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NEWS REPORT

Country:	The Netherlands
Title:	NIHR: No discrimination by denial of reasonable accommodation for pupil with Down Syndrome
Date:	18 April 2017
Expert:	Titia Loenen
<u>Context</u>	
Issue at stake:	Reasonable accommodation for people with disabilities
Ground of discrimination:	Disability
Source:	National equality body
Field:	Education
Applicable law:	Art. 2, 3 and 5b Act on Equal Treatment on the Ground of Disability or Chronic Illness (DDA)

Content

Case: A pupil with Down Syndrome attended a regular primary school for eight years, receiving specific and individual help and guidance to realize this. At some point his development deteriorated and he started to show inappropriate behavior such as yelling, being cross and running away. The way in which the pupil was supported was adjusted, but this did not improve the situation. After some time, the school decided to refer the pupil to the special education system as the school did not consider it feasible anymore to further accommodate the pupil's specific needs.

The parents did not agree with this and brought a complaint to the Netherlands Institute of Human Rights (NIHR), the national equality body. They argued that due to international developments, including the ratification by the Netherlands of the Convention on the Rights of Persons with Disabilities (CRPD), the DDA should be interpreted as requiring a more strict assessment of compliance with the duty to provide reasonable accommodation, as the CRPD requires inclusive education and explicitly prohibits segregation.

Decision of the Court: The NIHR found that the school did not violate its duty of reasonable accommodation as laid down in Article 2 in conjunction with Article 3 of the DDA as its efforts to accommodate the pupil's needs had been sufficient. Further accommodation would pose a disproportionate burden on the school. As far as the CRPD is concerned the NIHR pointed out that during the time the pupil attended the school the Netherlands had not yet ratified this Convention. In addition, the NIHR held that even if international developments would lead to a more far-reaching duty to realize inclusive education going beyond the level of reasonable accommodation required by Article 2 in conjunction with Article 3 DDA, this duty cannot be imposed on individual educational institutions such as the school at issue as the consequences of a more far-reaching duty would affect the Dutch educational system as a whole. The NIHR is a quasi-judicial body which issues non-binding Opinions. Its opinions are followed by the conventional courts in the majority of cases.

Key points of analysis: This case attracted a lot of attention in Dutch media. It clearly shows the difficulty of establishing how far the duty to reasonable accommodation extends in concrete cases. The school had put in a lot of effort to accommodate the pupil's specific needs, but at some point his behaviour started affecting the functioning of the entire class and thus the rights of the other children. How much additional money and/or staff time should be invested then in this single child? Resources are necessarily limited. Taking a look at all the facts of the case the NIHR held that the school's efforts had been sufficient. In fact, with this overall conclusion it followed the decision of the Dispute Settlement Commission on Inclusive Education (*Geschillencommissie Passend Onderwijs*) with which the parents had also lodged a complaint (section 4.2 of the opinion).¹

The NIHR did not explicitly address the point whether the CRPD indeed requires an 'absolute' right to inclusive education and prohibits segregated or special education, as the complainants argued, which would go beyond what the DDA requires. (The DDA explicitly allows for special education). Though the wording of the CRPD provisions dealing with education (Article 2) provides support for this view, common sense would suggest that an absolute right cannot have been envisaged as at some point the costs of inclusive education can indeed become prohibitive and/or not anymore in the best interests of the pupil concerned. As almost always in law, at some point a balance must be struck.

By saying that even if a more far-reaching duty to realize inclusive education than provided for under Dutch law would exist such duty cannot be imposed on individual educational institutions as it would affect the system of inclusive education as a whole, the NIHR seems to touch on the issue of the justiciability of social rights. The NIHR seems to imply here that a change in the Dutch system of inclusive education has to be realized through the legislature rather than through the adjudication of individual cases by a (semi)judicial body such as the NIHR.

Internet link source: NIHR Opinion 2017-41 of 4 April 2017 can be found at: <https://mensenrechten.nl/publicaties/oordelen/2017-41/detail>.

¹ *Geschillencommissie Passend Onderwijs* 22 December 2015, <https://onderwijsgeschillen.nl/sites/default/files/107032.pdf> (last accessed 18 April 2017).