



## Convention on the Rights of Persons with Disabilities

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### Committee on the Rights of Persons with Disabilities

#### Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 41/2017\*, \*\*

<i>Communication submitted by:</i>	Rubén Calleja Loma and Alejandro Calleja Lucas
<i>Alleged victims:</i>	Rubén Calleja Loma and Alejandro Calleja Lucas
<i>State party:</i>	Spain
<i>Date of communication:</i>	2 May 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 28 August 2020 (not issued in document form)
<i>Date of adoption of Views:</i>	28 August 2020
<i>Subject matter:</i>	Right to inclusive education for a child with Down syndrome
<i>Procedural issues:</i>	Admissibility; non-substantiation of claims
<i>Substantive issues:</i>	Right to inclusive education; discrimination and cruel, inhuman or degrading treatment or punishment on the basis of disability; respect for home and the family
<i>Articles of the Convention:</i>	7, 13, 15, 17, 23 and 24, read in conjunction with article 4
<i>Articles of the Optional Protocol:</i>	1 and 2

1. The authors of the communication are Rubén Calleja Loma and Alejandro Calleja Lucas, nationals of Spain who were born, respectively, on 25 August 1999 and 25 October 1962. At the time of the submission of the present communication, Rubén was a minor and was challenging the State party's administrative decision to enrol him in a special education centre on account of his Down syndrome. The authors claim that they are the victims of violations by the State party of their rights under articles 7, 13, 15, 17, 23 and 24, read in

\* Adopted by the Committee at its twenty-third session (17 August–4 September 2020).

\*\* The following members of the Committee participated in the examination of the communication: Ahmad Alsaif, Danlami Umaru Basharu, Monthian Buntan, Imed Eddine Chaker, Gertrude Oforiwa Fefoame, Mara Cristina Gabrilli, Amalia Gamio Ríos, Ishikawa Jun, Samuel Njuguna Kabue, Kim Mi Yeon, László Gábor Lovász, Robert George Martin, Dmitry Rebrov, Jonas Ruskus, Markus Schefer and Risnawati Utami.



conjunction with article 4, of the Convention. Rubén is represented by his father, Mr. Calleja Lucas.<sup>1</sup> The Optional Protocol to the Convention entered into force for the State party on 3 May 2008.

## A. Summary of the information and arguments submitted by the parties

### The facts as submitted by the authors

2.1 In September 2009, Rubén, then aged 10, entered grade 4 of compulsory primary education at the mainstream public school Antonio González de Lama de León, where he had been studying in the preceding years with the support of a special education assistant. Up to that point, his integration with his classmates and teachers at the school had been going well. However, from the outset of grade 4, Rubén's teacher, X, engaged in conduct that signalled rejection of him on account of his disability and subjected him to discrimination, neglect and abuse. In witness statements delivered on 23 January 2012 before Administrative Court No. 1 of León, the mothers of two of Rubén's classmates testified that the teacher had gone so far as to grab Rubén by the neck and threaten to throw him out of a window and had also threatened to hit him with a chair. The teacher told Rubén's parents that he was "anti-social and dangerous", and they were advised to have him transferred to a special education centre. Rubén was also physically assaulted by teacher Y, who slapped him several times. Although Rubén's parents reported these incidents to the Provincial Director of Education, no investigation was undertaken.

2.2 On 1 December 2009, a psychoeducational report was drawn up; it stated that Rubén had "attention deficit and disruptive behaviour disorder" and it even alluded to a form of "oppositional defiant disorder". In January 2010, the school asked the behavioural support team to intervene and a social worker began to work periodically with Rubén at school and provide educational guidance to his family and the teaching staff.

2.3 In September 2010, Rubén entered grade 5 of compulsory primary education with teacher Z. From the beginning of term up until 28 October 2010, Rubén received no support from the special education assistant, unlike in previous years, because teacher Z did not consider it necessary. Only after his parents had submitted complaints about the matter was Rubén allowed to have the support of his assistant. However, the teacher displayed a negative attitude and was uncooperative towards the assistant. The authors also state that on 19 January 2011 another teacher engaged in conduct that signalled rejection of Rubén and asked his father to have him transferred to a special education centre. The neglect and abuse by teaching staff continued, yet the school's management failed to take any measures to resolve the situation, in spite of the complaints submitted by Rubén's parents to the Provincial Directorate of Education.

2.4 On 13 December 2010, social worker B wrote a socioeducational report regarding Rubén, in which she stated that, according to Rubén's parents, in grade 4 of primary school Rubén began to exhibit signs of difficulty in adapting to the school environment because of a poor relationship with his teacher. The social worker made a positive assessment of Rubén's state in the areas of sensory processing, motor skills, personal autonomy, communication and specific skills. She concluded, upon analysis of the school environment, that "taking into account the complications that have arisen in the dynamics of the student's relationships with his teachers, other professionals and other students in the school, it seems reasonable for Rubén to transfer to another school (albeit one with similar characteristics and resources). It is not necessary to study the case in any great depth to arrive at the conclusion that, here, the child is accustomed to giving inappropriate responses; moreover, it is very difficult to alter such a complex and deep-rooted dynamic. These two factors make the situation practically irreversible and very harmful for both parties, although fundamentally for the child, who is the most vulnerable party (firstly, because he is still developing as a person and, secondly, because he is "handicapped" (*deficiente*)).<sup>2</sup> The social worker indicated that the management teams should define a process for Rubén's

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<sup>1</sup> Rubén provided a power of attorney that he had signed, authorizing his father to represent him.

<sup>2</sup> The Committee stresses that the term "handicapped" (*deficiente*) is not in accordance with the principles of the Convention, since it likens disability to a handicap (*deficiencia*), which it is not. The Committee calls upon States parties, their agents and the general population to use the term "persons with disabilities".

education and ensure that a framework for cooperation with his family was in place for the sake of his personal well-being and well-being in school. The authors stress that the social worker did not consider it at all necessary for Rubén to be placed in a special education centre.

2.5 On 17 December 2010, a report on Rubén's schooling was drawn up without his parents' authorization having been sought. The report mentions Rubén's "disruptive behaviour", "psychotic outbreaks" and a general developmental delay "associated with Down syndrome". This terminology is more appropriate to clinical psychology than to a psychoeducational report and, given their area of expertise, the report's authors were not qualified to make such observations, which focus on Rubén's psychological disability. The authors of the report did not meet with or interview the parents. The authors indicate that the report has significant shortcomings, as it does not provide a full picture of the circumstances described above as regards the abuse and lack of educational support that Rubén experienced.

2.6 On 21 March 2011, after Rubén's parents had expressed their disagreement with the first report, a second schooling report was drawn up, with which Rubén's parents also expressed their disagreement. The report recommended that Rubén should be placed in a special education centre. The report's conclusion is invalid, because it does not take into account the discrimination and abuse suffered by Rubén. This is clear from the following quotation from the report: "The teaching staff treat the child well. Currently, relations are being completely undermined by the child's behavioural problems and the teaching staff's difficulty in handling them."

2.7 On 6 May 2011, Rubén's parents reported the abuse and discrimination suffered by Rubén during the 2009/10 and 2010/11 school years to the León juvenile prosecution service. Their report was shelved on 4 October 2011, "since [...] the actions of the teaching staff are not considered to constitute the criminal offence of assault, coercion or abuse of [Rubén] and [it is] not the responsibility of [the] prosecution service, but rather that of other judicial bodies, to resolve other aspects covered in the report of 6 May 2011".<sup>3</sup>

2.8 On 20 June 2011, the Provincial Directorate of Education authorized Rubén's enrolment in the special education centre Nuestra Señora del Sagrado Corazón en León.

2.9 On 19 September 2011, Rubén's parents filed an appeal with Administrative Court No. 1 of León, through a special procedure for the protection of fundamental rights, challenging the decision of the Provincial Directorate of Education. They requested the Court to declare the decision null and void and to recognize Rubén's right to be educated in a mainstream public school. They argued that the decision violated the following constitutional rights: the right to equality (art. 14) in relation to the right to education (art. 27), and the right to moral integrity of the child (art. 15) in relation to the principle of human dignity (art. 10 (1)).

2.10 On 20 July 2012, Administrative Court No. 1 of León dismissed the appeal filed by Rubén's parents. The Court considered that the decision of the Provincial Directorate of Education did not violate any constitutional rights. The Court referred to the jurisprudence of the Constitutional Court, which states: "In conformity with the settled jurisprudence of this Court, the principle of equality 'before or in the law' places upon the legislator the duty to give equal treatment to those in equal legal situations."<sup>4</sup> The Court considered that in the present case there had been no violation of the rights to equality and education since Rubén is not in the same legal situation as other children without disabilities, hence there is no legislative duty of equal treatment.

2.11 In its ruling, the Court states that "only with individual attention and the support of specialist teachers who have been working with [Rubén] for a long time can an acceptable response be provided to the learning needs". The ruling also states that it cannot be "claimed that the administration failed to provide the student with the necessary support and assistance [...]. Such support has been provided throughout the child's education and he has in fact been educated until this point in a mainstream school with the support of a

<sup>3</sup> The authors provided a copy of the report filed with the prosecution service of León Provincial High Court, dated 4 October 2011.

<sup>4</sup> Administrative Court No. 1 of León refers to Constitutional Court Judgment No. 33/2006 of 13 February 2006 in paragraph 3 of its ruling.

special education assistant, a hearing and language specialist and a therapeutic education specialist. A separate matter, however, is that a point has been reached in the child's educational and behavioural development at which his inclusion can no longer be ensured with the resources available to the administration which, as stated in the 2009 ruling of the Burgos Chamber of the High Court of Justice of Castile and León, 'are what they are'."

2.12 On 24 September 2012, Rubén's parents filed an appeal with the Administrative Chamber of the High Court of Justice of Castile and León against the ruling of Administrative Court No. 1 of León. They asked that the ruling be quashed and again requested that Rubén's right to be educated in a mainstream public school be respected. The parents stressed that the ruling ignored the abuse suffered by Rubén and the administration's duty to provide reasonable accommodation at the mainstream public school that he attended. They also claimed that the judgment omitted any mention of the inconsistency between the schooling report and the social worker's report. Lastly, they claimed that the ruling ignored the expert evidence that they had submitted, namely the report of clinical psychologist G.C., according to which Rubén's difficulties in adjusting to schooling in the mainstream public school were due to a lack of educational support and the discriminatory, hostile environment that he experienced there. They reiterated that, contrary to what is stated in the ruling, Rubén did not have a special education assistant at the beginning of the 2010/11 school year, and that when such an assistant was later assigned, in the words of the assistant herself, the teacher "completely ignored and gave up teaching" Rubén. The authors argued that the Court's statement to the effect that Rubén could no longer be educated in a mainstream school because the resources available to the administration "are what they are" was "untenable and completely unfounded". They reiterated the point that Rubén had had the necessary support until the events described above unfolded and that, given Rubén's characteristics as a child with Down syndrome, such resources could perfectly well have been provided in a mainstream school. This is evidenced by the fact that the vast majority of children with Down syndrome attend mainstream public schools, as the expert G.C. pointed out, a claim that has never been denied.

2.13 On 22 March 2013, the High Court of Justice of Castile and León rejected the appeal, claiming that there had been no violation of the right to equality (Constitution, art. 14) in relation to the right to education and the principle of human dignity (Constitution, arts. 27 and 10 (1)).<sup>5</sup> The Court, in line with the ruling of Administrative Court No. 1 of León, concluded that there can be no valid comparison between children with disabilities and children without disabilities, and that, as a result, the enrolment of children with disabilities in special education centres cannot be considered to constitute discrimination. In its ruling, the Court recognized that "in fact, the situation in the school in recent years was not appropriate to [Rubén's] needs, the attitude of part of the teaching staff was not at all cooperative; moreover, the school's reaction to the teaching staff's actions was not what was immediately required of it (admitting, at least for the purposes of the argument, the serious accusations made against several teachers [...]), there could even have been some abnormal functioning, but such was the climate in the school where the child was receiving assistance and an education". This notwithstanding, the Court reiterated its view that the administrative decision was justified because, as indicated in the two schooling reports issued on 17 December 2010 and 21 March 2011 respectively, the child demonstrated "considerably delayed educational and cognitive development, in addition to some behavioural problems of particular relevance, including psychotic outbreaks involving disruptive behaviour". It considered that the report of the expert G.C. failed to provide sufficient guarantees of accuracy and independence that could nullify the two reports written by the administration. It also considered Rubén's specific support needs to fall into both the area of special education and the area of behaviour modification. According to the Court, this circumstance, coupled with the fact that Rubén only responds acceptably to learning activities when they involve individual attention from specialist teachers who have a long-term relationship with him, mean that he should no longer attend a mainstream school.

2.14 On 30 April 2013, Rubén's parents filed an appeal for *amparo* with the Constitutional Court against the ruling of the High Court of Justice of Castile and León.

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<sup>5</sup> The authors provided a copy of ruling No. 00491/2013 of the High Court of Justice of Castile and León, dated 22 March 2013.

They claimed a violation of the right to education (Constitution, art. 27) in conjunction with the right to equality (Constitution, art. 14). On 31 March 2014, the Constitutional Court informed the author that the appeal had been rejected, given the manifest absence of any violation of a fundamental right covered by *amparo*.<sup>6</sup>

2.15 On 14 May 2013, Rubén's parents filed a second report with the León provincial prosecution service regarding the discrimination and abuse suffered by Rubén at the school. This report included new evidence in the form of information reflected in the ruling of the High Court of Justice of Castile and León, in particular the statements of the mothers of Rubén's classmates and the Court's assertion that "there could even have been some abnormal functioning" in the school. On 8 October 2013, the prosecution service decided that the case should remain closed, in line with its previous decision, since it had not found the actions of the teachers and school staff to constitute "degrading treatment of a habitual nature or a sufficient intensity, or a specific, malicious intent to harass, denigrate or humiliate".<sup>7</sup>

2.16 On 12 May 2014, the León provincial prosecution service submitted a report to Court of Investigation No. 3 of León regarding Rubén's parents' decision not to take him to the Nuestra Señora del Sagrado Corazón special education centre, where he was enrolled. The prosecution service claimed that their actions constituted the criminal offence of neglect. On 23 May 2014, the Court ordered each defendant to provide a surety of €2,400 to cover any pecuniary obligations that may ultimately be imposed on them, with a warning that if they failed to do so, their assets would be seized in sufficient quantity to secure the amount indicated. On 20 April 2015, Criminal Court No. 1 of León acquitted Rubén's parents of the charges of neglect.<sup>8</sup>

2.17 On 26 September 2014, Rubén's parents took their case to the European Court of Human Rights and asked the Court to find a violation of article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and to order the State party to pay the author the sum of €100,000 in compensation for the personal injury caused. On 13 April 2014, the application was found inadmissible under articles 34 and 35 of the Convention pursuant to a decision of the Court sitting in single-judge formation.<sup>9</sup>

### **The complaint**

3.1 The authors claim that Rubén is the victim of a violation of article 24 of the Convention, insofar as the administrative decision to enrol him in the Nuestra Señora del Sagrado Corazón special education centre resulted in a violation of his right to inclusive education. They claim that the courts of the State party dismissed their request primarily on the basis of the guidance team's reports, which were prepared in close cooperation with and at the behest of the teachers who subjected Rubén to rejection, discrimination, neglect and abuse, with no respect for his rights or dignity. They also claim that the right of Rubén's parents to be an active and respected party to the whole process was violated.

3.2 The authors claim that there has been a violation by the State party of article 23 of the Convention in relation to the accusation of neglect made by the León provincial prosecution service against Rubén's parents. They claim that this could have led to the loss by Rubén's parents of their custodial authority. They argue that their right to family life was violated, since the decisions of the State party's authorities implied Rubén's internment and separation from his parents.

3.3 The authors also claim that Rubén is the victim of a violation of article 7, insofar as the State party has not taken the necessary measures to ensure his full enjoyment of all human rights and fundamental freedoms on an equal basis with other children.

<sup>6</sup> The authors provided a copy of the decision of the Constitutional Court, dated 31 March 2014.

<sup>7</sup> The authors provided a copy of the decision of the León provincial prosecution service, dated 8 October 2013.

<sup>8</sup> The authors provided a copy of the ruling of Criminal Court No. 1 of León, dated 20 April 2015.

<sup>9</sup> The authors provided a copy of the standardized decision of the European Court of Human Rights of 13 November 2014, in which the Court states that their case "does not meet the admissibility criteria set out in articles 34 and 35 of the Convention".

3.4 The authors further claim that a violation of article 13 of the Convention has occurred, since none of the rulings, decisions or decrees issued by the authorities of the State party during the domestic proceedings has referred to the Convention or the right to inclusive education, whereas the authors have referred to both in every document that they have submitted.

3.5 The authors maintain that Rubén is the victim of a violation of article 15 read in conjunction with article 17 on account of the rejection, discrimination, neglect and abuse that he suffered during the academic years 2009/10 and 2010/11 at Antonio González de Lama de León mainstream public school. They add that the mistreatment that Rubén suffered at the hands of teaching staff endangered his physical integrity. They claim that the León provisional prosecution service, which was twice informed of the events that had occurred, never offered to meet with Rubén’s parents, ignored the witness evidence and did not take any action to protect Rubén’s rights.

3.6 Lastly, the authors claim that they are the victims of a violation of article 4 of the Convention, since the State party has not yet adopted a legislative framework, an education policy or administrative measures that could ensure the full realization of Rubén’s human rights to inclusive education, despite the fact that the Convention entered into force for the State party on 3 May 2008.

#### **State party’s observations on admissibility**

4.1 On 26 December 2017, the State party submitted its observations on the admissibility of the communication. It requested that the communication should be shelved or declared inadmissible.

4.2 The State party recalls that, in their complaint, the authors requested, as a remedy, that “Rubén [be allowed to] study a module of adapted basic vocational training for administrative assistants and that, on completion of this module, he [be able to] certify the studies he has completed”. In this regard, the State party provides a report from the León regional government office attesting to the fact that, in the 2017/18 school year, Rubén was admitted to grade 1 of basic vocational training in administrative services at the publicly subsidized private educational centre “Down León Amidown Amigos del Síndrome de Down”.<sup>10</sup>

4.3 The State party concludes that since the authors’ requested remedy has been provided, they no longer have an interest in proceeding with the communication and it is therefore no longer appropriate to “make claims regarding the admissibility and merits” of the communication.

#### **Authors’ comments on the State party’s observations**

5.1 On 1 February 2018, the authors submitted their comments on the State party’s observations. They confirm that Rubén is enrolled in the 2017/18 school year at the publicly subsidized private educational centre “Down León Amidown Amigos del Síndrome de Down”. However, contrary to the assertions made by the State party, this does not mean that their request for action to be taken in compliance with article 24 of the Convention regarding the right to inclusive education has been met. They assert that the centre where Rubén studies is “fundamentally a special centre” for persons with Down syndrome. It is not a mainstream educational establishment. There are six students enrolled in the course and they are all persons with intellectual disabilities and special educational needs. The authors contend that Rubén’s right to inclusive education cannot be said to have been realized. They disagree with the State party’s assertion that they no longer have an interest in pursuing the request submitted to the Committee, an assertion which they claim is unfounded.

5.2 They reiterate that their intention is to ensure the recognition of Rubén’s right to undertake basic vocational training in delivery of administrative services within the mainstream education system, with the necessary adaptations being made according to his special educational needs, and to ensure that at the end of his studies he obtains an official certificate attesting to the studies he has completed.

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<sup>10</sup> The State party also provided a definitive list of all students over the age of 17 who are enrolled in basic vocational training, in which Rubén’s name features.

5.3 They explain that Rubén had to enrol in the “Down León Amidown Amigos del Síndrome de Down” centre because there were no adequate mainstream educational establishments in his city or in the surrounding area offering real, effective and high-quality inclusive education.

5.4 The authors reiterate their claims regarding the violation of their rights under articles 4, 7, 13, 15, 17 and 23 of the Convention and note that the State party has not commented on these allegations.

#### **Additional submissions by the parties**

6.1 In its observations of 30 May 2018, the State party argues that the authors have deviated from their initial request by citing violations of articles 4, 7, 13, 15, 17 and 23 of the Convention in their comments.<sup>11</sup> In response to what the State party considers to be the subject of the communication, namely the violation of article 24 of the Convention, it reaffirms that the authors’ request for reparation has been satisfied.

6.2 Both the module that Rubén is studying and the centre that teaches it are part of the State party’s mainstream education system. Order No. EDU/465/2017 of 13 June 2017<sup>12</sup> provides the following:

First. [...] The renewal of the education grant agreements signed by the private educational establishments listed in annexes I, II and III is hereby approved with the amendments set out in those annexes: (a) Annex I: Renewal of education grant agreements on the second cycle of nursery education, primary education, compulsory secondary education and baccalaureate programmes; (b) Annex II: Renewal of education grant agreements on vocational training; (c) Annex III: Renewal of education grant agreements on special education. Second. New agreements under the education grant agreements system. New agreements under the education grant agreements system signed by the private educational establishments and courses listed in annexes IV and V are hereby approved: (a) Annex IV: New agreements under the education grant agreements system in the area of vocational training; (b) Annex V: New agreements under the education grant agreements system in the area of special education.

6.3 The State party indicates that the “Down León Amidown Amigos del Síndrome de Down” centre appears in annex IV (new agreements under the education grant agreements system in the area of vocational training). This shows that the centre has signed an agreement to provide basic vocational training, not an agreement to provide special education as in the case of the establishments listed in annexes III and IV. It adds that the centre is listed in the Regional Ministry of Education directory of institutions as a private specialized training centre.

6.4 On 19 September 2018, the authors submitted additional comments, stating that the administrative services module taught at the Amidown private centre is not designed to be inclusive: it is a basic vocational training programme for students with special educational support needs. They reiterate that both Rubén’s family and the families of his classmates are aware that their children are not receiving an inclusive education, but that they consider it to be the “least worst option” offered by the State party in the absence of educational institutions in the area offering opportunities for real and effective inclusion. They explain that in the city of León there are two related modules on offer, the administrative services programme at Ordoño II secondary school and the agriculture, gardening and botanical studies programme at Juan del Enzina secondary school.

6.5 The fact that these modules are offered in mainstream public or private schools is not a guarantee of their inclusivity, since they are taught in segregated classrooms for students with special educational support needs. Moreover, “schooling in an educational establishment of any kind cannot constitute high-quality inclusive education if, in reality, the segregation [previously] experienced continues in practice”.

<sup>11</sup> The Committee notes that these articles of the Convention were also mentioned in Rubén’s initial complaint.

<sup>12</sup> Order No. EDU/465/2017 of 13 June 2017 approving new agreements under the education grant agreements system, the renewal of existing education grant agreements, and amendments for the school years 2017/18 to 2022/23.

6.6 Lastly, the authors reiterate their allegations with regard to the violation of articles 4, 7, 13, 15, 17 and 23 of the Convention. They have not received adequate protection from the administration or effective protection of their rights under the Convention and the State party's Constitution. Rubén's rights to equality and non-discrimination on the ground of his disability have been violated, which has had a grave impact on his dignity and moral integrity.

6.7 Order No. EDU/465/2017 of 13 June 2017, which continues to prop up a segregated special education system contrary to the Convention, was issued after the Committee had visited the State party. Following its visit, the Committee concluded that: "An inclusive system based on the right to non-discrimination and equal opportunities requires the abolition of the separate education system for students with disabilities."<sup>13</sup> Furthermore, the authors recall that Rubén's parents were prosecuted on criminal charges of neglect for demanding the protection of Rubén's right to inclusive education on an equal basis with others and that the very tough process of defending the fundamental right to inclusive education, which lasted more than seven years, took a high toll on their personal, family and social life and on their health and finances. They point to the Committee's recommendation that the State party should "ensure that the parents of students with disabilities cannot be prosecuted for neglect if they demand that their children's right to inclusive education on an equal footing be respected".<sup>14</sup> They request "true and proper compliance with the Convention to prevent the repetition of these serious violations of the Convention, which are causing [Rubén] a great amount of actual harm, since he continues to suffer from a lack of protection from discrimination and the violation of his fundamental rights".

## B. Committee's consideration of admissibility and the merits

### Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the case is admissible under the Optional Protocol.

7.2 The Committee notes that the authors submitted an application to the European Court of Human Rights based on the same facts as those presented to the Committee. By a decision of 13 November 2014, the European Court found that the application "did not meet the admissibility criteria set out in articles 34 and 35 of the Convention [on Human Rights]". The Committee recalls that, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of a case, "the same matter" should be deemed to have been examined within the meaning of article 2 (c) of the Optional Protocol.<sup>15</sup> However, given the brevity of the decision rendered by the European Court and, in particular, the absence of any argument or clarification explaining the rejection of the application on the merits,<sup>16</sup> the Committee is not in a position to determine with any certainty whether the case presented by the authors has already been the subject of an examination, however limited, on the merits.<sup>17</sup> The Committee thus finds that article 2 (c) of the Optional Protocol does not constitute a barrier with regard to the admissibility of the present communication.

7.3 The Committee notes the authors' claim that they have exhausted all effective domestic remedies available to them. In the absence of any objection by the State party in that regard, the Committee considers that the requirements of article 2 (d) of the Optional Protocol have been met.

7.4 The Committee further notes the State party's argument that the communication should be declared inadmissible because the authors' request for reparation has been met,

<sup>13</sup> CRPD/C/ESP/IR/1, para. 81. See also para. 79.

<sup>14</sup> *Ibid.*, para. 84 (e).

<sup>15</sup> See, in this regard, *V.F.C. v. Spain*, (CRPD/C/21/D/34/2015), para. 7.2, and also *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; and *A.M. v. Denmark* (CCPR/C/16/D/121/1982), para. 6.

<sup>16</sup> *V.F.C. v. Spain*, para. 7.2; *X v. Norway* (CCPR/C/115/D/2474/2014), para. 6.2.

<sup>17</sup> *V.F.C. v. Spain*, para. 7.2; *Mahabir v. Austria*, para. 8.3.



insofar as Rubén was admitted in the 2017/18 school year to grade 1 of basic vocational training in the delivery of administrative services at the publicly subsidized private educational centre “Down León Amidown Amigos del Síndrome de Down”. However, the Committee also notes that the authors do not consider their request to have been met, as the centre is not a mainstream educational establishment and the training that Rubén is undertaking is not inclusive in approach but is tailored exclusively to students with special educational support needs. Moreover, the Committee notes the authors’ allegations that the State party violated their rights under the Convention by virtue of the fact that: (a) the administrative decision to enrol Rubén in the Nuestra Señora del Sagrado Corazón special education centre – a decision which was upheld by the State party’s courts – violated his right to an inclusive education; (b) the accusation of neglect made by the León provincial prosecution service against Rubén’s parents on the ground that they had refused to take him to a special education centre violated Rubén’s right to family life; (c) the alleged acts of discrimination and abuse suffered by Rubén have not been properly investigated by the State party’s authorities; (d) the State party has not taken the necessary steps to ensure that Rubén enjoys all his rights on an equal basis with other children; and (e) the State party has not yet adopted a legislative framework or an effective policy that ensures the full realization of Rubén’s human rights, despite the fact that the Convention entered into force for the State party on 3 May 2008. In view of the above and given that the State party has not commented on any of the above allegations, the Committee considers that the authors have sufficiently substantiated their claims for the purposes of admissibility.

7.5 The Committee also takes note of the authors’ allegations that the State party violated Rubén’s rights under article 13 of the Convention, since none of the rulings, decisions or decrees issued by the authorities of the State party refers to the Convention, whereas the authors cited it frequently throughout the domestic proceedings. However, the Committee considers that these allegations have not been sufficiently substantiated for the purposes of admissibility, since the authors do not provide any information regarding a lack of training programmes for persons working in the administration of justice in the State party. It therefore declares them inadmissible in accordance with article 7 (f) of the Optional Protocol.

7.6 Consequently, and in the absence of any other obstacles with regard to admissibility, the Committee finds the communication admissible under article 2 of the Optional Protocol as regards the authors’ claims of the violation of articles 24, 23, 7, 15 and 17 of the Convention, read alone and in conjunction with article 4, and proceeds to its consideration of the merits.

### **Consideration of the merits**

8.1 The Committee has considered the present communication in the light of all the information that it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of the Committee’s rules of procedure.

8.2 With regard to the allegations of a violation of article 24, the Committee notes that, according to the authors, the administrative decision to enrol Rubén in the Nuestra Señora del Sagrado Corazón special education centre – a decision upheld by the State party’s courts – violated his right to an inclusive education. The Committee notes the authors’ allegations that this decision was taken on the basis of two reports drawn up by the guidance team in close cooperation with and at the behest of the teachers at the mainstream school that Rubén attended, who allegedly subjected him to discrimination and abuse. The Committee also notes that the State party has provided no response to these allegations. The Committee further notes that, as pointed out by the authors, from the information available in the communication it does not appear that the State party’s authorities have carried out a reasonable assessment or an in-depth, detailed study of Rubén’s educational needs and the reasonable accommodations that he would have needed in order to be able to continue attending a mainstream school. In this regard, the Committee notes that Administrative Court No. 1 of León states, in its ruling, that “only with individual attention and the support of specialist teachers who have been working with [Rubén] for a long time can an acceptable response be provided to the learning needs”, and that, although the administration had until that time supported Rubén’s inclusion in a mainstream school, a point had been reached in his educational and behavioural development at which such inclusion could no longer be ensured with the resources available to the administration,

“which are what they are”. The Committee also notes that: Rubén did not have a special education assistant at the beginning of the 2010/11 school year, since the teacher had decided that an assistant was not needed; the assistant was only assigned later, at the request of Rubén’s parents; and the assistant has stated that, following her assignment, the teacher “completely ignored and gave up teaching Rubén”.

8.3 In addition, the Committee notes that the decisions issued by the judicial authorities of the State party do not give any weight to the report drawn up by the clinical psychologist G.C. indicating that Rubén’s difficulties in adjusting to schooling in the mainstream establishment were due to a lack of educational support and the discriminatory, hostile environment that he experienced there. The Committee notes that the information provided does not show that all reasonable accommodation measures possible were taken to enable the author to study in a mainstream educational establishment.

8.4 The Committee recalls that “in accordance with article 24 (1), States parties must ensure the realization of the right of persons with disabilities to education through an inclusive education system at all levels, including preschool, primary, secondary and tertiary education, vocational training and lifelong learning, extracurricular and social activities, and for all students, including persons with disabilities, without discrimination and on an equal basis with others”.<sup>18</sup> The Committee also recalls that “inclusion involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and the environment that best corresponds to their requirements and preferences”.<sup>19</sup> The Committee further recalls that “the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation and must be understood in the context of the duty to provide accessible learning environments and reasonable accommodation”.<sup>20</sup>

8.5 The Committee recalls the context in which these events occurred. It recalls that in its inquiry concerning Spain under article 6 of the Optional Protocol to the Convention, it concluded that: (a) in the State party “a structural pattern of discriminatory exclusion and educational segregation on grounds of disability has been perpetuated, by means of a medical model, which disproportionately and particularly affects persons with intellectual and psychosocial disabilities and persons with multiple disabilities”;<sup>21</sup> (b) “given the number, continuing nature and diversity of violations found and the fact that they are interlinked on a permanent and continuous basis, and taking into account that such violations result in large part from the system established by legislation, policies and institutional practices [...] the findings of the present inquiry are reliable and indicate grave or systematic violations within the meaning of article 6 of the Optional Protocol and rule 83 of the Committee’s rules of procedure”;<sup>22</sup> and (c) “in accordance with its jurisprudence and its general comment No. 4, the Committee recalls that an inclusive system based on the right to non-discrimination and equal opportunities requires the abolition of the separate education system for students with disabilities”.<sup>23</sup>

8.6 The Committee also recalls its expression of concern, in its most recent concluding observations concerning the State party, about the “limited progress made by the State party with regard to inclusive education, including the lack of a clear policy and action plan for the promotion of inclusive education. The Committee is particularly concerned that the State party has maintained all regulatory provisions on special education and a medical impairment-based approach. The Committee is concerned that a high number of children with disabilities, including autism, intellectual or psychosocial and multiple disabilities, are still receiving segregated special education.”<sup>24</sup>

8.7 With regard to the authors’ claim that Rubén is the victim of a violation of article 24 read in conjunction with article 4 of the Convention, since the Convention entered into

<sup>18</sup> General comment No. 4 (2016) on the right to inclusive education, para. 8.

<sup>19</sup> *Ibid.*, para. 11.

<sup>20</sup> *Ibid.*, para. 13.

<sup>21</sup> CRPD/C/ESP/IR/1, para. 74.

<sup>22</sup> *Ibid.*, para. 79.

<sup>23</sup> *Ibid.*, para. 81.

<sup>24</sup> CRPD/C/ESP/CO/2-3, para. 45.

force for the State party on 3 May 2008, but the State party has not yet adopted legislation or policies that ensure Rubén's right to inclusive education, the Committee recalls that: "For article 4 (1) (b) of the Convention to be implemented, States parties should take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities and that are in violation of article 24. Where necessary, discriminatory laws, regulations, customs and practices should be repealed or amended in a systematic and time-bound manner."<sup>25</sup>

8.8 For the above reasons, the Committee considers that the administrative decision to enrol Rubén in a special education centre without taking into account the opinion of his parents, without effectively exploring the possibility of making reasonable accommodations that could have allowed him to remain in the mainstream education system, without giving any weight to the reports of the clinical psychologist and the special education assistant, and without taking into account the authors' allegations regarding acts of discrimination and abuse suffered by Rubén in the mainstream school, constitutes a violation of his rights under article 24 of the Convention read alone and in conjunction with article 4.

8.9 With regard to the allegations related to article 23 read in conjunction with article 4 of the Convention, the Committee notes the authors' claim that the State party violated their right to family life by accusing the parents of neglect on the ground that they had refused to take their child to the Nuestra Señora del Sagrado Corazón special education centre. The Committee notes the authors' claim that if the accusation had been successful, it could have caused the parents to lose custody of their child. The Committee also notes that, according to the information available in the communication, on 23 May 2014, the Court ordered Rubén's parents to provide a surety of €2,400 each pending the outcome of the trial. This was ordered as a precautionary measure, on pain of the seizure of their assets. The Committee notes that this precautionary measure was only lifted almost a year later, on 20 April 2015, when the parents were acquitted. The Committee considers that this surety placed an excessive financial burden on Rubén's parents, which compounded the tensions arising from their struggle for the recognition of their child's rights to inclusive education, and that this undoubtedly had a negative impact on their personal and family well-being.

8.10 In this regard, the Committee recalls that in its inquiry concerning Spain under article 6 of the Optional Protocol it urged the State party to "ensure that the parents of students with disabilities cannot be prosecuted for neglect if they demand that their children's right to inclusive education on an equal footing be respected".<sup>26</sup> In the light of the arguments set forth in the preceding paragraph, the Committee finds that the State party failed to discharge its obligations under article 23 of the Convention read alone and in conjunction with article 4.

8.11 The Committee also notes the authors' allegations that during the 2009/10 and 2010/11 school years, Rubén was subjected to discrimination and abuse in the Antonio González de Lama de León mainstream public school, which endangered his physical integrity and undermined his dignity, in violation of his rights under article 15 read in conjunction with article 17 of the Convention. In particular, the Committee notes that: (a) according to witness statements made before Administrative Court No. 1 of León, the mothers of two of Rubén's classmates testified that his teacher grabbed him by the neck and threatened to throw him out of the window and also threatened to hit him with a chair; and (b) the authors claim that Rubén was physically assaulted by a teacher, who slapped him several times.

8.12 The Committee recalls that under article 15 of the Convention no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the State party must take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities from being subjected to torture or cruel, inhuman or degrading treatment or punishment. The Committee recalls that under article 17 of the Convention every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others. In this regard, the Committee notes that the ruling of the High Court of Justice of Castile and León recognized that "in fact, the situation in the school in recent years was not appropriate to [Rubén's] needs, the attitude

<sup>25</sup> General comment No. 4, para. 19.

<sup>26</sup> CRPD/C/ESP/IR/1, para. 84 (e).

of part of the teaching staff was not at all cooperative; moreover, the school's reaction to the teaching staff's actions was not what was immediately required of it (admitting, at least for the purposes of the argument, the serious accusations made against several teachers [...]), there could even have been some abnormal functioning, but such was the climate in the school where the child was receiving assistance and an education".

8.13 The Committee also notes the authors' claim that the León provincial prosecution service, which was twice informed of the events that had occurred, closed the case. In particular, the Committee notes that, in their second report, the authors included new evidence in the form of information contained in the ruling of the High Court of Justice of Castile and León regarding the statements of the mothers of Rubén's classmates, who testified to the abuse that he had suffered, and the Court's statement that "there could even have been some abnormal functioning" in the school. The Committee considers that, faced with such information, the authorities of the State party had an obligation to carry out an effective and thorough investigation into these allegations, but it failed to do so. In the light of the above and in the absence of any comments from the State party in this regard, the Committee considers that the State party has violated Rubén's rights under articles 15 and 17 of the Convention read alone and in conjunction with article 4.

8.14 Having found violations of the authors' rights under the aforementioned articles of the Convention, the Committee does not consider it necessary to examine the same allegations under article 7 of the Convention.

8.15 The Committee recalls that, pursuant to article 4 of the Convention, States parties have the general obligation to take all necessary measures to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities. Thus, in the light of the arguments set forth in the preceding paragraphs, the Committee finds that the State party failed to discharge its obligations under articles 7, 15, 17, 23 and 24 of the Convention, read alone and in conjunction with article 4.

## C. Conclusion and recommendations

9. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under articles 7, 15, 17, 23 and 24 of the Convention, read alone and in conjunction with article 4. The Committee therefore makes the following recommendations to the State party:

- (a) Concerning the authors, the State party is under an obligation to:
  - (i) Provide them with an effective remedy, including reimbursement of any legal costs they have incurred, together with compensation, taking into account the emotional and psychological harm they have suffered as a consequence of the treatment they received and the way their case was handled by the authorities;
  - (ii) Ensure that Rubén is admitted to a truly inclusive vocational training programme, in consultation with him and with his parents;
  - (iii) Conduct an effective investigation into the allegations of abuse and discrimination reported by the authors and ensure accountability at all levels;
  - (iv) Publicly recognize, in accordance with the present Views, the violation of the rights of Rubén, a child, to inclusive education and to a life free from violence and discrimination, as well as the violation of the rights of his parents, who were wrongly charged with the criminal offence of neglect, which had psychological and financial consequences;
  - (v) Publish the present Views and circulate them widely in accessible formats so that they are available to all sectors of the population.

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In this regard, the Committee refers to the recommendations contained in its concluding observations (CRPD/C/ESP/CO/2-3, paras. 46 and 47) and in its inquiry concerning Spain under article 6 of the Optional Protocol (CRPD/C/ESP/IR/1). In particular, it requests the State party, in close consultation with persons with disabilities and the organizations that represent them, to:

- (i) Expedite legislative reform, in line with the Convention, to fully eliminate the medical model of disability and clearly define full inclusion of all children with disabilities and its specific objectives at each level of education;
- (ii) Take measures to ensure that inclusive education is considered as a right, and grant all students with disabilities, regardless of their personal characteristics, the right of access to inclusive learning opportunities in the mainstream education system, with access to support services as required;
- (iii) Formulate a comprehensive, inclusive education policy with strategies for promoting a culture of inclusion in mainstream education, including individual rights-based assessments of educational needs and necessary accommodations, support for teachers, respect for diversity in ensuring the rights to equality and non-discrimination, and the full and effective participation of persons with disabilities in society;
- (iv) Eliminate any educational segregation of students with disabilities in both special education schools and specialized units within mainstream schools;
- (v) Ensure that the parents of students with disabilities cannot be prosecuted for neglect if they demand that their children's right to inclusive education on an equal basis with others be respected.

10. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee, within six months, a written response, including any information on action taken in the light of the present Views and recommendations of the Committee.

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