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NEWS REPORT

Country:	Cyprus
Title:	Responses of the Ombudsman's office in its capacity as independent mechanism for the CRPD on disability discrimination in education
Date:	17 December 2018
Expert:	Corina Demetriou
<u>Context</u>	
Issue at stake:	The independent mechanism for the implementation of the CRPD delivers two conflicting decisions on complaints for disability discrimination in education
Ground of discrimination:	Disability
Source:	Report of the independent mechanism for protection and monitoring of the U.N. Convention for the rights of persons with disabilities on the decision not to allow a student with ADHD to advance to the next grade due to incomplete attendance as a result of unjustified absences, Ref. SAA 86/2017, 30 October 2018; Report of the independent mechanism for protection and monitoring of the U.N. Convention on the rights of persons with disabilities regarding the integration of children with disabilities in child care centres and kindergartens, File No. SAA 126/2017, 12 November 2018
Field:	Education
Applicable law:	CRPD articles 3, 7 and 24; Law on persons with disabilities 127(I)/2000; Law on Children Cap 352, article 29; Order No. 262/2011 issued under the Law on Children Cap. 352, article 3; Bill entitled 'Law on the protection and care of children'; Regulations for the operation of secondary education schools 1990-2016 and New Regulations of 2017; the Combating of Racial and other forms of Discrimination (Commissioner) Law N. 42(I)/2004

Content

Case 1

In October 2018 the Ombudsman's office, in its capacity as independent mechanism under article 33(2) of the CRPD, published a decision in response to a disability related complaint received in July 2017 from the parents of a child with ADHD. The complainants claimed that the Ministry of Education and the school had failed to promptly diagnose their son's disorder, as a result of which he was labelled 'naughty' and 'unruly' at school and was regularly blamed for every problem in the classroom. Even after the student was diagnosed with ADHD, the school did not receive proper guidance from the Ministry of Education regarding the characteristics and needs of ADHD children and, as a result,

failed to support him in his classroom performance and overall behaviour. At the end of school year 2016-2017 the school decided not to permit the student to progress onto the next grade because of too many absences, in line with standard school policy. The absences were the result of the student being late to turn up for classes and sometimes leaving the classroom without permission. The school psychologist verified that the student's fragmented class attendance was a symptom of his ADHD and recommended that his disorder be taken into account when assessing his performance.

The relevant school regulation provides that students with over 51 absences in a single school year have to repeat the same grade for another year without the right to take the end-of-term exam, however the school retains discretion to decide otherwise in special cases where the absences are justified as a result of a health issue. Nevertheless, the school did not exercise its discretion in a manner that would exempt the student from this sanction.

The Ombudsman decided that the teachers ought to have used their discretion to avoid the sanction, either by waiving some of the absences or by utilizing the opinion of the educational psychologist regarding the cause of the student's absences, pointing out that treating unequal things in the same manner amounts to discrimination. The report concluded that the school's decision that the student should not advance to the next grade ignored his disorder and as such was disproportionate. The report added however that the decision could serve merely as moral justification for the student and his family; it was issued more than a year after the complaint was received. The report describes the new regulations issued in 2017 regarding the operation of secondary education schools, pointing out that although there is no explicit provision in the Regulations about disability and the duty to safeguard full enjoyment of rights by children with disabilities, the Ministry of Education is in any case under a duty to ensure that the Regulations are interpreted and implemented in light of the CRPD. The report recommends that the Ministry provides training for teachers on the special behavioural issues emanating from mental health conditions and adjusts teaching methods and systemic procedures, removing barriers which impede effective access and promoting integration of students at risk of exclusion or marginalisation.

Case 2

A few days following the publication of the above decision, in November 2018, the Ombudsman delivered a different decision to a similar complaint. The claim was directed against a private kindergarten for refusing to enroll a child with Down syndrome. The parents of the child had complained that the kindergarten's principal had sought to justify his refusal claiming that the child would require an escort which the school was unable to provide, as the child was overweight and unable to walk and not because of prejudice towards disabled children. The parents rejected both these factual allegations, stating that their child was in fact running around the place when they visited and was not overweight at the time. The parents argued that their child did not require any special treatment and that the school's refusal to enroll him infringed the principle of equal treatment and his right to social integration. The particular school had been selected by the parents due to its proximity to their residence. In the end, the parents enrolled their child at a public kindergarten which accepted the child without having to hire an escort or provide any other accommodation for him as evidence that there was indeed no need for special accommodation for their child.

The legal framework regulating the operation of kindergartens does not require them to provide escorts; however, for children aged over three years, an escort may be provided by the Ministry of Education following assessment. A bill is currently under way purporting to better regulate the operation of kindergartens which includes non-discrimination and reasonable accommodation provisions. In spite of references to the CRPD and to the Law on persons with Disabilities, which amongst others transposes the disability component of the Employment Equality Directive, the Ombudsman concluded

that the legal framework regulating the operation of kindergartens did not include any provision regarding the equal treatment of children with disabilities by kindergartens. The report acknowledges that although the law setting out the Ombudsman's mandate entitles the ombudsman to issue an order and to impose sanctions, it decided to refrain from taking any such action because of the gaps in the national legislation on the treatment of children with disabilities by kindergartens. According to the Ombudsman's report, national legislation on the operation of kindergartens does not include provisions implementing the relevant CRPD provisions and the current legal framework does not create a duty to safeguard the full enjoyment by children with disabilities of all rights under the CRPD.

Key points of analysis: In the first case, which concerned access to reasonable accommodation in a public school, the decision found that the applicable regulations had to be viewed in light of the CRPD. In the second case which concerned access to pre-school private education, although differential treatment was established, the monitoring body decision concluded that there was no applicable legal framework to ensure equal treatment. The disparity between the facts of each case do not justify the different treatment afforded to these cases by the monitoring body. Under the principles of international law, ratified conventions rank higher than national law and can be directly invoked in Court, so there is no reason why the same should not apply to semi-judicial bodies such as the Ombudsman.

Internet link sources:

The Report on access to kindergartens (File No. SAA 126/2017, 12 November 2018) is available at

[www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/C68178ADB3C514E4C2258345002BA7F3/\\$file/saa126_2017.pdf?OpenElement](http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/C68178ADB3C514E4C2258345002BA7F3/$file/saa126_2017.pdf?OpenElement).

Report of the independent mechanism for protection and monitoring of the U.N. Convention on the rights of persons with disabilities on the decision not to allow a student with ADHD to advance to the next grade due to incomplete attendance as a result of unjustified absences, Ref. SAA 86/2017, 30 October 2018, available at

[http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/90CEC4825B2AC4DFC225833800244A40/\\$file/86_.pdf?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/90CEC4825B2AC4DFC225833800244A40/$file/86_.pdf?OpenElement).