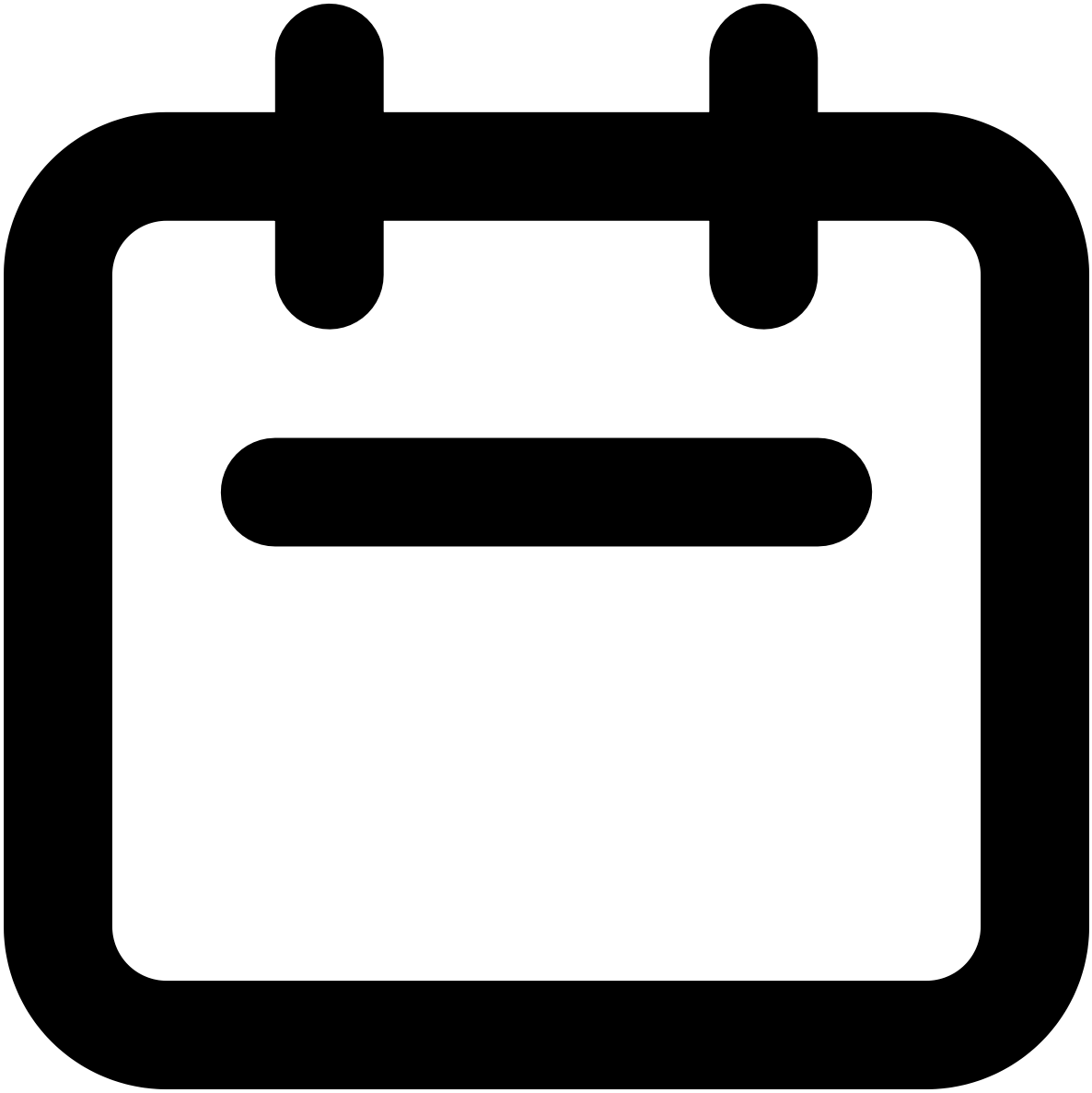
# Reasonable accommodation in schools in S. v. the Czech Republic: How the ECtHR’s position on the CRPD has become untenable



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In the case of S. v. the Czech Republic, a child with autism spectrum disorder requested his school to provide reasonable accommodations, which were provided after a delay. In the subsequent court case on this issue, the child's request to be heard was denied. Twice the absence of a medical report lay at the root of the issue. The Court, however, found no fault with the requirement of a medical attestation before any type of reasonable accommodation could be set up. The case's outcome did not come as a surprise to anyone who has been following the Court's case law on inclusive education and reasonable accommodation for persons with disabilities.

This post analyses the judgment in the context of earlier cases and argues that the Court's approach is permeated by the medical model of disability, despite the applicants' clear argumentation in favour of the social model of disability. This makes the Court's stance that it interprets the Convention "so far as possible in harmony with other rules of international law of which it forms part" and that it "takes into account the provisions on the rights of persons with disabilities laid down in the CRPD" (§39) increasingly untenable.

## Facts

The applicants in this case are a child with autism spectrum disorder, S., and his mother. They asked the primary school where S. was enrolled for reasonable accommodation to enable him to enjoy his right to education under conditions equivalent to those of other children. In school year 2011-2012, the school drafted an individual integration plan for him, but the drafting and approval of this plan was delayed for many reasons. Part of the responsibility for this lay with the parents and part with the school. During his time at the school, S. was moreover subjected to restrictive educational measures because of his disruptive behaviour. He received warnings, was isolated in the corridor, was put in the corner and was excluded from a school outing.

The applicants filed a lawsuit on the inadequacy of the reasonable accommodation and against the restrictive educational measures at the national level. S. was a minor at this time and asked to be heard at this trial, but outside the public hearing or in the presence of an appropriate expert. The court invited the applicants to provide a medical report confirming that S. could be heard without this harming him. As such a report could not be provided, the applicants

withdrew their request and S. was not heard. The court eventually dismissed the complaints: the school could not be held responsible for the delay in drawing up the individual integration plan and the restrictive educational measures were justified, exceptional and in no way aimed at humiliating S. The national judge also mentioned that not hearing S. was in his best interests, referring to the applicant's bad state of health. On appeal, this verdict was upheld.

Before the ECtHR, the applicants complained under the prohibition of discrimination, Article 14 ECHR, and the right to education, Article 2 P1, that S. had been discriminated against on the basis of his disability, as the school did not make reasonable accommodations in line with his specific educational needs in the 2011-2012 school year. The applicants further complain that the lack of reasonable accommodation during the trial violated Article 14 ECHR, read in conjunction with Articles 6, 8 and 13 ECHR. As the Court is of the view that this complaint raises the question whether the applicant's interests and position were sufficiently taken into account by the courts, it re-qualifies the latter complaint to one under the right to private life, Article 8 ECHR.

## Judgment

The Court considers that the applicants in this case were placed in a difficult position, caused in part by systemic deficiencies that were the responsibility of the State. Nevertheless, the national authorities were aware of their obligation to guarantee effective non-discriminatory protection of the applicant's right to education. They were not blind to the difficulties and tried to find solutions for them (§53). In its assessment, the Court states that S. had not been denied education at any point in time. The parents delayed in providing relevant information and documents to the school, such as, for example, the recommendation of a specialised pedagogical centre, which was necessary to set up individual integration. The Court further notes that the national courts considered the parents' cooperation in this regard to be insufficient, which contributed to the delay in drawing up the plan (§47). The Court adds that at the same time, there is also an active role for the State in protecting the best interests of the child in such situations and the burden cannot lie solely on the parents (§48). Nevertheless, the delays on the part of the school were justified and the school took the necessary steps to provide reasonable accommodations.

As regards the restrictive measures, the Court states that in principle they seemed inappropriate and stigmatising, especially when they targeted children with autism spectrum disorder. At the same time, they were not punishments but disciplinary measures, imposed in situations where the applicant's safety or the smooth running of classes were at risk. Moreover, the measures were negotiable. Under these circumstances, the measures did not constitute discrimination (§50).

Even though the school could have reacted more quickly once the applicant's needs were clear, the school still tried to provide the applicant with the necessary reasonable accommodations. To judge that this was insufficient would be an unreasonable burden on the school (§54). There is therefore no violation of Article 14 ECHR, read in conjunction with Article 2 P1.

The ECtHR considers the complaint under Article 8 ECHR about the lack of reasonable accommodation in court inadmissible. In this regard, the Court states that S., who was 15 years old at the time, showed sufficient discernment to be heard. At the same time, he suffered from autism spectrum disorder and had indicated to be afraid of reliving negative experiences. In these circumstances, the national judge could not be blamed for asking for a medical report to confirm that S. could testify without inflicting harm upon himself. The judge could legitimately consider that not hearing S. was in his best interests and he was adequately represented by his lawyer (§62). The complaint is therefore manifestly ill-founded.

## One step forward and two steps back, again.

S. v. the Czech Republic is the most recent case in the Court's line of case law on inclusive education and reasonable accommodations for persons with disabilities. Already in 2019, Lievens and Spinoy noted on this blog that "[w]hile other recent cases seemed to indicate an embracing of the CRPD model (unlike the very first cases on the right to education for persons with disabilities), the Court here seems to take a step back". This comment was made with respect to the case of Dupin v. France and referenced the earlier cases of Çam v. Turkey and Enver Şahin v. Turkey as cases that had embraced the CRPD model. The very first cases on the right to education for persons with disabilities – before Çam and Enver Şahin – did not equally value education for 'normal' children and that organised for persons with disabilities. They considered inclusive or even integrated education and reasonable accommodations favours rather than rights and emphasised the finite nature of resources and the complexity of the service of education for children with a disability. Lievens and Spinoy wondered whether the Court "was really going old school?" Spoiler alert: the answer was – and remains – yes.

The following case, Stoian v. Romania, confirmed their fear. Cojocariu explained how "the Court's drift on disability rights intensifie[d]". The case after Stoian, however, seemed to mark a turn back to a CRPD-compliant interpretation of the Convention. G.L. v. Italy showed a Court that got "back in line with its promising line of case law on the inclusion of pupils with disabilities and [set] a valuable next step in the direction of substantive equality". G.L. was a cause for optimism: Spinoy and Willems indicated that despite the outliers of Dupin and Stoian, the Court now "largely reaffirms its inclusive strand". They were optimistic about the Court's repeated consideration that "children with disabilities should be able to take part in education in conditions equivalent to children without disabilities", which was in perfect conformity with inclusive education (with reference to G.L. v. Italy, paras. 65-72).

Since then, the Court's case law has taken another step back with the case of T.H. v. Bulgaria. Although the ECtHR never fully aligned itself with the CRPD principles, refusing to acknowledge a right to inclusive education and failing to embrace the social model of disability, the case of T.H. v. Bulgaria clearly muddied the waters with respect to CRPD principles. This muddying of the waters is now solidified by the case at hand. The optimism created by G.L. concerning equivalent conditions can be struck down: S. v. the Czech Republic shows that such equivalent conditions, as interpreted by the ECtHR, in no case lead to a right to inclusive education, and not even to a satisfactory right to reasonable accommodations. In S. v. the Czech Republic, the provision of reasonable accommodations is subject to the issuance of a medical report. In addition, the Court seems to accept quite some formalism with respect to such medical report: the first report sent to the school had hand-written comments in the margins and was deemed invalid because of them. Only after receiving the second, clean version did the school begin drafting the individual integration plan (§47). The Court did not take any issue with this. This is so despite the fact that the ECtHR has expressly modelled the right to reasonable accommodation under the ECHR to that of the CRPD (*Ibid.*, §41; Çam v. Turkey §§65-67) and that this last Convention does not require any medical document before granting the right to reasonable accommodations.

### What's next?

The case law in this area has been one of "one step forward and two steps back", quite literally speaking. Principles adhered to in one case have been ignored in cases following it. In some cases the Court extensively cites the CRPD ánd applies (some of) its principles (e.g. Çam v. Turkey). In others it cites the CRPD without applying its principles (e.g. S. v. the Czech republic) and still in others it does not mention the CRPD at all (e.g. T.H. v. Bulgaria). These elements have made it impossible to predict the outcome of the next case in line. With the principles on education of persons with disabilities under the ECHR being completely unclear, the Court's effectiveness is also being undermined. National authorities will have no way of knowing what is required under the ECHR, which paves the road for many future cases on this issue. Both for principled (legal certainty) and for pragmatic reasons (caseload), the Court would therefore do best to finally take a clear stance with respect to persons with disabilities' right to education.

In any case, the Court's position with respect to the CRPD has become untenable. Although it never completely adhered to CRPD principles, in earlier cases it did apply other principles and looked to the CRPD for inspiration. The current case mentions principles taken from the CRPD, such as inclusive education and reasonable accommodations, but diverges so far from the CRPD's spirit in applying them that it negates its core principles. One of those core principles is the rejection of the medical model of disability.

### The medical model of disability

The CRPD advances a concept of inclusive equality. This goes hand in hand with the replacement of a "medically driven incapacity approach to disability" with a "human rights model of disability", which recognises that disability is a social construct. Requiring a medical certificate before considering reasonable accommodations is telling of a medical model of disability. It shows a point of departure where the neutral status quo, namely the way that schools/court hearings are currently organised, can only be amended if there are clear reasons linked to a person's incapacity that warrant such amendments. As long as the person's disability is not proven, accommodations are not even considered. This is exactly the point of departure which was taken by the national authorities in the case at hand, an approach that was not questioned by the Court in deeming the complaints unfounded and inadmissible. It was, moreover, "in the child's best interests" that his request for reasonable accommodation in court was not even considered without a medical certificate (§62).

The medical model of disability which is endorsed by the ECtHR in this case, is fully rejected under the CRPD (see preamble, at (e)). Instead, the CRPD adheres to a human rights model of disability, which recognises that "impairments cannot be a legitimate ground for the denial or restriction of human rights". Disability is the result of the "interaction between the impairments of persons with disabilities and the physical and social barriers to their participation in society". The CRPD thereby requires that children with disabilities and their parents are heard and their opinions are taken into account. In the national court case on his lack of reasonable accommodations at school, S. was literally not heard. He and his mother were of the view that, provided some small changes were made, he could be heard. These changes consisted of hearing him outside the public hearing or in the presence of an appropriate expert. However, without a medical report, the reasonableness and possible burden of implementing such changes was not even considered. Without a medical report, the S. and his mother's assessment of the situation was not believed: they were not heard.

## Conclusion

This commentary shows that the position whereby the ECtHR purports to interpret the Convention "so far as possible in harmony with other rules of international law of which it forms part" and that it "takes into account the provisions on the rights of persons with disabilities laid down in the CRPD" (S. v. the Czech Republic, §39), is indefensible. These statements make it seem as though the fact that the Court ignores the fundamental principles underlying the CRPD means that it is "not possible" for it to interpret the ECHR in line with the CRPD. This is not true. I believe this and past cases (see here, here, here and here) lead to the conclusion that the ECtHR chooses to diverge from CRPD principles. In my view, it chooses to interpret the ECHR in a different way, borrowing but also twisting concepts from that Convention. It is high time the Court recognises this and takes an explicit, clear stance with respect to the CRPD. Whether it admits that it will not bring its interpretation of the ECHR in line with the CRPD or it decides to finally do exactly that and embraces core CRPD principles, its current position has become untenable.

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A version of the factual summary in this blog post was previously published in a case note (in Dutch) for EHRC updates.

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