

An Education in Sign Language as a Human Right? The Sensory Exception in the Legislative History and Ongoing Interpretation of Article 24 of the UN Convention on the Rights of Persons with Disabilities

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ABSTRACT

A key provision of the Convention on the Rights of Persons with Disabilities (CRPD) for deaf people was the inclusion of articles that would allow deaf children to be educated in sign language settings with access to peers who use sign language and teachers who were fluent in sign language. The legislative history shows governments saw a “sensory exception” for deaf, blind, and deafblind learners as an uncontroversial exception to the principle of full inclusion in the education of children with disabilities. However, non-state actors have not fully acknowledged this provision in post-ratification interpretations of Article 24. Any interpretation of Article 24 must take into account this background of respect for the different needs of deaf, deafblind, and blind students.

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I. INTRODUCTION

In recent years, deaf communities worldwide have been witnessing the closure of (residential) schools for deaf children: these educational settings date back to the late eighteenth century. Moreover, these schools traditionally served as spaces for peer contact between deaf children and adults and thus as crucial spaces for the development and intergenerational transmission of sign languages and deaf cultures.¹ The closure of those schools is a direct consequence of the evolution towards “educational inclusion” of children with disabilities. In most cases, this means that an individual child with a disability is placed within a local regular school. Although the deaf child should normally receive support measures and reasonable accommodations such as sign language interpreters or note-takers, this is not always the case. Additionally, many are isolated among non-signing children without support services or interaction with peers in sign language.

Deaf-led nongovernmental organizations (NGOs) have traditionally resisted having deaf and deafblind children swept under the mandate of “full inclusion,” seeing individual placements in local schools as linguistically and socially isolating. The resistance deaf communities have shown against these policies demonstrates a profound difference between deaf people and other people with disabilities, many of whom seek the elimination of separate, group-based education as one of their primary goals. One of the goals of the World Federation of the Deaf (WFD), an international NGO representing approximately 70 million deaf people worldwide, is to ensure deaf children have the right to a bilingual education in sign language in educational settings with a critical mass of signing peers and teachers who are native users of the sign language(s) in that country.²

This is the background to the WFD’s involvement in the drafting of the UN Convention on the Rights of Persons with Disabilities (CRPD)³ and the organization’s close involvement with the drafting of Article 24 on education. This article focuses on the WFD’s attempts to promote linguistic rights for deaf people during the drafting stages and post-ratification interpretation of Article 24. Analysis and discussion of the CRPD’s impact on deaf people is still scarce,⁴ and an analysis of Article 24—one of the most important provi-

1. Tom Humphries et al., *Language Acquisition for Deaf Children: Reducing the Harms of Zero Tolerance to the use of Alternative Approaches*, 9 HARM REDUCT. J. 1, 5 (2012).
2. Annelies Kusters et al., *On “Diversity” and “Inclusion”: Exploring Paradigms for Achieving Sign Language Peoples’ Rights*, 9, 16 (Max Planck Institute for the Study of Religious and Ethnic Diversity, Working Paper No. 15-02, 2015), available at <http://www.mmg.mpg.de/en/publications/working-papers/2015/wp-15-02/>.
3. Convention on the Rights of Persons with Disabilities, adopted 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2006) (entered into force 3 May 2008) [hereinafter *The Convention*].
4. Some analysis which has been done include Annelies Kusters et al., *supra* note 2; Maartje De Meulder, *The UNCRPD and Sign Language Peoples*, in UNCRPD IMPLEMENTATION IN

sions in the Convention for deaf people—both pre- and post-ratification, is long overdue. This article focuses on the WFD because it was the lead (and at times the only) representative for deaf people during the drafting of the CRPD, and it is leading post-ratification attempts to clarify what Article 24 means for deaf people.⁵ This article further assesses how Article 24 must be interpreted with the aim to fulfill the effective right to education for deaf children. Ultimately, the situation of deaf children points to the need to move beyond the unreflective placement of deaf children in local schools towards the development of multiple models of inclusion.

II. SHIFT FROM MEDICAL TO SOCIAL MODEL TO HUMAN RIGHTS MODEL

Adopted in 2006, the CRPD and its associated Optional Protocol is the first international convention to explicitly recognize disability as a fundamental human rights issue.⁶ Thus, the Convention marks a paradigm shift within UN legal drafting by recognizing that disability is not an individual medical problem, but “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”⁷ Therefore, the CRPD urges state parties to take action to remove societal barriers to the participation and inclusion of persons with disabilities. In fact, the CRPD moves away fully from the medical model in not referring to prevention or treatment of impairment at all.⁸ This is one of the most remarkable differences between the CRPD and the UN’s prior work in the area of disability and human rights⁹ and exemplifies the expansion of the social model into a human rights model of disability. The CRPD even affirms “persons with disabilities as part of human diversity and humanity.”¹⁰ As the only group of persons with disabilities with a dual category status, being (seen as) both persons with disabilities and cultural-linguistic minorities, deaf people are included in the Convention; all articles are applicable to them.

EUROPE—A DEAF PERSPECTIVE. ARTICLE 29: PARTICIPATION IN POLITICAL AND PUBLIC LIFE 12 (Annika Pabsch ed., 2014); Sarah C. E. Batterbury, *Language Justice for Sign Language Peoples: the UN Convention on the Rights of Persons with Disabilities*, 11 LANG. POL’Y 253 (2012).

5. One co-author, Joseph Murray, is currently Vice President of the WFD and chairs the WFD’s Human Rights Steering Committee. He was not involved in CRPD drafting but has been involved in the WFD’s post-ratification work, including work on Article 24.
6. Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 1–2 (2008).
7. CRPD, *supra* note 3, pmb1.(e).
8. Article 25(b) however, refers to the right to “health services . . . including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities.” *Id.* art. 25(b).
9. Kayess & French, *supra* note 6, at 24.
10. CRPD, *supra* note 3, art. 3(d).

III. IMPORTANCE OF THE CRPD AND ARTICLE 24 FOR DEAF PEOPLE

The WFD joined the negotiations on the development of the CRPD because they saw a different opportunity to achieve their cultural-linguistic goals. The WFD has consultative status within the UN that allowed it to participate in Ad Hoc meetings and CRPD negotiations. Liisa Kauppinen and Markku Jokinen, past and current presidents at the time of the CRPD drafting process, respectively, represented the WFD during the CRPD negotiations.¹¹ The WFD negotiated, on its own and in coalition with other international organizations of persons with disabilities, as part of a coalition that was formerly known as the International Disability Coalition (IDC) (which has now evolved into an independent organization called the International Disability Alliance). The sustained involvement of WFD representatives during the drafting stages of the Convention led to the CRPD being the first international human rights treaty to include sign languages as languages; the CRPD mentions sign languages eight times in five different Articles with references to Deaf culture and sign language. Indeed, “[. . .] no other disability group and their needs are mentioned overtly as precisely and as often in the convention as the Deaf/Deafblind group.”¹² Observers have noted the CRPD accords persons with sensory disabilities special status. The CRPD, positions this group as a subgroup within the group of persons with disabilities, especially with regard to Article 24. This outcome is the result of an alliance between the WFD, the World Blind Union, and the World Federation of the Deaf Blind, as will be seen below.

However, the larger disability movement did not understand the WFD’s decision to join negotiations, because the movement had come to believe that deaf people saw themselves only as linguistic minorities.¹³ In addition, the WFD came to the negotiations with a clear cultural-linguistic agenda and took a unique position that set them apart from most other groups for persons with disabilities. Some groups criticized the WFD for its agenda and position.¹⁴ These differing views became most clear during the negotiations and development of one specific article of the CRPD: Article 24 on Education.

It is no coincidence that this Article was one the WFD was closely involved in drafting. Education has long been and still is the primary battleground in the fight for deaf people’s human rights. The right to education is one of the most important rights for any minority. Moreover, the right to

11. HUMAN RIGHTS AND DISABILITY ADVOCACY 290 (Maya Sabatello & Marianne Schulze eds., 2014).

12. Sherman E. Wilcox, Verena Krausneker, & David F. Armstrong, *Language Policies and the Deaf Community*, in THE CAMBRIDGE HANDBOOK OF LANGUAGE POLICY 374, 391 (Bernard Spolsky ed., 2012).

13. De Meulder, *supra* note 4, §3.1.

14. Liisa Kauppinen & Markku Jokinen, *Including Deaf Culture and Linguistic Rights*, in HUMAN RIGHTS AND DISABILITY ADVOCACY 131, *supra* note 11, at 132–139.

education in sign language is a crucial prerequisite for the ability to enjoy any human rights because without sign language access many deaf people have minimal, if any, linguistic input and are hindered severely from developing native language fluency.¹⁵ Access to sign language enables deaf people to exercise other human rights and in this way works as a multiplier.¹⁶ While the issue of linguistic input is unique to deaf people, the idea of education as an “indispensable means of realizing other human rights” is widely acknowledged.¹⁷

IV. THE ORIGINS OF “THE SENSORY EXCEPTION” IN HUMAN RIGHTS LAW

The “legal right to inclusive education for persons with disabilities is not a completely new invention in the CRPD”; it has been under development and elaborated in international legislation which is not legally binding, or “soft law.”¹⁸ Some of the soft legislation already acknowledge deaf children as a group that is granted exceptions from the general trend towards full inclusion. Examples of such exceptions can be found in the UNESCO Salamanca Statement on Principles, Policy and Practice in Special Needs Education and the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities.¹⁹ Both instruments highlight the fundamental principle of inclusive education but specify that if general education system does not meet the needs of the student, special education should have the same quality of education as the general education system. The exception to full inclusion is often called a “residual perspective” of special education. However, the exception for deaf and deafblind persons goes beyond this residual perspective. Instead, education for this group “may be more suitably provided in special schools or special classes and units in mainstream schools.”²⁰ Both instruments justify this exception due to the “particular communication needs” of this group. Further, they recognize the right of

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15. Tom Humphries et al., *The Right to Language*, 41 J.L. MED. & ETHICS 872, 873 (2013).
 16. Gauthier de Beco, *The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions*, 32 NETH. Q. HUM. RTS. 263, 265 (2014).
 17. Oddný Mjöll Arnardóttir, *The Right to Inclusive Education for Children with Disabilities—Innovations in the CRPD*, in *MAKING PEOPLES HEARD: ESSAYS ON HUMAN RIGHTS IN HONOUR OF GUDMUNDUR ALFREDSSON 197, 200* (Asbjørn Eide, Jakob Th. Möller, & Ineta Ziemele eds., 2011).
 18. *Id.* at 204.
 19. U.N. Standard Rules in Kayess and French, *supra* note 6, at 16; UNESCO, *The Salamanca Statement and Framework for Action on Special Needs Education, adopted 7–10 June 1994 by the World Conference on Special Needs Education: Access and Quality*, § 21 (1994) [hereinafter *The Salamanca Statement*].
 20. *The Salamanca Statement*, *supra* note 19, at § 21.

deaf children to use sign language in education and, more specifically, a right to “access to education in their national sign language.”²¹ The WFD was involved in negotiations over both instruments. This “sensory exception,” namely the distinction between sensory disabilities and other peoples with disabilities, re-emerges in the CRPD.

The above-mentioned “soft law” instruments contributed to the interpretation of the right to education in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). First, the Committee on Economic, Social and Cultural Rights (CESCR) stated in its analysis of Articles 13 and 14 with regard to the right to education that “persons with disabilities can best be educated within the general education system.”²² To achieve this perspective, states must undertake measures to ensure teachers in regular schools have the proper training to educate children with disabilities and have access to the necessary equipment and support. It further illustrates these measures in the case of deaf children: “sign language should be recognized as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.”²³ The CESCR recognizes that “[i]n some circumstances, separate educational systems or institutions for groups defined by the categories in Article 2(2) shall be deemed not to constitute a breach of the [International Covenant on Economic, Social and Cultural Rights].”²⁴ It affirmed in this regard the content of the Article 2 subsection (b) of the UNESCO Convention Against Discrimination in Education.²⁵ This subsection, in part, refers to “[t]he establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education.”²⁶ Notably, the categories in Article 2(2) do not refer to disability but refer to religion and language; this can be read as supporting separate educational settings for linguistic reasons, such as the use of sign language.²⁷

Second, the Committee on the Rights of the Child (CRC) addressed the importance of sign language use in the family of a deaf child and defined inclusive education in a broad perspective including “a certain portion of

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21. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, Rules 5(7), 6(9), U.N. Doc. A/RES/48/96 (1994); The Salamanca Statement, *supra* note 19, § 21.
 22. *General Comment No. 5, Persons with Disabilities*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 11th Sess., ¶ 35, U.N. Doc. E/C.12/1994/13 (1994).
 23. *Id.* § 35.
 24. *General Comment No. 13, The Right to Education*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 21st Sess., § 33, U.N. Doc. E/C.12/1999/10 (1999).
 25. *Id.*
 26. Convention Against Discrimination in Education, *adopted* 14 Dec. 1960, UNESCO, 11th Sess., art. 2 (b), 429 U.N.T.S. 93 (*entered into force* 22 May 1962).
 27. *Id.*

special education.”²⁸ When the interpretations from the Committees under the ICESCR and the CRC are read in conjunction with the guiding instruments issued by the UNESCO and the UN, previously analyzed, the result is that inclusive education also refers to special education forms in general education systems for specific groups of children with disabilities, for example, deaf children using sign language.

V. THE SENSORY EXCEPTION IN THE DRAFTING OF ARTICLE 24

During negotiations, the WFD’s goal was explicit recognition of deaf people’s linguistic rights, and to further this aim, it participated in all eight Ad Hoc Committee meetings, other expert meetings, and drafting committee meetings.²⁹ The WFD found itself spending a lot of time educating governments and other representatives on basic issues related to sign language and deaf people, even to the point of making the case that sign languages were not “abnormal.” They hosted a Side Event on sign language and distributed materials on deaf people and on the negative consequences of not having access to sign language. The WFD utilized existing human rights instruments related to one’s right to one’s own language and culture including provisions on the non-discrimination of languages and language minorities. These were important in promoting a linguistic and cultural view of deaf people found in the final draft of the CRPD and in Article 24.³⁰

The Ad Hoc Steering Committee established a Working Group to draft Article 17 (which later became Article 24). A draft presented to the Third Ad Hoc Session focused on the “right to education” in a variety of settings. The Working Group draft noted, “the general education system and specialist education services are not mutually exclusive options, and that there is a range of options in between that are available.”³¹ Then, the Third Ad Hoc Session debated whether the primary issue in the education of children with disabilities was “choice” of educational settings or “inclusive education” in the regular educational system.³² For a time, a “twin track” approach allowing for both inclusive and special education gained traction among participants at the Ad Hoc Session. However, a clear exception was made from tilt towards inclusion for blind, deaf, and deafblind children, who

28. *General Comment No. 9, The Rights of Children with Disabilities*, adopted 11–29 Sept. 2006, U.N. GAOR, Comm. on the Rts. of the Child, 43d Sess., §§ 41, 67, U.N. Doc. CRC/C/GC/9 (2007).

29. Kauppinen & Jokinen, *supra* note 14, at 132–33, 139.

30. Liisa Kauppinen, *Presentation: XV General Assembly of the World Federation of the Deaf Workshop* (13 July 2007).

31. Arnardóttir, *supra* note 17, at 209.

32. *Id.* at 210–211.

could be educated in “special groups.”³³ This special group exception was not contingent on the twin track approach. The legislative history makes clear that there was widespread acknowledgment and support for a “sensory exception.” This may be due, in part, to the precedent set by the Standard Rules. In addition to this collective approach with sensory NGOs, the WFD also submitted its own comments concerning draft Article 17 in this Session. The WFD proposed language that emphasized the right of deaf children to learn bilingually in their own groups and with teachers who are fluent in sign language, including deaf teachers.³⁴

The WFD argued that bilingual education in sign language should not be seen as “special education” or “segregated education,” as the disability movement understands it, but as a form of education within the inclusive education system.³⁵

During the Fifth Session, the WFD attempted to mainstream the issue of linguistic rights into a general paragraph, stating, “State Parties shall ensure that all . . . [people] with disabilities have full access to inclusive education in their own community in the language of their own choice in terms of delivery of education information.”³⁶ A separate paragraph followed the general paragraph and contained a slightly different version of the proposal from the Third Session. Even though all the attempts failed, they demonstrate the WFD did try to reconcile linguistic rights within a framework of inclusion seeing it as possible to respect the need for inclusion for people with disabilities while promoting linguistic rights for deaf people. However, their proposals did not make the final text of the Convention, because the negotiating parties saw their demands as “exceptional to the general principle of educational ‘inclusion.’”³⁷ Additionally, as stated by the WFD, their arguments probably were not fully understood by disability groups, and the legal language of the CRPD required that all needs of people with disabilities be stipulated in general phrases.³⁸

33. *Id.*

34. Kauppinen & Jokinen, *supra* note 14, at 137; Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Comments, Proposals and Amendments submitted electronically on Article 24 (24 May-4 June 2004), *available at* <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>.

35. Markku Jokinen, Speaker at the Day of General Discussion on the Right to Education of Persons with Disabilities of the Committee on the Rights of Persons with Disabilities (15 Apr. 2015), *available at* <http://www.ohchr.org/Documents/HRBodies/CRPD/DGD/2015/MarkkuJokinen.pdf>.

36. Kauppinen & Jokinen, *supra* note 14, at 138 (emphasis omitted).

37. Batterbury, *supra* note 4, at 265.

38. Kauppinen & Jokinen, *supra* note 14, at 138.

The Sixth Ad Hoc meeting took up Article 17 again. The Centre for Studies on Inclusive Education, an organization for inclusive education, again tried to push the meeting to eliminate special education from the CRPD altogether.³⁹ The WFD, the World Federation of the Deafblind and the World Blind Union opposed this proposal. They argued that inclusive settings could “create *de facto* segregation in public schools where children who are Deaf, Blind, and Deaf-Blind would be physically present but mentally and socially absent.”⁴⁰ This attempt to eliminate special education did not succeed; the sensory exception had widespread support with the International Disability Coalition (of which the above organizations were members) and UNESCO, among others. The Sixth Session closed with a strong tilt towards full inclusion, a rejection of a “twin-track” approach for all children with disabilities, and a decided shift to enshrining a right to “inclusive education” (not just “a right to education” as in the first draft). However, as the Ad Hoc Committee closing report noted, there was also “general support” among participants (both civil society organizations and governments) for learning environments in which deaf, deafblind, and blind children could learn with their peers.⁴¹ The sensory exception to full inclusion remained in the Convention.

The draft circulated at the Seventh Ad Hoc Session corresponded closely to the eventual final version of Article 24.⁴² Arnardóttir notes the change from “inclusive education” to “inclusive education system” in Article 24(1) that, as will be seen below, is currently used by the WFD to argue for linguistic rights.⁴³ Inherent here is a different approach: if the entire educational system is required to be inclusive, then deaf schools and other separate educational settings with a critical mass of deaf children could also be considered part of a national inclusive education system. This is exactly what the WFD argues post-ratification.

What was achieved in the end was a compromise enshrined in 24(3) (c): that “education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.”⁴⁴ In the final text of the CRPD, general education is the normative goal and special education the (implicit) exception.⁴⁵

For the WFD, the most significant change was the use of the phrase “in environments which maximize academic and social development” instead

39. Arnardóttir, *supra* note 17, at 211.

40. *Id.*

41. *Id.* at 214, 215.

42. *Id.* at 215.

43. *Id.* at 218.

44. CRPD, *supra* note 3, art. 24 § 3(c).

45. de Beco, *supra* note 16, at 274.

of “educational setting.” Arnardóttir states that although there is no explicit reference to separate educational institutions, the language

in environments which maximize academic and social development in draft Article 24(3)(c) *in fine* became ‘code’ for ‘special and alternative’ education, ranging from a mixed ‘alternative’ model of special classes or groups within the mainstream setting and all the way to ‘special’ segregated educational institutions when justified and considered preferable for blind, deaf and deafblind children.⁴⁶

Markku Jokinen, WFD President during CRPD negotiations, argues that in fact, the expression means bilingual education for deaf students.⁴⁷ This interpretation is further supported in documents emitted after the CRPD entered into force. For example, a 2008 position paper from the International Disability Alliance (IDA) stated that for deaf, blind, deafblind students and, in some cases, hard of hearing students as well, “the option for separate learning environments must be understood as necessary to ‘maximize academic and social development.’” Also, the WFD and partner organization submissions made after the CRPD entered into force (see further in the article) support this interpretation.⁴⁸ Arnardóttir notes Article 24(3) begins by referring to “life and social development skills” and not explicitly to education.⁴⁹ Thus, reference to the legislative history is essential to ensure the intention of preserving separate educational settings for deaf, deafblind, and blind children is maintained.

The legislative history of Article 24 shows a clear shift to full inclusion as the educational goal of the drafters. It also shows the WFD and other sensory organizations sought to ensure a sensory exception to full inclusion; one that was accepted as uncontroversial by state parties and ended up in the final text of the Convention, both via Article 24(3)(c) (as noted above) and via Article 24(3)(b) that calls on state parties to take measures “[f]acilitating the learning of sign language and the promotion of the linguistic identity of the deaf community” as part of the education of deaf children.⁵⁰ This article now turns to post-ratification interpretations of the meaning of inclusion and how principles of inclusion can be interpreted to support the sensory exception.

46. Arnardóttir, *supra* note 17, at 219–20.

47. Markku Jokinen, *Inclusive Education: A Sustainable Approach?*, in *SIGN LANGUAGE, SUSTAINABLE DEVELOPMENT, AND EQUAL OPPORTUNITIES: ENVISIONING THE FUTURE FOR DEAF STUDENTS* 105, 108–109 (Goedele A.M. De Clerck & Peter V. Paul eds., 2016).

48. International Disability Alliance (IDA), *Position Paper on the Convention on the Rights of Persons with Disabilities (CRPD) and Other Instruments* (2008), available at http://www.internationaldisabilityalliance.org/sites/default/files/documents/ida_crpd_paper_final.doc.

49. Arnardóttir, *supra* note 17, at 220–21.

50. The Convention, *supra* note 3, art. 24(3)(b).

VI. THE MEANING OF “INCLUSION” IN ARTICLE 24 AND ACCORDING TO THE WFD

The CRPD does not include a definition of “inclusive education,” nor is there any consensus or universal definition of the principle on the general legal level.⁵¹ It may be differentiated from the concept of integration where children have access to education but do not benefit from special measures allowing them to participate in the general education system thus putting them at risk of exclusion.⁵² It may also be distinguished from the concept of special education where children with disabilities are provided education in segregated settings along with their peers. The purpose of inclusive education is to allow children with disabilities to access the general education system and participate in all of its aspects.⁵³ The CRPD Committee issued a General Comment on Article 24 in September 2016 in which it presented its own view of inclusive education.⁵⁴ The nine “core features” of inclusive education the Committee identified focus mostly on a “whole systems approach” in which the principle of inclusion is reflected in resource allocation, policy development, teacher training, and other governing processes of national education sectors.⁵⁵ Nothing in these core features works against the idea of a “sensory exception.”

According to the WFD, both in its own comments and in documents created in cooperation with the International Disability Alliance, changing the state parties’ education system does not necessarily require a transition from the special education system to the regular education system. For them, deaf students should be provided with appropriate sign language learning environments, as part of an inclusive education system.⁵⁶ Furthermore, they state it is important to take a “holistic approach when discussing inclusive education,” entailing “access to [...] education systems and learning environments, learning materials, teacher skills, reasonable accommodations and

51. Paula Flynn & Michael Shevlin, *Presentation on Inclusive Education, Context, and Challenges, given at the Conference on Inclusive Education* (22 Feb. 2014).

52. Gauthier de Beco, *Het Recht Op Onderwijs Voor Personen met een handicap volgens artikel 24 van het VN-Verdrag Inzake de Rechten van Personen met een Handicap: Juridische Analyse en Toepassing in Vlaanderen* [The Right to Education for Persons with Disabilities According to Article 24 of the U.N. Convention on the Rights of Persons with Disabilities: Legal Analysis and Application in Flanders], in *tijdschrift voor jeugd- en kinderrechten* [TJK] 90, 95 (2013).

53. Flynn & Shevlin, *supra* note 51.

54. General Comment No. 4, *The Right to Inclusive Education*, Comm. on Rts. of Persons with Disabilities, §§ 11–12, U.N. Doc. CRPD/C/GC/4 (2016).

55. *Id.*

56. World Federation of the Deaf (WFD), European Union of the Deaf (EUD), World Federation of the Deaf Youth Section (WFDYS), & European Union of the Deaf Youth (EUDY), *Submission on the Draft General Comment No. 4 on Article 24*, at 5, available at http://www.ohchr.org/Documents/HRBodies/CRPD/GC/RighttoEducation/WFD-EUD-WFDYS_EUDY-23.12.2015.doc [hereinafter WFD, EUD, WFDYS, & EUDY].

individual support” measures.⁵⁷ According to Markku Jokinen, “[a]ccessibility, universal design, reasonable accommodations, and individual support measures facilitate an inclusive education system” to “meet[s] “the diverse needs of the students and create a nondiscriminatory learning environment.”⁵⁸ When state parties provide measures to achieve each of these elements, learning environments can be made more inclusive. With this background in mind, the authors have identified four fundamental principles that apply to inclusive education. These are reasonable accommodation, individualized support measures, accessibility, and universal design. In order to understand what this means, this article turns to an analysis of the first three principles of inclusive education and the principles’ meaning in the context of Article 24.

VII. REASONABLE ACCOMMODATION AND SIGN LANGUAGE INTERPRETERS: A PARTIAL USE OF ARTICLE 24: IMMEDIATE APPLICATION AS PART OF THE NON-DISCRIMINATION OBLIGATION (ARTICLE 5)

The CRPD states that, “States Parties shall prohibit all discrimination on the basis of disability” and are expected to take “appropriate steps to ensure that reasonable accommodation[s]” are provided in the education for children with disabilities.⁵⁹ Reasonable accommodations are individualized measures meeting children with disabilities’ individual requirements: “[t]hey aim to move beyond formal equality and achieve substantial equality.”⁶⁰ The obligation is neither subject to progressive realization nor to availability of resources, because the denial of reasonable accommodations constitutes a form of discrimination on grounds of disability under the CRPD.⁶¹ The obligation of reasonable accommodation is therefore an anti-discrimination measure that must be realized with immediate effect.⁶² However, it is subject to a defense of “disproportionate or undue burden.”⁶³ This means that the practical realization will differ from state to state and situation to situation, depending on the interpretation of the concept “reasonable.”

“Reasonable accommodation” is defined in the Convention as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to

57. *Id.* at 6.

58. Jokinen, *Inclusive Education*, *supra* note 47, at 109–10.

59. The Convention, *supra* note 3, art. 5 §§2 & 3, art. 24 §2(c).

60. de Beco, *supra* note 16, at 278.

61. Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L. L. & COM. 563, 598.

62. Human Rights Council, *Thematic Study on the Right of Persons with Disabilities to Education: Report of the Office of the United Nations High Commissioner for Human Rights*, H.R.C. 25th Sess., § 21, U.N. Doc. A/HRC/25/29 (2013).

63. CRPD, *supra* note 3, art. 2.

persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁶⁴ During the debate on the definition of reasonable accommodation throughout the drafting process, the WFD interpreted this provision in light of two additional aspects: the “individualized/personalized accommodation” must be adjusted to the type of disability, and the accommodation consisting of adjustments must be context-specific.⁶⁵ Therefore, no reasonable accommodation will be identical between several deaf people and must be developed on a case-by-case basis and appropriate to the context of education. The Human Rights Council takes a similar approach when it recommends that state parties take a student-centered approach and “accommodate the different needs and ways of learning of all students.”⁶⁶

Since the obligation to provide reasonable accommodation is of immediate effect, most state parties tend to provide sign language interpreters in regular schools to comply with this duty. In a Belgian court case in 2009, the court found the Flemish Government guilty of discrimination because the amount of interpreting hours they provided in secondary education was far below what was necessary, thus consisting a refusal of reasonable accommodation for persons with disabilities. The Flemish Government appealed this verdict arguing that there were not enough interpreters to meet this demand. In September 2011, the Ghent Court of Appeal rejected the appeal as unfounded and confirmed the verdict of the First Court; it concluded that the Flemish Government did not prove an “undue burden.”⁶⁷ The Court stated that there are enough certified interpreters, but the interpreters cannot effectively work because of the low amount of interpreting hours, the enforced self-employed statute, and the low wage and administrative overregulation, all of which are responsibilities of the Flemish Government itself. Because one pupil went to school in Flemish-Brabant and the others in Ghent, two different courts passed judgment on the complaint.⁶⁸

The Ghent court case led to the Flemish Government enacting a decree in July 2013 granting the right to sign language interpretation for deaf pupils and students starting from kindergarten.⁶⁹ The decree legally guaranteed the right to seventy percent interpreting hours in primary, secondary, higher, and adult education.

64. CRPD, *supra* note 3, art. 2.

65. Kauppinen & Jokinen, *supra* note 14, at 135 (emphasis omitted).

66. Human Rights Council Res. 25/20, The Right to Education of Persons with Disabilities, U.N. GAOR, 25th Sess., Agenda Item 3, §8(d), U.N. Doc. A/HRC/25/L.30 (2014).

67. Hof van Beroep [HvB] [Court of Appeal] Gent, 7 Sept. 2011, Nieuw Juridisch Weekblad [NjW] 2012, 220 (Belg.).

68. Annelies D’Espallier, *Tolkuren Voor Dove en Slechthorende Leerlingen [Interpreting Hours for Deaf and Hard of Hearing Students]*, nieuw juridisch weekblad [NjW] 606, 609 (2010).

69. Decreet Betreffende het Onderwijs XXIII [Education Act XXIII] of 19 July 2013, BELGISCH STAATSLAD [B.S.] [OFFICIAL GAZETTE OF BELGIUM], 27 Aug. 2013, 56395, arts. II.27, III.64.

The Flemish Deaf Association (Doof Vlaanderen) stated there is no fully realized bilingual education in Flanders and mainstream education with an interpreter is not the same. Parents who chose a bilingual option at home would not have the opportunity to have this strengthened in the schools. Moreover, the organization feared mainstreaming in regular education would prevent students from having the opportunity to acquire, at least, sign language from a peer group at the deaf school. They formally argued that interpreters in primary education are an urgent, temporary, and short-term solution for a very small target group (children who can acquire sign language at home, which in Flanders are almost only children with deaf parents). In addition, that a suitable educational model must be found for all deaf children, including children who cannot acquire sign language (sufficiently) at home.

Another problematic aspect of using sign language interpreters is that while it gives immediate effect, as required for a reasonable accommodation, it is only a partial application of Article 24. This accommodation overlooks Articles 24(3) and 24(4) that emphasize the need for deaf children to learn sign language and deaf culture and have access to teachers (including deaf teachers) who know sign language. An interpreter is not a teacher. The WFD has recently shared its concern that sign language interpretation should not be seen as the only measure state parties rely on to ensure inclusive education for deaf children.⁷⁰ It may be interesting to note that Article 24 itself does not mention any reference to sign language interpreters. Indeed, sign language interpreters may not replace the richness of group discourse provided by deaf peers; limiting the deaf student to an interpreter only provides a “dyadic” and unnatural group of communication.⁷¹ Deaf children need access to the “richness and complexity of community and language” by meeting deaf peers and by being taught in sign language by teachers proficient in the language. Governments violate the intent and purpose of Article 24 if they focus on the provision of sign language interpreters as the sole means of providing reasonable accommodation. The Article promotes a right to access to education *in* sign language, not only *with the support of* sign language.

VIII. INDIVIDUALIZED SUPPORT MEASURES

Article 24 also mentions the provision of effective individualized support measures “in environments that maximize academic and social development, consistent with the goal of full inclusion.”⁷² Individualized support

70. Joseph Murray, *WFD Statement Delivered by Dr. Joseph Murray at the opening of the 11th session of the CRPD Committee, 31 March 2014*, WORLD FEDERATION OF THE DEAF, (31 Mar. 2014), available at <https://wfdeaf.org/news/wfd-statement-to-be-delivered-by-dr-joseph-murray-at-the-opening-of-the-11th-session-of-the-crpd-committee-31-march-2014/>.

71. Humphries et al., *supra* note 15, at 881.

72. CRPD, *supra* note 3, art. 24 § 2(e).

measures complement the concept of reasonable accommodation: they do not focus on the individual limits of the student (as reasonable accommodations do) but on the barriers existing in the educational settings. They consist of general measures tailored to meet particular needs. This is an obligation that state parties have to fulfill, in addition to the obligation of reasonable accommodation, by allocating sufficient and adequate financial and human resources.⁷³ In opposition to reasonable accommodations, individualized support measures are subject to a principle of progressive realization. This does not mean that states can defer their responsibilities: they have the obligation to start building inclusive education systems right away, within the limits of available resources, and have to provide a timetable and monitoring.⁷⁴ Of relevance to this article is that a standstill-principle applies here: State Parties must not make changes to their education systems for children with disabilities that would be seen as degrading this education compared to its level of compliance to CRPD when the country ratified the CRPD.⁷⁵ If state parties apply those measures, they would ensure that the inclusive education system allows every student to be in an environment which matches their needs and this could mean specialized schools for deaf people.

IX. ACCESSIBILITY (ARTICLE 9) AS APPLIED TO ARTICLE 24

Accessibility is enshrined in Article 9 of the Convention and is a crosscutting principle of the CRPD applying to all articles of the Convention, as opposed to Articles 10 through 30, which are rights-based provisions. Therefore, Article 9 applies to the Article 24 and its scope of application is not restricted.

The CRPD Committee confirmed in its interpretation of Article 24—read in conjunction with the Article 9 of the CRPD—that accessibility in education is not limited to buildings or information and communication, but it entails the whole process of inclusive education; thus, it also includes the promotion and conduction of education in sign language among other elements.⁷⁶

The CRPD Committee has noted accessibility is related to groups' needs and this distinguishes it from the concept of reasonable accommodation that is individual-based.⁷⁷ Furthermore state parties have the obligation to ensure the accessibility at a prior and structural stage (*ex ante* duty) while the obligation of reasonable accommodation is applied when accessibility

73. de Beco, *supra* note 16, at 277, 281.

74. *Id.*

75. ANNELIES D'ESPALLIER, STEFAN SOTTIAUX & JAN WOUTERS, *DE DOORWERKING VAN HET VN-VERDRAG INZAKE DE RECHTEN VAN PERSONEN MET EEN HANDICAP* 107 (2014).

76. *General Comment No. 2, Article 9: Accessibility*, 31 Mar.-11 Apr., Comm. Rts. of Persons with Disabilities, 11th Sess., § 39, U.N. Doc. CRPD/C/GC/2 (2014).

77. *Id.* § 25.

standards are not sufficient to respond to an individual's needs.⁷⁸ During CRPD negotiations, the WFD emphasized that accessibility also includes linguistic and cultural accessibility; the learning process should be culture- and language- sensitive, and the curriculum should include modules nurturing the linguistic identity of the deaf community, among other elements.⁷⁹

X. TRANSFORMATION OF THE EDUCATION SYSTEMS TOWARD AN INCLUSIVE EDUCATION SYSTEM: PROGRESSIVE REALIZATION

State parties can achieve inclusive education when they fulfill two kinds of obligations: the non-discrimination obligation which is of immediate effect as well as the obligation to undertake progressive steps toward its full realization. More specifically, the adoption of an inclusive education law including non-discrimination and reasonable accommodation provisions should be the first step state parties take. At the same time, over a longer period of time, state parties must create and execute or implement a transformation plan that guarantees the conditions for an inclusive education system.⁸⁰ This transformation process requires state parties to undertake progressive steps toward full realization of the inclusive education with the maximum available resources they have.⁸¹ In this process, persons with disabilities and their representative organizations should be fully involved along with other stakeholders.⁸²

The CESCR notes both obligations must be "deliberate, concrete and targeted."⁸³ For example, the CRPD Committee described that undertaking efforts includes not only the legal obligation of reasonable accommodation, but also "allocating sufficient financial and human resources to implement the right to inclusive education."⁸⁴ Through this allocation, state parties must be able to show that they progressively realize the right to education.⁸⁵ The CESCR mandates the state parties to give all meaningful content to these provisions and "move as expeditiously and effectively as possible" to achieve their full realization.⁸⁶

78. *Id.*

79. Jokinen, Inclusive Education, *supra* note 47, at 110.

80. *Report of the Office of the United Nations High Commissioner, supra* note 62, at 100.

81. The Convention, *supra* note 3, art. 4 § 2.

82. *Id.* art. 4 § 3.

83. *General Comment No. 13, supra* note 24, § 43.

84. *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Concluding observations of the Committee on the Rights of Persons with Disabilities, 19–23 September 2011, Comm. Rts. of Persons with Disabilities, 6th sess., ¶ 44(a), U.N. Doc. CRPD/C/ESP/CO/1 (2011)* (emphasis removed).

85. *de Beco, supra* note 16, at 277.

86. *General Comment No. 13, supra* note 24, § 44.

As current educational settings very rarely provide education in sign language, state parties must undertake a fundamental transformation of the education system. Therefore, they are expected to start as soon as they ratify the CRPD by developing a plan with achievable measures toward a full inclusive educational system for deaf students. In the past, deaf schools were the key places for deaf children to learn sign language and to develop and share their linguistic and cultural identity. Therefore, governments closing deaf schools and *not providing sign language environments in inclusive education at the same time* are violating the intent of the Article 24. The standstill principle applies here.

XI. FURTHER EVOLUTIONS POST-CRPD RATIFICATION

A. Day of General Discussion and Side-Event on Deaf Education

Post-ratification, the WFD and the European Union of the Deaf (EUD) got further involved with the interpretation of Article 24 clarifying their view on inclusive education. In April 2015, a Day of General Discussion (DGD) was held on the right to education for persons with disabilities oriented towards a General Comment on the right to education as set out by the CRPD.⁸⁷ The WFD and EUD made a submission to this DGD for which they included information from forty-six countries, were granted time for an oral intervention, and organized a side-event on deaf education. This all further clarified the WFD and EUD's view on inclusive education and "sign language environment." First, they recommended the Committee clarify, in their final General Comment on Article 24, what "sign language learning environment" means. For the WFD and EUD, a barrier-free learning environment is key in the concept of inclusive education for all learners and for deaf students. This means a sign language environment as part of bilingual education.⁸⁸ There are two important aspects to this sign language environment. The first aspect regarding communication in the learning environment, necessitates (1) that sign language is used as a language of instruction in all subjects; (2) the employment of teachers qualified in sign language, including deaf teachers; (3) that a class contains a critical mass of other deaf students or other students who know sign language and (4) that there is professional sign language interpretation when appropriate. The second aspect of a barrier-free

87. High Commissioner for Human Rights, *The Right to Education of Person with Disabilities- Committee on Rights of Persons with Disabilities Holds Day of General Discussion*, Comm. On Rts. of Persons with Disabilities, (15 Apr. 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15847&LangID=E>.

88. WFD, EUD, WFDYS, & EUDY, *supra* note 56.

sign language learning environment deals with content-specific learning and requires that (1) sign language is taught as a school subject and (2) that deaf culture and history are included in curricula and learning materials. All of these aspects together support “[f]acilitating the learning of sign language and the promotion of the linguistic identity of the deaf community” as per CRPD Article 24§3(b).⁸⁹

The WFD response said a sign language environment should show respect for sign languages as equal languages, with acknowledgement that a sign language environment is best realized via bilingual education, a right that should not be denied to deaf people.⁹⁰ The WFD also stated that according to the information from forty-six countries they received, current oralist approaches in deaf education had not changed, despite CRPD ratification. Moreover, in some countries the situation has worsened because governments based on their own interpretation and understanding of inclusive education have placed deaf children in schools near their homes without ensuring a sign language education environment in direct conflict with Article 24 of the CRPD.⁹¹

A recurring issue that the WFD and EUD needed to explain post-ratification was their view on separate schools. The WFD representative Markku Jokinen, in his speech at the DGD, explicitly stated, “that from the beginning, the WFD has neither demanded special or segregated education nor regard bilingual and bicultural education as special education.”⁹² Instead, bilingual education is seen as a form of education within the inclusive education system. The two organizations stress that “separate” should be distinguished from “segregated” since placement in a sign language classroom in a specialized school for deaf people “does not necessarily mean education that ‘excludes’ or segregates.”⁹³ Instead of placing deaf children with non-signing children in the same classroom, the WFD and EUD stated, “it would be better to organise separate classes and schools for children who use sign language.”⁹⁴ When it is not possible to form such a sign language school or establish bilingual classes in each grade due to the low number of deaf

89. CRPD, *supra* note 3, art. 24 §3(b).

90. WFD, *WFD’s Response to Questions from CRPD Committee at WFD side-event on Deaf Education* (Apr. 2015) at 4, available at <https://www.google.com/url?sa=t&rct=j&q=&e&source=web&cd=2&ved=0ahUKEwi2iqTQ5pjXAhUB6xoKHbt3D6gQFggTMAE&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FHRBodies%2FCRPD%2FDGD%2F2015%2FWorldFederationOfTheDeaf1.doc&usg=AOvVaw0iucDYgQggM3KJr5ESO bNS>.

91. World Federation of the Deaf (WFD) & European Union of the Deaf (EUD), *Submission to the Day of General Discussion on the right to education for persons with disabilities*, available at <http://www.ohchr.org/Documents/HRBodies/CRPD/DGD/2015/WFDAndEUD.doc> [hereinafter WFD & EUD].

92. Jokinen, Speaker at the Day of General Discussion, *supra* note 35.

93. WFD, EUD, WFDYS, & EUDY, *supra* note 56, at 6.

94. WFD & EUD, *supra* note 93, at 4.

and signing students living in a certain area, one of the second best alternatives would be to create a “home class” for all deaf students in a regular school. In this home class, they would be taught (by deaf teachers) part of the time in their own class and part of the time in other (regular) classes by hearing teachers with itinerant deaf teachers (in parallel) or professional sign language interpreters. They referred to Finland here with a bilingual class in a regular school.⁹⁵

At the Side Event, Committee Member Theresia Degener asked whether the “WFD wanted the Committee to add a sentence in the forthcoming General Comment on Article 24 that Article 24.3 would allow segregated education” and stated that “if this is what the WFD calls for,” that would be “‘a big problem’ for the Committee.”⁹⁶ The WFD replied that “the question is not about segregated education but the optimal use of available resources.”⁹⁷ Since deaf children often live scattered across a town or country, they stated, the resources to provide a sign language learning environment in each separate school are limited. The WFD again clarified that it should be “possible to place deaf children in the same school to ensure such a sign language learning environment,” even if “the school is not geographically closest to the home of the deaf student.”⁹⁸ They asked to “[b]ear in mind the legislative history of the CRPD” and that Article 24(3) was specifically inserted to ensure the needs of deaf, deafblind, and blind children, and “to ensure they receive optimal education in classrooms alongside their peers.”⁹⁹ They stated that since this “‘sensory exception’ to the general trend of inclusive education was uncontroversial during the drafting of the CRPD,” they “expect[ed] this would continue to be uncontroversial for the CRPD committee.”¹⁰⁰

XII. GENERAL COMMENT NO. 4 ON ARTICLE 24

General Comments or General Recommendations explicate rights mentioned in a specific human rights treaty. They provide orientation for the practical implementation of human rights and form a set of criteria for evaluating the progress of states in their implementation of these rights. A General

95. *Id.* at 2–5.

96. WFD, *WFD’s Response to Questions from CRPD Committee at WFD side-event on Deaf Education* (Apr. 2015), at 4, available at <https://www.google.com/url?sa=t&rct=j&q=&e&src=s&source=web&cd=2&ved=0ahUKewi2iqTQ5pjXAhUB6xoKHbt3D6gQFggTMAE&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FHRBodies%2FCRPD%2FDGD%2F2015%2FWorldFederationOfTheDeaf1.doc&usg=AOvVaw0iucDYgQggM3KJr5ESO bNS>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

Comment does not need unanimous support from all Committee members. Instead, it represents the view of a majority of Committee members who are present at a closed session in which the General Comment is adopted. General Comments are not, themselves, treaties and thus not legally binding, but they have a highly authoritative character justified by the fact that they are the result of a comprehensive participatory process including different interest groups as well as NGOs.

During its fourteenth session, the CRPD Committee made a call for submissions regarding the draft General Comment on Article 24.¹⁰¹ In their submission, the WFD and partner organizations expressed “grave concerns” about the draft General Comment in its current form.¹⁰² In addition to the lack of “linguistic and cultural perspectives of deaf people according to Articles 2, 21, 24, and 30 of the CRPD,” the General Comment focuses mainly on regular education giving the impression that the innovative approach of the CRPD towards challenging and changing the whole education system has been side-lined. Moreover, “[s]everal paragraphs on accessibility” did “not take[] into account or adequately address concepts of linguistic and cultural accessibility . . . instead simply focusing on providing individual support in the mainstream education system.”¹⁰³ The draft did not sufficiently highlight the “importance of having teachers with disabilities and role models for students”; nor did it “explicitly clarify what ‘full inclusion’ means.”¹⁰⁴

The WFD and its partner organizations outlined areas where a sensory exception needs to be incorporated into the Committee’s understanding of inclusion. For instance, these organizations noted Paragraph 3 of the Draft of the General Comment stated, “children with disabilities, for example, have greater overall gains in academic outcomes and behaviours in inclusive environments than their peers with similar disabilities in segregated classrooms.”¹⁰⁵ In their comments, the WFD and partner organizations stated that this does not necessarily apply to deaf students and that “[i]t must be remembered that education provided for the deaf in sign language is based on the importance of language and culture, not disability.”¹⁰⁶

A key point of contention is what is meant by words such as segregation and isolation, often used as drivers for the placement of children with disabilities in local schools. Paragraph 4 of the Draft of the General Comment mentioned that “many millions of persons with disabilities continue to

101. The draft can be found at *Draft General Comment No.4, Article 24: The Right to Inclusive Education, Comm. Rts. of Persons with Disabilities*, 14th Sess., (2015), available at http://www.ohchr.org/Documents/HRBodies/CRPD/GC/DraftGC_Education.doc [hereinafter *Draft General Comment No.4, Article 24*].

102. WFD, EUD, WFDYS, & EUDY, *supra* note 56, at 1.

103. *Id.*

104. *Id.*

105. *Id.* at 2.

106. *Id.*

be denied the right to education, and for many more, such education as is available only exists in settings where they are isolated from their peers.”¹⁰⁷ The WFD replied that “[f]or deaf students, other deaf students would be their linguistic and cultural ‘peers’” and that “placing deaf students in regular schools without other deaf students would lead to their isolation, no matter how much individualized ‘support’ is provided.”¹⁰⁸ Paragraph 11 of the Draft of the General Comment highlights that “creating discrete and isolated units for students with particular disabilities within a mainstream school environment remains a form of segregation and cannot be defined as inclusive education.”¹⁰⁹ The WFD replied, “that the General Comment needs to clearly articulate how sign language learning environments and the diversity of students must be promoted as required by CRPD Article 21(e) and Article 24(3).”¹¹⁰ Paragraph 27 of the Draft of the General Comment again emphasizes the requirement of “State parties [to] ensure that children with disabilities are able to attend primary and secondary schools within the communities in which they live,” and that “[i]t is not acceptable for students to be sent away from home in order to receive an education.”¹¹¹ The WFD questioned “why schools closest to the homes of persons with disabilities are reflected as the only valid option and how freedom of choice and flexibility of the inclusive education system can be promoted to ensure that persons with disabilities receive the best educational possibilities.”¹¹² Again, they stated: “linguistically and culturally based sign language learning environments should not be seen as ‘segregated’ environments but positively as one part of a unique inclusive education system that is appreciated by many deaf students worldwide.”¹¹³

The CRPD Committee released the final General Comment at its 16th Session in August 2016. The General Comment showed little consideration of the issues raised by the WFD and other representative organizations of deaf people. Instead, it advanced two definitions of inclusion, one explicit and one implied. One definition, explicitly outlined in §12, lays out a whole systems framework for inclusion.¹¹⁴ In this framework, all levels of the educational system, from education ministries down to local schools, must ensure that all policies, procedures, and environments are accessible to all learners. This focus on systematic change is identified as “core features” of the concept “inclusive education.”¹¹⁵ This definition does not differ from the legislative history, nor does it conflict with the “sensory exception” of Article 24.

107. Draft General Comment No. 4, Article 24, *supra* note 102, ¶ 4.

108. *Id.* at 4.

109. Draft General Comment No.4, Article 24, *supra* note 102, ¶11.

110. WFD, EUD, WFDYS, & EUDY, *supra* note 56, at. 2 (emphasis removed).

111. Draft General Comment No.4, Article 24, *supra* note 102, ¶ 27.

112. WFD, EUD, WFDYS, & EUDY, *supra* 56, at 3 (emphasis removed).

113. *Id.* at 5.

114. *General Comment No. 4, supra* note 54, § 12.

115. *Id.*

It is the General Comment's second definition of the concept of inclusion that ignores the legislative history outlined in this article. Interposed at various parts throughout the General Comment are sentences that define inclusion specifically as placement among students without disabilities. In §11, the General Comment explicitly defines the concept of "segregation" (a term not found in the CRPD) as "separate environments designed or used to respond to a particular or various impairments, in isolation from students without disabilities."¹¹⁶ Although this could be helpful in clarifying inclusion for some groups, it also describes the type of environment which the sensory exception was designed to support, an exception which was seen as uncontroversial during the drafting of Article 24 and which was the intent of Article 24(3)(c). Likewise, §26 suggests a narrower form of inclusion in which students should be able to have "[a]ctive participation with other students" in local schools alongside their siblings.¹¹⁷

It is unclear how the Committee reconciles this implied focus on local schools with its call for state parties to take measures "promot[ing] the linguistic identity of the deaf community" and to give "recognition of and support for their specific cultural and linguistic identity, including sign language and deaf culture."¹¹⁸ This narrower view of inclusive education sprinkled throughout the General Comment limits any meaningful consideration of how to achieve the linguistic and cultural rights of deaf learners and the unique needs of deaf, deafblind, and blind learners. A real consideration of these rights would include the opportunity to choose from a variety of educational settings which best fit their individual needs: from placement in local schools to participation in special schools which use sign language. The General Comment's use of the term "local sign language" demonstrates this apparent lack of knowledge of the issues advanced by deaf people.¹¹⁹ The majority of sign languages used in educational settings have been long defined by national identifiers and there is no such thing as a "local" sign language.

How to explain the failure of the Committee to incorporate the legislative history of Article 24 and the views of deaf organizations into General Comment No. 4? The Sixteenth Session was the last session for a number of Committee members who have been active in the disability movement. They may have seen this as their last chance as Committee members to address an issue of intense interest. As noted earlier, a General Comment is not legally binding but gets its legitimacy from being formed in a consultative process and as being an authoritative interpretation of the Convention. The composition of the CRPD Committee at that time did not include any signing

116. *Id.* § 11.

117. *Id.* § 27.

118. *Id.* § 35.

119. *Id.* § 14.

deaf members, and efforts by deaf organizations to bring their perspectives to the Committee did not pay off in any meaningful consideration of how to interpret Article (23)(3)(c) within the framework of an inclusive education system for signing deaf learners. This apparent failure to take consultation seriously, the presence of two competing interpretations of inclusion, one explicit and one implied and at odds with the intent of Article (23)(3)(c), and an error in basic information about sign language, all raise the question as to whether General Comment No. 4 can be said to be a valid interpretation of Article 24 as it pertains to deaf learners.

XIII. CONCLUSION

This article has argued that the legislative history of the CRPD and Article 24 shows an intention to ensure deaf children are able to access educational settings where they have consistent contact with signing peers and access to sign language role models, including deaf peers and adults. Such environments may be in separate educational settings, such as deaf schools or sign language schools. The legislative history of Article 24 makes it clear that state parties and NGOs to the Convention viewed a “sensory exception” as uncontroversial. In addition, the “sensory exception” has a pre-CRPD history in several international soft law instruments showing widespread acceptance by governments over a longer period of time for deaf and deafblind children to be educated in settings with their signing peers. Thus, any interpretation of Article 24 must take into account this long history of respect for the different needs of deaf, deafblind, and blind students to the general trend toward full inclusion.

The “environments” referred to in Article 24(3) should not be seen as different from educational settings. This assessment is particularly important at this historical juncture when traditional sign language settings (deaf schools) are disappearing and deaf children are being placed in a wide variety of educational settings under the aegis of “full inclusion.” While previous generations of deaf children were educated alongside peers, this generation is being educated in widely varying settings with equally variable access to sign language. Many deaf children are placed in settings without any sign language access, whereas others attend schools with large deaf programs and deaf teachers as part of a local educational institution. There is a clear need for more research showing best practices in ensuring sign language environments for deaf children within different educational settings, from local schools to separate schools or units for deaf children. In this article, we have laid out ways in which the principles of inclusive education can be interpreted to further increase opportunities for deaf children to be educated in such environments.

Looking away from the CRPD, there are also opportunities for the use of other Conventions to promote a right to language for individual deaf children. The UNESCO Convention Against Discrimination in Education makes clear separate educational systems are not inherently discriminatory provided the education given is equal. Reasons for such separate institutions can be religious or linguistic.¹²⁰ Therefore, separate institutions for children who want to learn in sign language environments are not discriminatory and can be seen as part of an inclusive educational system. Going further, there is an opportunity to use human rights instruments to promote sign language environments for deaf children in the home as well. For example, the Committee on the Rights of the Child noted the need to support families with deaf children in learning sign language as the family's common language.¹²¹

The WFD succeeded in many of its aims during the drafting of the CRPD. However, it is in the on-going interpretation of specific articles and concepts, such as "inclusion" and "sign language environments," in which these rights will be operationalized. Clearly, there is still a need to clarify an understanding of inclusion that allows for a diverse array of educational settings that fit deaf children's linguistic and cultural needs. There are many different possibilities, from deaf schools to immersion schools for deaf and hearing children. However unpopular 24(3)(c) may be to proponents of a narrow form of inclusion, the intent of the CRPD drafters clearly allows for these options for deaf, deafblind, and blind learners. It is essential that post-ratification interpretations take into consideration *all* of Article 24, not only those sections which fit a particular ideological definition. Ultimately, the "sensory exception" demonstrates there are multiple models of inclusion beyond the simple placement of children with disabilities in local schools.

120. Convention Against Discrimination in Education 1960, *supra* note 26, art. 2.

121. *General Comment No. 9*, *supra* note 28, § 41.