Day of General Discussion on the right to education of persons with disabilities

Presentation of the Human Rights and Disability Advisor

Office of the High Commissioner for Human Rights

Mr. Facundo Chavez Penillas

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Dear colleagues and friends,

It is a pleasure for me to share with you today the views of the Office of the High Commissioner for Human Rights on the right to education of persons with disabilities, particularly on the antidiscrimination aspects considered in article 24 of the Convention on the Rights of Persons with Disabilities. OHCHR has developed its understanding of this right from a comprehensive analysis of the human right to education as enshrined in international human rights law, starting from the Universal Declaration for Human Rights, going through the International Covenant on Economic, Social and Cultural Rights and the contributions made by other human rights treaties, to the CRPD. For a more extensive consideration of the OHCHR’s position on the right to education, I invite you to read the thematic study on the right to education A/HRC/25/29.

OHCHR reads the CRPD interconnected and interdependently with other rights considered in its text and beyond, and sustains that the right to education must be realized for all students, including those with disabilities. In that line, the OHCHR supports a systemic approach to the right to education where all students are equally valued and recognized as substantive contributors to the educational process in their diversity, irrespective of their social condition, gender, sex, ethnic origin, nationality or impairment, among others.

As proposed by the CRPD, the OHCHR considers that the best way to realize this right for all students is through inclusive education systems. The implementation of such systems is subjected to progressive realization, as recognized by article 4(2) of the CRPD. Consequently, aspects such as support, equalization of opportunities, professional training and capacity building, and lifelong learning should be fully achieved in time, starting immediately after the ratification of the treaty.

The CRPD, while recognizing the progressive implementation of these aspects of the right to education for all students, including those with disabilities, it also provides for two substantive antidiscrimination measures that ensure the enjoyment of this right immediately: the non-rejection clause and the provision of reasonable accommodation. These two elements of article 24 are mutually reinforced and should not be confused with the larger general obligation of implementing inclusive quality education frameworks, which is not to be replaced by the sole implementation of antidiscrimination schemes. I will develop on these two now.

The non-rejection clause is recognized in article 24(2)(a) of the Convention, stating that States parties must ensure that students with disabilities are not rejected from general education on the basis of disability. This clearly implies that no measures or schemes should be in place leading to deny the right of students to choose for pursuing their education in regular schools or other education facilities available to the general public. States parties cannot adopt laws or policies that force students to study in special schools if they (or their families) choose for integrated or inclusive settings. This antidiscrimination measure, as such, is of immediate realization and States must ensure, to the maximum of their available resources, that students with disabilities that decide for being educated in general education settings enjoy of quality education on an equal basis with others. The non-rejection clause is applicable on individual basis, and is not subjected to reasonableness tests.

Due to the innovative aspects of article 24 (at least in international human rights law, as these practices can be found in many countries in the world in all regions) and the progressive realization nature of most of its provisions, some States may not have the support services needed in place to effectively realize the right to education for certain students with disabilities. In these cases, States must provide for reasonable accommodation in order to ensure the realization of this right. As any other antidiscrimination measure, reasonable accommodation is of immediate realization. States must ensure that education service providers, both public and private, provide for reasonable accommodation upon request of a student with disability. While the CRPD Committee has not yet defined the reasonableness objective test in the context of the realization of the right to education, some of its elements were identified (in general terms) in the analysis of the case Jungelin v. Sweden. Drawing from these elements and those identifiable in comparative law, the following elements of the test are advisable to be considered in the design of a General Comment on the right to education.

1. Undue burden: The student with disability must request the adequate duty bearer the provision of accommodation. The State should identify in law and policy the duty bearer to avoid posing such burden on the student.
2. Interactive dialogue: the duty bearer and the right holder should engage in an interactive dialogue in order to identify the necessary accommodations that fulfills the goal of enjoying the right to inclusive quality education.
3. If no agreement is reached in the interactive dialogue between the duty bearer and the right holder, law should reverse the burden of proof on the duty bearer, who will have to prove at least one the following elements in order to avoid responsibility on the basis of discrimination:
   1. Relevance: the duty bearer must prove that the accommodation requested was irrelevant for the effective access to inclusive quality education of the student;
   2. Proportional: means that the duty bearer in the interactive dialogue considered the requested accommodation, can prove that objectively is beyond the necessary and proposed an alternative that objectively equally provides for the effective enjoyment of inclusive quality education;
   3. Possible: implies that the accommodation requested must exist and can be made available;
   4. Financially feasible: the duty bearer must prove that it exhausted financial support resources to provide for the accommodation requested, including by requesting public and private funding;
   5. Economically feasible: the duty bearer must prove that the implementation of such accommodation jeopardizes the existence of the duty bearer or that it substantially jeopardizes the performance of its core functions.

In a final note, both the non-rejection clause and reasonable accommodation must be enforceable through free administrative and, otherwise, judicial claiming procedures. NHRIs and courts have a substantive role on ensuring the right of access to justice to make these measures an effective remedy in the case of a violation of the right to education.

Thank you.