

**Submission by the Open Society Foundations to the
Committee on the Rights of Persons with Disabilities for the preparation of
the General Comment on Article 24 of the Convention -
The right to education**

The Open Society Foundations' Human Rights Initiative¹ is pleased to present this submission to the UN Committee on the Rights of Persons with Disabilities toward the development of the General Comment on the Convention on the Rights of Persons with Disabilities (CRPD) Article 24, the right to education. The Open Society Foundations work to build vibrant and tolerant societies whose governments are accountable and open to the participation of all people. We support equity, human rights, human development, and social justice by advancing the right to inclusive education and by challenging exclusionary policies, practices, and cultures. Inclusive education is fundamental to democratic societies. It ensures that *all* members of society embrace diversity and are well-prepared to both participate in and benefit from engagement in their communities.

Herein, we call upon the Committee to advance an interpretation of the right to education as the right to inclusive education, emphasizing that quality education is indeed inclusive in terms of setting, curriculum, and pedagogical practice, responding to a holistic conception of education that provides children with life skills, strengthens their capacity to exercise and enjoy the full range of human rights, and promotes human rights values. We also address the practical implications of implementing the right to inclusive education and the importance of early childhood interventions and education in both advancing inclusive education and combatting institutionalization. Further, we highlight the importance of data collection for monitoring the fulfillment of the right to education, and, particularly in the context of discussions around sustainable development goals, the importance of developing human rights-compliant indicators around inclusive education to measure states' progress toward education development targets toward informing the Committee's General Comment on Article 24.

I. Substantive interpretation of the right to education under Article 24

a. The right to education as the right to inclusive education

The right to education is a fundamental human right that applies to all persons and whose implementation is instrumental in realizing other rights, particularly social and economic inclusion and full participation in the community by promoting "the full development of the human personality and . . . the strengthening of respect for human rights and fundamental freedoms."² International human rights instruments recognize governments' obligations to promote the principle of non-discrimination in education,³ an aim which, it has been recognized, is promoted

¹ <http://www.opensocietyfoundations.org/about/programs/human-rights-initiative>

² Article 26, Universal Declaration of Human Rights.

³ These instruments include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the CRPD.

most effectively through inclusive education.⁴ Among the human rights instruments with binding obligations on States Parties, the CRPD provides the clearest conceptualization of the right to inclusive education as an integral and fundamental component of the right to education.

Reading Article 24 in conjunction with the rest of the treaty, which emphasizes non-discrimination, inclusion, and full and effective participation of persons with disabilities in society, we understand that the right to education is indeed the right to inclusive education. In realizing this right, under Article 24(2)(e), States commit to ensuring “[e]ffective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.” It would be important for the Committee to clarify that this does not open a door to segregated education through reference to alternative learning environments, rather to emphasize the role of States Parties in eradicating structural barriers that prohibit the effective participation and inclusion of children with disabilities in the mainstream education system. As such, emphasis is shifted from the difficulties children themselves may have with existing practices of teaching and learning, to the difficulties that emanate directly from the construction and naturalization of such practices by and for a non-disabled majority.⁵

Additionally, while Article 24 makes repeated reference to “inclusion,” clarification of this term is vital for addressing many of the impediments currently facing children with disabilities across the globe, from non-registration of children at birth to disabling rules and procedures, segregation, curricular and pedagogical rigidity, homogenization of the education process, and naturalized forms of expression.⁶ Toward this end, we believe the Committee has an opportunity to emphasize that the text of Article 24 referring to “environments that maximize academic and social development” be interpreted as goals for inclusive learning spaces rather than an acceptance of segregated education. The United Kingdom’s interpretative declaration (stating that the government understands that special schools are permissible under the CRPD), and the Republic of Mauritius’ reservation on Article 24 (stating that the country’s policy of inclusive education is being implemented gradually, alongside special education) both imply a precedent for an interpretation of Article 24 as establishing the right to inclusive education, and, at the very least, underscore the need for greater clarity here.

b. The right to inclusive education as a right for *all*

Across the globe, children from marginalized groups face segregation and discrimination in education. It is estimated that more than half a billion children of primary school age are not enrolled in school at all, and poverty and disadvantage are still the major causes of exclusion. Exclusion of different discriminated groups from mainstream education occurs in a number of ways, including outright refusal to enroll children in the education system, segregation in special schools or classrooms, and targeted programs or schools that allegedly prepare minorities for

⁴ UN Human Rights Council, *Thematic study on the right of persons with disabilities to education*, 18 December 2013, A/HRC/25/29, available at: <http://www.refworld.org/docid/531468a74.html> [accessed 20 March 2015]

⁵ Waddington, L., & Toepke, C. (2014). *Moving Towards Inclusive Education as a Human Right: An Analysis of International Legal Obligations to Implement Inclusive Education in Law and Policy*. Maastricht Faculty of Law Working Paper, (2014-7), p. 241.

⁶ The phrase “naturalized forms of expression” refers to practices or expressions of discrimination that are taken for granted by the majority population to such an extent that they are no longer viewed as discriminatory, e.g., that fact that, commonly, children with intellectual disabilities are segregated in substandard schools and the majority of society considers this appropriate.

eventual inclusion in mainstream classrooms. These groups also suffer from discrimination through their complete absence or negative portrayal in the curriculum. The common denominator for this exclusion is negative stereotyping, prejudice, and discrimination against children from marginalized groups, perpetuating the patterns of social exclusion and discrimination in society.

A foundation of exclusion from mainstream education is the notion of “objective difference.” The perception that there are children who are fundamentally “different” than others because of cognition, ability, or capacity, has given rise to one of the most potent grounds for exclusion from the mainstream education system. This perceived difference in ability, either through a formal diagnosis procedure or more informal social practices, has served to exclude not only children with disabilities from mainstream classrooms, but other groups as well. This perception of difference in ability has been used to tag children from particular ethnic groups, children of migrant families, those belonging to minority or minority language groups, children with disabilities, and other groups “unwanted” in the mainstream system, as unable to participate in regular classrooms through the social construction of disability rather than the examination of barriers to participation in education that include inaccessible buildings, curriculum that excludes or prejudicially portrays some groups, or discriminatory pedagogy. Though not the *only* ground for exclusion of these groups, it is a powerful one, all the more so because it pits marginalized groups against one another: in the attempt to challenge wrongful placements, groups are driven to imply that those with the “real” difference belong in separate settings.

Furthermore, all too often, inclusive education is misunderstood as an education modality that applies only or particularly to children with disabilities. This misunderstanding stymies efforts to transform education systems for the benefit of all children, and has a tendency to promote a diagnosis-based, rehabilitation-focused approach to education that privileges those who have the resources to fight for or supply supports or additional one-to-one services for their children, rather than integrating support into the classroom through pedagogy and professional support that emphasizes shared responsibility for every student’s learning. As referenced above, a detailed account of what “inclusion” means in practice could help to clarify common misconceptions. Inclusive education has the potential to dismantle social stigma and prejudice and challenge continued discrimination against children from marginalized groups. Moreover, inclusive education supports the right of all children to benefit from learning in a diverse setting.

While this Committee is charged with interpreting the right to education in the context of disability, we urge the Committee to advance an understanding of inclusive education as a right that applies to *all* children. This is particularly important because the preamble to the Convention makes clear that disability is the result of interaction between characteristics of the individual and the social environment. Thus, disability does not depend on the criteria or categories that national governments may use to define it, and barriers to participation in education may well exist for many children regardless of these categories. By advancing an interpretation of the right to inclusive education as a right pertaining to *all* children, the Committee has an opportunity to have a transformative effect on the implementation of education that will build more inclusive, authentically participatory, and open societies for all.

c. Interpretation of the right to reasonable accommodation in the context of education

‘Resource constraints’ is never an acceptable argument for excluding children from mainstream education, despite the fact that Article 24(2)(c) provides the right to “reasonable accommodation of the individual’s requirements” to access inclusive education based on the principles of non-

discrimination and equal opportunity. As established in Article 2, “reasonable accommodation” is defined as the “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.” International human rights law has long established that States have an obligation to provide education for all. Given that education is a fundamental right whose realization is instrumental for the enjoyment of other rights, particularly for realizing the object and purpose of the Convention, we urge the Committee to further clarify that States cannot claim that including children with disabilities in mainstream classrooms imposes a “disproportionate or undue burden” on the State. Furthermore, the CRPD recognizes the social construction of disability as “long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” Thus, disability becomes a function of the barriers embedded in the environment where the person lives, works, socializes, and attends school.⁷ As such, reasonable accommodation in the context of education should be interpreted as underscoring States’ duty to provide adapted curriculum and supports in the mainstream classroom in a manner that both responds to individual needs and provides an environment where all students can realize their full potential, and that financial constraints is never an acceptable argument for excluding children from mainstream education. In wealthy and middle income countries, where States may have better-resourced education systems, policy makers’ reference to financial constraints may too easily mask a lack of political will to reallocate existing resources to make education systems more inclusive. We urge the Committee to underscore in the General Comment that an ever-declining percentage of the education budget be allocated to segregated settings. Furthermore, it is important for the Committee to clarify that private education providers receiving State funds must be held to the same standards for inclusion as the public education system.

d. Clarification needed of position on segregated education

It is of utmost importance that the General Comment clarify the Committee’s position with regard to segregated education. We have seen that segregated systems with a stream of special education in separate schools or classes, even when viewed as a temporary measure, take on an independent institutional life with strong incentives to create or maintain categories of children assigned to them. Often, these include financial incentives act as powerful barriers to the transformation of education systems. In the absence of targeted policy initiatives, these institutions are highly unlikely to work toward their own obsolescence. Furthermore, it is arguably more costly to maintain two education systems—a segregated one and a mainstream one—than it is for States to transform education systems to advance inclusive education. As long as separate modalities are maintained, education systems are unlikely to be backed by the political will and necessary resources to implement inclusive education. Accordingly, we maintain that inclusive education in mainstream settings can never be fully realized in an education system that allows segregation to remain an option. In this context, we urge the Committee to advance an interpretation of Article 24 clarifying that the Convention does not condone the provision of segregated education.

At the same time, the right to inclusive education must also be balanced with the right of choice in education discussed in Article 26 of the Universal Declaration on Human Rights. We hold that the

⁷ Palmer, J. (2013). The Convention on the Rights of Persons with Disabilities: Will Ratification Lead to a Holistic Approach to Postsecondary Education for Persons with Disabilities? *Seton Hall Law Review*, 43(2) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243137

choice to place children in separate schools can only be made by parents and children themselves and is only acceptable when there are no barriers to participation in the mainstream school system and the separation is based on the desire to pursue an idea in education rather than to segregate children around a single shared characteristic. For example, a school exploring use of ASL as a language of instruction and including an enriched deaf studies history curriculum and still open to interested hearing children meets these criteria. In a truly inclusive system, separate or highly focused schools would thus be the minority and the vast majority of public funds would be dedicated to education based on principles of inclusion rather than the maintenance of a parallel system.

II. Practical implications of implementing the right to inclusive education

There is a need to elucidate on many of the practical implications of implementing the right to inclusive education. Given space limitations, we highlight three of what we consider the more salient practical implications below.

a. The education of all children should be the task of Ministries of Education

In many countries around the globe, there is a division in responsibility among government ministries with regard to education, where Ministries of Education are responsible for most children's education, while the education of children with disabilities is the responsibility of Ministries of Social Welfare or other similarly-named government entities. Often, the underlying argument for this bifurcation of responsibility is that children with disabilities' primary needs are for "rehabilitation," specialized health care services, or services that can "only" be provided through institutionalization, rather than for education. In order for education systems to transform so that every child is included in mainstream classrooms—even those that governments have deemed unable to benefit from education—government systems must ensure that the education of all children is the responsibility of Ministries of Education.⁸ The Committee could make an important contribution by underscoring that Ministries of Education should be responsible for the education of all children in the General Comment.

b. Need to underscore that inclusive education must be implemented in countries developing or rebuilding education systems

Through the General Comment, the Committee has an opportunity to underscore that inclusive education must be implemented in countries developing or rebuilding education systems, where children with disabilities often form a substantial portion of what could be a large contingent of children that are out of school. The notion that an education system must develop to a certain point before children with disabilities can be included is counterproductive and antithetical to the spirit of inclusion. All children should have access to publicly-funded schools in whatever situation or level of development they exist. When education provision is poor quality and/or significant numbers of children cannot access education, governments must work to improve and expand the reach of the education system. But the need to make significant investments in education because

⁸ See, e.g., Organisation for Economic Cooperation and Development, *Reviews of National Policies for Education Kazakhstan, Kyrgyz Republic and Tajikistan 2009: Students with Special Needs and Those with Disabilities*. Paris, available at <http://www.oecd.org/countries/tajikistan/43851447.pdf> [accessed 20 March 2015]

education quality is substandard for the majority may not be used as an excuse for continued exclusion of children with disabilities ‘until schools are ready for them.’ Based on the principle of non-discrimination, which States have an immediate obligation to implement, all children have the right to attend school in their communities with their peers and to participate, on an equal basis with others, in the improvement of the education system. Here, we are not suggesting that implementing inclusive education will happen overnight. Rather, we are emphasizing that because inclusion relates to the education system as a whole, rather than to special support measures, it must be incorporated in plans to improve education systems from the beginning. Planning for inclusion from the inception of education system development and reform is the only way that schools are likely to develop inclusive settings, curriculum, and pedagogy as part of systemic and systematic education reform efforts, often supported by the Global Partnership for Education, UNICEF, the World Bank, and others. Furthermore, adopting the principle of universal design—to overcome architectural, communicational, and attitudinal barriers—in the development of education systems from the inception and/or with the influx of additional investments, will be less costly than retrofitting, retraining, and redesigning systems to ensure compliance with States’ binding obligations in realizing the right to inclusive education. As such, we urge the Committee to underscore that all education development and reform efforts begin from the principle of inclusion. As an immediate step, we recommend that the General Comment specifically state that the implementation of relatively low-cost and high-impact changes, like the revision of the pre- and in-service curricula for teacher training, be undertaken immediately.

c. Emphasize the importance of States establishing concrete action plans

Another important contribution would be for the General Comment to underscore the importance of State Parties adopting concrete action plans or reform initiatives to advance inclusive education. We recommend that the Committee request that State Parties develop national action plans that would be adopted, for example, through a national legislative process, and then tied to reporting to the CRPD Committee. States would then be bound legally to demonstrate progressive implementation of these plans.

III. Need to emphasize the importance and interaction of early intervention and early childhood care and development opportunities and, in their absence, the threat of institutionalization

The foundation of inclusive education begins with Early Childhood Interventions (ECI) and Early Childhood Care and Development (ECCD). Extensive research data indicate that key gains in a child’s development are achieved during the first five years of a child’s life, and this is particularly relevant to the wellbeing of children belonging to vulnerable groups, including children with disabilities. ECI and ECCD services not only support important skill development in young children, they also empower parents to fulfill their role as their child’s first teacher. Children who receive ECI and ECCD services are often able to overcome initial delays or require fewer supports to be successful in an inclusive educational setting. Furthermore, early education has been proven to narrow the gaps in learning achievement for children facing social or economic disadvantage.

Most disadvantaged young children, including children with disabilities, however, are still less likely to access ECI and ECCD provision, compared to their regularly developing peers, despite research showing that they are likely to benefit most from quality early learning opportunities. Quality ECI and ECCD for this group of children also creates an invaluable opportunity to reduce gaps in equity, which become difficult to shift after children enter school. Because of this, families

and communities must be supported from the beginning and throughout all stages of a child's life cycle. Importantly, ECI and ECCD services support families to keep their children at home, helping children and families participate fully in community life and creating a social network that provides not only opportunities to develop skills, but enjoyable relationships and experiences.

This requires transforming preschools and schools so that they are able to accommodate all children and are responsive to their diverse needs. Many children and adults with disabilities have historically been excluded from any educational provision and/or restricted to special education opportunities. In most countries in the Central and Eastern Europe and Eurasia region, for example, efforts at providing education or training for young children with special educational needs and disabilities were generally through separate special preschools. These institutions provided varied quality of teaching, reached only a small proportion of those in need, and were not cost-effective. They also tended to isolate children from their families and communities and perpetuated a cycle of segregation that most children, and then adults, were never able to escape.

Unfortunately, assessment commissions continue to direct young children with disabilities to segregated settings, particularly in countries where segregated educational and residential institutions continue to operate. While very little reliable data exists on the number of children with disabilities and the rate of children institutionalized, existing estimates in Central and Eastern Europe and Eurasia suggest that the rate has increased in the last decade, and in many countries only 1% of children with disabilities and developmental delays are attending inclusive early childhood development provision, while one-third of all primary aged children who are not in school are children with disabilities. In Central and Eastern Europe and Eurasia approximately 1.5 million infants and young children grow up in institutional care settings; of these children, more than 300,000 have a disability. According to one study, 60% of all children placed in institutions in Eastern Europe have a disability.⁹

The Committee could use the General Comment to highlight the strong relationship between coordinated ECI and ECCD services—which often requires substantial cooperation among ministries responsible for education, health, and social protection—and implementation of Article 24. Furthermore, the Committee could play an important role in calling attention to the often symbiotic relationship between exclusion from education and institutionalization in certain regions. The Committee should urge State Parties to include information on ECI and ECCD services, and ensure that States include data on children in institutions in their reporting on Article 24 implementation.

IV. Developing data indicators to close equality gaps in education

Defining States' obligations to implement the right to inclusive education clearly is critical, not only for monitoring the implementation of Article 24, but particularly as the monitoring mechanisms attached to global aid frameworks will establish the data that governments must collect to demonstrate progress toward development targets.

⁹ Jonsson, T., & Wiman, R. (2001). Education, Poverty and Disability in Developing Countries. A Technical Note Prepared for the Poverty Reduction Resource Book (2001), p. 9 *available at* <http://www4.congreso.gob.pe/comisiones/2006/discapacidad/tematico/educacion/Poverty-Education-Disability.pdf>

a. Data collection for monitoring the fulfilment of the right to education

Collection and disaggregation of data is essential for understanding the barriers in the education system and progress toward minimizing or removing them. Presently, there is little understanding of the data States must collect to measure progress toward inclusive education. Rather, oftentimes the data collected reinforces the discrimination inherent in education systems. For example, many countries do not collect data on children who are not in school or children enrolled in special education, and children who are not registered at birth are at risk of being excluded from the education system. The General Comment could helpfully include guidelines for the disaggregation and management of data to support the reporting of State Parties on implementation of the right to inclusive education. At a minimum, the General Comment could underline the importance of harmonized data collection and categories among ministries and agencies responsible for providing services for persons with disabilities, the inclusion of questions or indicators on disability in national census and other survey exercises, and the incorporation of data on school placement (including in institutions not under the Ministry of Education), accommodations and support services in mainstream schools be included in Education Management Information Systems (EMIS) and reporting to the Committee. Finally, we recommend that data be disaggregated to address the possibility of multiple vectors of exclusion or discrimination, for example by gender, race, ethnicity, migrant status, or native language. Within the context of disability, particular efforts should be made to collect data on groups that are particularly marginalized and often invisible when governments report on progress, including children with intellectual disabilities and children with atypical behaviors.

b. Indicators for measuring progress toward education development targets

The adoption of the Sustainable Development Goals (SDGs) in 2015 means that significant investments that will be made in education based on the way education quality is measured and education systems are evaluated under the targets and indicators of the SDGs, and Goal 4, in particular, which is likely to include a direct reference to inclusive education. As such, the next two to three years are critical for framing the right to education. In particular, the monitoring mechanisms attached to global aid frameworks will influence the data governments must collect to demonstrate progress toward development targets. Through the General Comment, the Committee could provide guidance about how State Parties should seek to implement their obligations under Article 24 within their bilateral international assistance or aid programs, as well as through their financing and participation in multilateral organizations, including international financial institutions. For example, as all of the States providing funding to the Global Partnership for Education (GPE) have binding obligations to respect and implement the Convention or national non-discrimination legislation on the basis of disability, the negotiation of monitoring and evaluation indicators in GPE funding instruments supportive of inclusive education could be interpreted as part of their obligations to implement the Convention and their commitment to advancing principles of non-discrimination for persons with disabilities.