter have participated in the vote: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and United Kingdom.

<sup>2</sup>2010 survey of establishments and services (Directorate of Research, Studies, Evaluation and Statistics (DREES)).