

**Advance Unedited Version**Distr.: General  
28 March 2025

Original: English

**Committee on the Rights of Persons with Disabilities****Views adopted by the Committee under article 5 of the  
Optional Protocol, concerning communication No. 82/2020<sup>\*,\*\*</sup>**

Communication submitted by:	Günter Handke and Kirsten Wilke (represented by Olivier Tolmein)
Alleged victim:	Christoph Jo Handke
State party:	Germany
Date of communication:	9 July 2019 (initial submission)
Date of adoption of views:	19 March 2025
Subject matter:	Free access to inclusive secondary school of a child with disabilities.
Procedural issues:	Exhaustion of domestic remedies; substantiation of claims; victim's status
Substantive issues:	Right to inclusive education, reasonable accommodation, accessibility
Articles of the Convention:	5 (3), 7 (1), 9 and 24 (1) and (2)
Articles of the Optional Protocol:	1, 2 (d) (e)

1.1 The authors of the communication are Günter Handke and Kirsten Wilke. They act on behalf of their son, Christoph Jo Handke, a national of Germany born on 16 May 2001, who lacks sufficient capacity to consent. The authors allege a violation of Christoph's rights under articles 5 (3), 7 (1), 9 and 24 (1) and (2) of the Convention. The Optional Protocol entered into force for the State party on 26 March 2009. The authors are represented by counsel.

1.2 On 17 February 2023, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the State party's request to examine the admissibility separately from the merits.

\* Adopted by the Committee at its thirty-second session (3–21 March 2025).

\*\* The following members of the Committee participated in the consideration of the communication: Muhannad Salah Al-Azzeh, Magino Corporán Lorenzo, Gerel Dondovdorj, Mara Cristina Gabrielli, Amalia Gamio Rios, Natalia Guala Beathyate, Laverne Jacobs, Rosemary Kayess, Miyeon Kim, Alfred Kouadio Kouassi, Abdelmajid Makni, Floyd Morris, Christopher Nwanoro, Gertrude Oforiwa Fefoame, Markus Schefer and Hiroshi Tamon. Pursuant to rule 60 of the rules of procedure, Inmaculada Placencia Porrero did not participate in the examination of the communication

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

### **Facts as submitted by the authors**

2.1 Christoph has tuberous sclerosis, a genetic disease characterised by epileptic seizures and cognitive impairments. His mental development was severely impaired in infancy by frequent epileptic seizures. In 2008, he started an inclusive primary school, attended by pupils both with and without disabilities. The authors note that this inclusive education was highly beneficial for Christoph, allowing him to develop excellently according to his abilities, to make significant progress in practical life and to make friends.

2.2 The law of the federal state of Saxony-Anhalt, where the authors reside, provides for four years of primary school attendance. The authors wanted Christoph to later attend an inclusive secondary school, which would offer joint target-differentiated education for children with and without disabilities. On 20 October 2011, they submitted an application to the State School Authority requesting information as to schools in their district which could provide such education. The State School Authority scheduled a meeting to discuss this question but later adjourned it. On 12 January 2012, the authors filled in a school career declaration form stating that they wished their son to attend a school with joint, inclusive education and that both public and private schools were eligible. As they received no proposal from the authorities, they started enquiring on their own. Two schools informed them that inclusive schooling would not be possible. A third school, the Alexander-von-Humboldt school, (Humboldt school), stated during a discussion held on 1 February 2012 that it did not have the necessary personnel and material capacities for schooling children with intellectual disabilities and that Christoph's attendance was strongly discouraged. The only remaining school in the district was the Käthe-Kruse-Förderschule, a school exclusively for children with intellectual disabilities.

2.3 On 6 March 2012, the authors contacted the Saale school, located in Halle, about 60 km from their residence. This private school could not offer admission for the 2012-2013 school year and was the only inclusive school within reachable distance which would accept the author for the 2013-2014 school year. The authors applied for their son to remain in primary school for an additional fifth year in order to avoid his referral to a school for children with intellectual disabilities. In a school career declaration form of 15 February 2013, the authors requested his admission to a public secondary school with inclusive education for children with and without disabilities. They enclosed a letter specifying why attendance of an inclusive school was necessary for their son's intellectual development and affirming that a public school was their preferred option. They pointed out that they had been looking for such a school since October 2011. The only inclusive school within reachable distance being the private Saale school, they requested that the author be assigned to it.

2.4 On 2 May 2013, the State School Authority invited the authors to an expert commission meeting. The latter acknowledged that Christoph's inclusive education at primary school had had a positive impact on his development and confirmed that schools in their district were not suitable for further inclusive schooling. Both the general speaker for secondary schools and the representative of the State School Authority strongly advised against Christoph's attendance of Humboldt school because there was no prospect of inclusive education there due to class sizes and available resources. The authors were informed that he could only be assigned to a public school and that he would be assigned through an allocation order to the Humboldt school or to the Käthe-Kruse-Förderschule for children with intellectual disabilities.<sup>1</sup> Upon their request, the State School Authority agreed to include an additional line in the school allocation order, dated 16 May 2013, according to which it did not raise objections to Christoph's enrolment at the Saale school. The allocation order also stated that support of an integration assistant was recommended to ensure Christoph's successful schooling in joint lessons and that application for such support could be made at the Social Welfare Office.

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<sup>1</sup> The authors parents provide a personal record of the meeting taken from memory, signed by both of them and by the head of Montessori School in Naumburg, who assisted to the meeting.

2.5 The authors enrolled Christoph in the private Saale school in the 2013-2014 school year as they were convinced that this was the only school offering inclusive education. The state school law stipulates that authorities must ensure transport of a school-age child to the nearest school of the type chosen by the pupil, the “nearest school” being understood as the school the pupil is assigned to in the official allocation order (§ 71 Paragraph 2 Sentences 2 and 5 of the School Act LSA). Because of his disability, Christoph cannot use public transport to travel a distance of 60 km to Saale school, which is why he needs a private driver or a cab to go to school, which results in monthly travel expenses of 2,000 €. He also needs an integration assistant to assist him during the travel. In total, the authors have to pay over 30,000 € yearly in order to offer him inclusive education.

2.6 On 22 June 2013, the authors applied to the administrative Burgeland district for the reimbursement of his travel expenses to Saale school. On 16 August 2013, their application was rejected by the Burgeland district on the basis that he had not been officially assigned to the Saale school by the School Authority. For the same reasons, the Social Welfare Office of Sachsen-Anhalt refused to bear the costs of his travel assistance by an integration assistant, which amount to 800 € per month.

2.7 The authors challenged the school allocation order of 16 May 2013 before the Administrative Court of Halle alleging a violation of their son’s right to inclusive education, which was not granted at any public school, and requesting his reassignment to the Saale school, because of the decisive importance that the allocation order has for all subsequent decisions concerning travel and assistance expenses. They were not assisted by a lawyer.

2.8 By a judgment of 28 March 2014, the Court dismissed their complaint as inadmissible arguing that the authors lacked right of action as they could not claim to have any entitlement for the allocation by the school authority to Saale school, meaning that the school authority’s refusal to make such an order cannot infringe on or violate any of Christoph’s rights. The right to bring an action requires that the existence of the plaintiffs’ claim appears to be at least possible. The court considered that it was impossible from the outset that they could have a right to the requested allocation order to the Saale school. The court found that there was no possible legal basis for such claims. The court clarified that it would have been conceivable to officially order the attendance of a state school outside the responsible school district. However, the education law does not allow the School Authority to allocate private schools in the school allocation orders.

2.9 On 3 June 2014, the authors filed an appeal with the Saxony-Anhalt Higher Administrative Court, this time with legal assistance. They pointed out that the first instance court had erroneously assumed that they had been primarily concerned with their son’s assignment to the Saale school rather than with his assignment to a school suitable for inclusive education. The Saale school was merely the only factually suitable inclusive school within an accessible distance. The authors had simply considered more practical to bring a concrete action for assignment to the Saale school instead of a general action for inclusive education. The authors stated that if the court of first instance considered this to have a decisive detrimental effect on the admissibility of the action, it should have pointed this out to them within its legal duty of care. Instead, the court had imposed excessive requirements for the right to bring an action. The authors set out that the right to bring an action arises from the required interpretation of the state school law in the light of the prohibition of discrimination of persons with disabilities under article 3.3 of the Basic Law.

2.10 On 17 November 2015, the Saxony-Anhalt Higher Administrative Court rejected the application for the admission of the appeal. The Court stated that Christoph’s right to inclusive education had not been infringed as the transportation costs were merely an indirect legal consequence of the authors’ decision and that there was no discernible reason for their son’s assignment to a private school after he had been admitted to this school by means of a school contract. With regard to the misjudged claim, the court stated that the Administrative Court was not obliged to provide legal advice to claimants. It stated that private school autonomy outweighed the request for reimbursement of pupil costs. The Court pointed out that the prohibition of discrimination under article 3.3 sentence 2 of the Basic Law had not been violated because Christoph had been provided with inclusive education at the private school of his choice.

2.11 The authors submitted a hearing complaint against this decision. They complained that both courts had completely disregarded the fact that his attendance at the private school was a consequence of the refusal by the State School Authority to offer him inclusive education at a public school. By a resolution of 9 December 2015, the Saxony-Anhalt Higher Administrative Court dismissed the complaint.

2.12 On 22 December 2015, the authors lodged a complaint with the Federal Constitutional Court alleging violation of the prohibition of discrimination under article 3.3 of the Basic Law in conjunction with articles 24 para 2, 7 and 9 of the Convention. By a decision of 22 June 2017, the Court refused to consider their complaint without providing any reasons.

2.13 The authors also initiated parallel proceedings before the Administrative Court of Halle and the Halle Social Court to request the reimbursement of his travel costs and travel assistance. Both proceedings were suspended pending the final decisions of the Administrative Courts and the Federal Constitutional Court. Despite the final decision having been adopted, in German procedural law, a suspended procedure remains suspended until it is reopened by one of the parties. The authors have chosen not to reopen the suspended proceedings until the Committee adopts a decision on his communication. They claim that reopening the proceedings today would have no prospect of success following the dismissal of their complaints by the Saxony-Anhalt Higher Administrative Court and the Federal Constitutional Court.

### **The complaint**

3.1 The authors allege a violation of their son's right to inclusive education without discrimination under article 24 of the Convention, read in conjunction with its article 5(3). They claim that the State party did not grant their son a possibility of obtaining free inclusive education and that the State School Authority's school allocation order of 16 May 2013 legally excluded him from the general education system by assigning him to a school not suitable for his disability. The allocation to a "special" school for children with intellectual disabilities, in addition to his allocation to the unsuitable public school, meant that his entire social and professional life would be directed towards a parallel system for persons with intellectual disabilities. This allocation order induced the refusal by other authorities to reimburse his transportation costs. They claim that the conduct of the public authorities aims at producing segregation and isolation of pupils with disabilities. They underline that their child can only attend a mainstream integrative secondary school rather than being permanently placed in the system of "special" schools, because of their extremely costly, time and energy consuming commitment.

3.2 The authors argue that national courts misinterpreted national law by considering that there was no possibility of his allocation to a private school. They also claim that the courts' reasoning according to which private school autonomy outweighs his right for free integrative schooling, is contrary to the Convention, particularly when the private system is the only system of school education that can actually be used. The authors label as absurd the statement of the Halle Administrative Court according to which it was legally impossible for them to claim official allocation to a private inclusive school because they had already concluded a contract with this school.

3.3 Referring to the Committee's General Comment No. 4, the authors allege a violation of their son's right to reasonable accommodation. Their son has a right to reasonable accommodation meaning individually tailored support measures to enable his school attendance. They state that the State School Authority acted contradictorily, both acknowledging that support of an integration assistant was recommended for him to be able to pursue schooling in joint lessons and ordering his school allocation in such a way that joint lessons would not be provided and the costs of integration assistance could not be reimbursed. They submit that their son suffers a triple discrimination. First, his journey to school is considerably longer and more expensive than that of pupils without disabilities because there is no integrative school in the immediate vicinity. Second, his travel costs are not borne by the public authorities unlike the travel costs of other schoolchildren. Third, the costs of his travel assistance, which he needs because of the particularly long journey to school, are not reimbursed.

3.4 The authors submit that the State School Act of Saxony-Anhalt is not sufficiently adapted to the requirement of promoting equality under article 5 para 3 of the Convention. According to this law, in exceptional cases, attendance of a school in another district may be ordered. However, according to the interpretation by the national authorities and courts, only public schools are concerned.

3.5 The authors submit that the aforementioned violations are aggravated by the fact that their son is a minor and is subject to particular protection under article 7(1) of the Convention. They claim that according to his best interest as a child, inclusive education must be preferred to isolated instruction at a “special” school exclusively for persons with intellectual disabilities.

3.6 Finally, the authors submit that according to article 9 of the Convention and the Committee’s General comment No. 2, the State party shall establish educational institutions and programs without discrimination. This requires the complete educational system to be universally accessible, including curricula, teaching materials, teaching methods, assessment procedures and language and support services. The State party shall promote inclusion and equal treatment of pupils with disabilities, including transportation, and make education at all levels affordable for persons with disabilities. Reasonable accommodation must not create additional costs for pupils with disabilities. According to the authors, the criteria of equal accessibility are not fulfilled in his case because no public educational institution was willing to provide their son with joint target-differentiated education with curricula and teaching materials adapted to his disability, and because his transportation and travel support expenses place a considerable burden on them.

3.7 The authors request that the Committee draw the attention of the State Party to the violations of the Convention and recommend that appropriate steps be taken to remedy his situation. A retroactive amendment of the school allocation order and of decisions related to reimbursement of transportation and assistance costs may be considered. He also requests reimbursement of legal costs related to preparation of this communication and to domestic procedures.

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

4.1 In its observations of 22 March 2021, the State party notes that on 22 June 2013, the authors applied for the continuation of school transport for their son after the change of school to Saale school in school year 2013/2014. The Burgenland District, as provider of school transport, is only obliged to provide transport to or reimburse the necessary expenses of travelling to the nearest state school of the chosen school type, pursuant to section 71 (2) of the Saxony-Anhalt School Act (Schulgesetz des Landes Sachsen-Anhalt – SchulG LSA) in conjunction with Burgenlandkreis District’s school transport statutes. The nearest school is the school of the respective school district, according to the school development plan. According to section 71 (2) SchulG LSA, the nearest school may also be such school the attendance at which is ordered by the school authority. In the case of the authors’ son, no such order was issued regarding the Saale school. On 16 May 2013, the Saxony-Anhalt School Authority rather found that both the secondary school Humboldt school and the “special” school “Käthe-Kruse-Schule” Naumburg (Käthe-Kruse-Schule) were suitable schools for the authors’ son within his school district. The State party argues that the School Authority could not have decided otherwise. An assignment to the Saale school would only have been possible under the condition that this specific school, which is a private school, was the only school where the authors’ son could have been educated in an inclusive manner. This was not the case because the Humboldt school in Naumburg was able to provide inclusive education.

4.2 The State party submits that the authors have exhausted domestic remedies only with respect to one specific aspect of the dispute, namely their request to be assigned to the Saale school by the School Authority. In this respect, no further remedies were available to them after the Halle Administrative Court, the Magdeburg Higher Administrative Court and the Federal Constitutional Court had dealt with the matter.

4.3 It argues that from a legal point of view, however, the assignment order constitutes only a side issue of the dispute. It emphasizes that the State Party’s authorities did not prevent

the authors' son from attending the school of his choice. On the contrary, in its notice of 16 May 2013 the School Authority explicitly acknowledged the authors' wish for him to attend the Saale school. The authors' challenge of the School Authority's omission to formally assign him to the Saale school was therefore not directed at any change in the authors' son's schooling situation. The authors' son enjoyed inclusive education at a school of his choice at all times. The State party argues that the aim of the proceedings with regard to the assignment was rather to establish the pre-conditions for a reimbursement of the extra costs (travelling expenses in particular) caused by the attendance of the Saale school.

4.4 While it is true that in case of a formal assignment to the Saale school the author undoubtedly would have been entitled to reimbursement, the question of reimbursement nevertheless was not a subject of these proceedings. This question is rather still open and to be resolved in the suspended proceedings before the Halle Administrative Court and the Halle Social Court. No rule of national procedural law prevents the authors from reopening the suspended proceedings. Both the decisions of the administrative and the social courts will then, in case of need, be subject to further judicial review. The State party therefore notes that in substance, the courts are, in principle, still free to conclude that the authors, due to his son's specific situation, should be entitled to reimbursement. It would be up to the courts to examine whether the authors' son's schooling in the Humboldt school, as a question of fact, would have been in line with the requirements of the Convention. Should this be answered in the negative, they could consider whether this gave rise to a claim for reimbursement in order to comply with the Convention.

4.5 In its judgment of 28 March 2014 the Halle Administrative Court explicitly left open whether inclusive education would have been feasible at the Humboldt school since this aspect was irrelevant for question of a formal assignment to the Saale school. Accordingly, this is an aspect which could be reconsidered by the courts in the proceedings which are suspended. The State party argues that the authors have not elaborated on the prospect of success of reopening of the proceedings that are currently suspended. It argues that this is confirmed by their statement that they decided not to reopen the suspended domestic proceedings because they first wish to wait for a decision of the Committee. The State party argues that this approach is obviously incompatible with the article 2 (d) of the Optional Protocol.

4.6 The State party further submits that the communication should be found inadmissible as manifestly ill-founded under article 2 (e) of the Optional Protocol. It argues that the authors' claims are based on the assumption that the State party authorities denied their son the possibility of inclusive education in the community where he lives and that it was only due to their financial capabilities and commitment that he nevertheless could attend an inclusive school. It argues that this assumption is incorrect as he could have attended the Humboldt school in Naumburg, which offers inclusive education. The State party claims the authors have not submitted conclusive evidence that Humboldt-Schule was not inclusive. The authors refer to the minutes of a meeting of 2 May 2013 which only reflects the individual memory of the authors and is only signed by them and the head of the Montessori school. Even this document however confirms that the school authority would have assigned the author to the Humboldt school if that had been the wish of his parents. Further, by letter of 8 July 2013, the School Authority informed the Burgenland district that all material and personnel requirements were available at both state schools in Naumburg or would have been made available in case of need in a similar way to Saale school: "the necessary conditions for inclusive education are available at the above-mentioned state schools, or can be created, in a way similar to the Saale School". This letter was made known to the authors. The authors' son would have been among the first pupils with intellectual disabilities to attend the secondary school Humboldt school. The school would have received appropriate personnel and professional support. In addition, he would have had an assistant accompanying him in everyday school life. In the school years 2013/2014-2015/2016 two trained "special education" teachers and two additional teachers with further training in inclusive education were employed at the Humboldt school. About 6% of the pupils in the joint classes had "special needs". Accordingly, the necessary prerequisites for a joint schooling were given. In years 2013/2014 and 2014/2015 there was one child with intellectual disabilities at the school.

4.7 As a consequence, a possible violation of Article 24 has not been demonstrated by the authors. The authors' son enjoyed inclusive education at all times as he could enrol the Saale school as desired by them. Inclusive education would also have been available in his community. For the same reasons the alleged violations of articles 5, 7 and 9 of the Convention are unfounded. The authors' son was offered inclusive education in Naumburg. The extra costs incurred were therefore not necessary to achieve the aim of inclusive education as provided for by the Convention.

### **Authors' comments on the State party's submission**

5.1 In their comments of 14 April 2022, the authors reiterate their claim that there were no school in Naumburg that offered inclusive education to their son and maintain their claim that the Humboldt school did not offer inclusive education. They claim that there is no concrete evidence for the assertion of the school authority of Saxony-Anhalt that the necessary conditions for inclusive education were available or could be created. The fact that Humboldt school did not appear to be a suitable institution for inclusive education emerges from the discussion held on 2 May 2013 by a specialist commission. However, the State party describes the presentation in the communication as unsubstantiated because the document presented was based only on the recollections of the parents and a representative from the Montessori school. In that regard, the authors refer to a second minutes of that meeting that was located as part of the students' file in the Saale school where the admission to a "specialized" school is recommended as a better alternative. The possibilities of support, communicated in the conversation, are a two-hour contingent for common instruction at the school which is in no way sufficient for inclusive education.

5.2 The authors maintain that generally in Germany the insufficient staffing and material resources for inclusive education at general schools leads to students with impairments receiving less support than is possible and necessary and that inclusive education is then perceived as unsatisfactory in secondary schools. Inclusive education requires more, experience and human and material resources that just a few "common lessons" accompanied by "special needs" teachers in between. In the German system of state schools, children are carefully segregated between grammar schools, comprehensive schools, lower secondary schools and "special" schools, according to academic performance and where appropriate, the nature of their disability. The authors did not want to choose a school that the school authority merely claimed could educate the author inclusively, without being able to demonstrate relevant experience and rely on corresponding concepts and resources.

5.3 The authors refer to the substantive experience of the Saale school in inclusive education since 2007, including the recognition received and the public information provided by the Saale school about inclusive education on their website while none is provided in the Humboldt school website. They maintain that only the possibility of being able to attend the independent Saale school ensured their son the possibility of a secondary school career. The fact that according to the State party, in Humboldt school in two years there was only one student with an intellectual impairment enrolled at the school and in 2015/2016 none underlines the statement of the school authority in the discussion of the expert commission that the Humboldt school is probably unsuitable for students with cognitive impairments. That's why the authors did not want their son to be the first and only child with cognitive impairment at the Humboldt school to try out whether inclusion can work, even though the school authorities actually think it is wrong.

5.4 The authors argue that they have exhausted all available domestic remedies. They refute the State party's claim that the domestic proceedings relating to their son's entitlement to be assigned to the Saale school was of a secondary nature to his claims. They note that a formal order from the School Authority assigning him to the Saale school is a mandatory prerequisite for the reimbursement of this travel costs. They further note that this issue has been conclusively ruled on by the courts, which found that the School Authority did not have to assign him to Saale school. They argue that contrary to the argument by the State party, the examination of whether the Humboldt school would have fulfilled the requirements of integrated schooling is not a matter pending examination, in view of the already existing final decision as to his son's assignment to Saale school. They further argues that it would be unreasonable to require him to further pursue domestic remedies in the State party, having

pursued the initial proceeding to the Constitutional Court, especially taking into account the time, effort and expense it would take to pursue further proceedings.

### **State party's observations on the merits**

6.1 In its observations of 13 June 2023, the State party maintains its request to reject the author's communication as inadmissible and in the alternative to find that the communication is without merits.

6.2 Regarding the admissibility concerning the victim status, the State party considers that while in the present case the authors do not explicitly claim a violation of a right under the Convention on their behalf, it cannot be ignored that the grievance that sparked the dispute in the beginning was that the authors had to bear the burden of paying the costs for transportation and travel assistance. The communication expressly states that it was the parents' income, not their son's, on which inclusive education supposedly depended. The aim of the proceedings before the national courts was thus to achieve the reimbursement of these costs. It was not their aim to enforce inclusive education on behalf of their son. This right was, undisputedly never denied. For these reasons the State party expresses its doubts whether in substance the present communication serves the implementation of their son's rights under the Convention or whether it should not rather be considered as an attempt to compensate the authors' expenses. The authors, however, do not qualify as persons with disabilities in the sense of Article 1 of the Convention and can therefore not claim to have victim status.

6.3 The State party claims that it has not violated article 24 in conjunction with article 5(3) of the Convention, as the authors' son was not excluded from the general education system. The authors' reasoning that the allocation order according to which, *inter alia*, the Humboldt school was the responsible state school for the authors' son, excluded him from the general education system amounts to a contradiction. The Humboldt school undisputedly is a mainstream secondary school which could have been attended by the author. This is true both in terms of law and in terms of fact. It refers to Section 1 (3a) of the School Act of Saxony-Anhalt (SchulG LSA) which explicitly provides that "students with special educational needs and students without special educational needs are educated together if the parents of the students with special educational needs apply for this, if the personnel, material and organizational facilities are available or can be created in accordance with the budgets and if the individual support needs can be met with joint schooling and education. Parents receive comprehensive advice for their decision about the further educational path of their children."

6.4 In the present case, the school authority, in full accordance with the SchulG LSA, acknowledged that the mainstream Humboldt school was the competent state school and that the authors' son had the right to attend this school. In particular, the school authority affirmed that the necessary conditions for inclusive education are available, *inter alia*, at the Humboldt School and could be improved in a way similar to the Saale School. The State party refers to the letter of the Saxony Anhalt School Authority dated 8 July 2013. By this, the school authority at the same time expressed that according to its estimation the further requirements of Section 1(3a) SchulG LSA were fulfilled in case of the authors' son, meaning the personnel, material and organizational facilities were available and could be improved in accordance with the budgets and the individual support needs of the authors' son that could be met.

6.5 The authors decided not to exercise their son's right to inclusive education at the Humboldt school. The decision not to exercise a right must, however, not be confused with the exclusion from a right. Such an exclusion never took place. At no time the school authority denied the authors' son right to inclusive education.

6.6 The State party neither violated the authors' son's right of equal access to free secondary education on an equal basis with others in the community in which he lives. Their assertion that no single state school in the responsible school district or otherwise within an accessible distance was able to fulfil the aforementioned rights is contested by the State party. The authors' son was also not denied free education since his attendance at the Humboldt school in Naumburg would have been free. Possible travel costs to the Humboldt school as



the nearest school could have been reimbursed in accordance with the laws of the State of Saxony-Anhalt. Furthermore, the authors cannot argue that their son had an individual right under the Convention to free access to Saale school because this school, due to its longer experience with joint schooling, may have been better prepared to offer inclusive education. The Convention does not provide for a right to access a specific school that the parents considered the best for their child, it only requires access to inclusive, quality and free education. This would have been granted by the Humboldt school in Naumburg. The authors cannot claim that the rejection of their applications to reimbursement of costs for transportation and travel assistance violates the right to access to free education. These costs cannot be attribute to the State party. They exclusively resulted from the authors' individual decision to enrol their son at the Saale school and thus not to exercise his right to free inclusive education at the Humboldt school. The State party submits that the minutes of the 2 May 2013 meeting of an expert commission cannot be considered as conclusive evidence of what exactly was said during the meeting as they were drafted according to the memory of the parents and the head of the Naumburg Montessori school and was not signed by the other persons present in the meeting. Even if the minutes were considered authentic, they reveal that the meeting took place at a time when the authors' decision to enrol their son at the Saale school was already final. While the school authority identified some obstacles regarding education at the Humboldt school, at the same time it illustrated the options to overcome them. As to the second minutes, the State party notes that the document is not signed by the persons present and that it cannot be excluded that it constituted only a draft which was not yet finally consolidated.

6.7 Concerning the authors' statement that they were reluctant to enrol his child in the Humboldt school "as the first and only child with a cognitive impairment", the State party submits that this is irrelevant from a legal point of view. Inclusive education is deprived of its chance to become a practiced standard at all general schools if schools without extensive experience regarding inclusive education were principally avoided by students with disabilities. Any such school without these experiences must, at a certain point in time, be attended by the "first" student with a disability. Otherwise, inclusive education would be doomed to remain an exception. While the authors' decision not to make use of this opportunity must be respected, there is no legal reason under the Convention or national law to honour this decision by an entitlement to compensation for the accompanying additional costs. These costs are not caused by a failure of the State party to implement inclusive education but solely on the individual decision of the authors.

6.8 The State party submits that the authors' son was not discriminated on the basis of his disability. On the contrary, he is treated on an equal basis with others, namely with students who, for whatever reason attend schools that are not the nearest school to the place where they live and whose transportation costs are therefore not borne by the public either. To reimburse the authors the costs of transportation to the Saale school would thus be equivalent with granting the author more rights than the general population.

6.9 The State party submits that it has not violated article 5 (3) of the Convention. The authors' son's right to reasonable accommodation would have applied to his attendance of the Humboldt school, as it provided inclusive education. The opportunity was offered to the authors' son, however, the authors decided otherwise. Accordingly, there is no need to decide whether the national courts were under an obligation to apply the SchulG LSA in a manner that would have resulted in the author's right under national law to be officially assigned to the Saale School. Article 5 (3) Convention did not require such an interpretation since such an assignment was no precondition for the exercise of the authors' son's right to inclusive education.

6.10 The State party also submits that there has not been a violation of article 7 of the Convention. At no point in time "the best interests of the child" have been impaired by the State party. The school authority fully respected the authors' evaluation that it was in the best interest of their son to attend the Saale school instead of a "special" school or the Humboldt school. Even if it was the school authority's assessment, assuming that the minutes of the meeting of 2 May 2013 were authentic, that the school that suited the authors' son the best was in fact the Kathe Kruse "special" school, such an assessment constituted no more than an opinion and was undisputedly not enforced vis a vis the authors' son.

6.11 The State party further submits that it has not violated article 9 of the Convention. The authors' argument that the State party violated this because costs of transportation and travel assistance were not reimbursed is not valid. Firstly, the authors' son was not denied access to transportation to the Saale school. Transport was successfully provided by a cab company on a daily basis. Secondly, under the Convention, the authors' son had no individual right to free access to a particular school of his preference. Article 24 (2) (b) of the Convention only grants access to inclusive, quality and free education in general. The State party fulfilled this obligation by providing an opportunity for inclusive education at the Humboldt school in Naumburg. Therefore, costs for transport and travel assistance cannot be considered to constitute an obstacle to accessibility of the school environment in the sense of Article 9 (1) of the Convention that would have had to be eliminated by way of reimbursement. Accessibility of the school environment was sufficiently ensured by granting access to secondary education in Naumburg, the community where the authors' son lived.

6.12 Finally, the State party submits that no systematic failure to implement article 24 of the Convention has been established by the author in Germany or in the State of Saxony-Anhalt. In order to ensure implementation of the right to education without discrimination as guaranteed in Article 24 of the Convention, the federal states in the Federal Republic of Germany have gradually created an inclusive education system at all levels through a wide range of legal, financial and actual measures. Extensive inclusion concepts, programs and action plans have been launched in all States to enable the equal participation of persons with disabilities in the education system. This does not mean that the structural duality between general schools and "special" schools has been completely abandoned. In some States, "special" schools are an important part of the school system; they usually have small classes and well-trained specialists. The State of Saxony-Anhalt also took a series of steps to ensure the right to inclusive education, not only amending its school legislation but also adopting a State action plan concerning the implementation of the Convention on 25 May 2021 which updated the former State action plan of 2013, including goals on inclusive education. The progress in realizing inclusive education is also reflected in a constantly increasing number of students with "special educational needs" who are educated at general schools in Saxony-Anhalt. The number of students with cognitive impairments tripled from 37 to 121 in Saxony-Anhalt in the past ten years (2011 to 2020). Therefore, the authors' contention of a general systematic failure to implement inclusive education in accordance with Article 24 CRPD cannot be sustained.

#### **Authors' comments on the State party's submission**

7.1 In their comments of 26 January 2024, the authors reiterate that they have exhausted domestic remedies by bringing their complaint up to the Federal Constitutional Court. These proceedings are the main proceedings, and not a secondary aspect as the State party claims. The non-allocation of the authors' son to the Saale school which was refused by the competent school authorities of the State party is the core of the violation of article 24 of the Convention and the centre of the proceedings for an actual inclusive education of the author without discrimination.

7.2 The authors submit that their son's right to inclusive education without discrimination asserted in their complaint is his most personal right, for the legal and actual realisation of which, his parents, as his legal representatives, are responsible. The fact that the authors, had to bear the costs of his transport in his interest was in order to enable his inclusive school education without discrimination and does not render the communication inadmissible.

7.3 The author submits that the complaint is also well-founded. In the absence of an alternative of public inclusive education, the parents turned to the private Saale school which had extensive and good experience with inclusive education based on the requirements of the Convention. They refer to the meeting in May 2013 and reiterate that there are two minutes of this meeting, one that the parents draw up after the meeting and another one that was initially only contained in the pupil file kept by the Saale school and which appears to have been written by a school officer but was not personally signed. Both records are similar in content and document that education in the non-inclusive "special" school for persons with intellectual disabilities was considered as a better alternative by the authorities. The State party, which had initially characterised the parents' minutes as insufficient evidence because

they originated from the parents concerned, now also casts doubt on the evidential value of the second minutes because they are not signed by hand and it can therefore "not be ruled out" that they are merely a draft. The authors consider that the authorities are obliged to document their behaviour and communication and to keep these files. Moreover, even an unconsolidated version should express the content of the conversation at least reasonably plausibly. Since the internal affairs of the authority are a matter for the State party, it could have conducted its own investigations to clarify the facts. If it had done so, it would be appropriate to present these investigations transparently and conclusively; if it had not done so, the question would be why not.

7.4 In view of this, it seems understandable that the authors reacted with little optimism to the letter of 8 July 2013. The letter merely states in sober words and with a vague formulation that "at the above-mentioned state schools, the necessary conditions are available or can be created for joint teaching, as at the Saale school". The letter was received in July just a few weeks before the start of the school year and it remains unclear what the state education authority understands by "necessary conditions". In May 2013, just a few weeks earlier, it was announced that there was only a two-hour quota for joint lessons at the school. The two hours a week cannot be used to provide inclusive lessons that meet the requirements of the concept of inclusive education in accordance with the General Comment No. 4 and the article 24 of the Convention.<sup>2</sup> Such rudimentary concept does not correspond to the conditions at the Saale school.

7.5 The authors consider that it is up to the school authorities and society as a whole to build up appropriate structures on the basis of the knowledge already known, to impart specialist qualifications and to create appropriate conditions (for example through general curricula, a sufficient number of teachers with appropriate prior training, social pedagogues, through intensive communication with pupils with disabilities, their parents, corresponding specialist and self-representation associations) in which experience can then be gained by all. Sending individual pupils to a non-inclusive environment where there are no separate curricula, two support lessons per week, no prepared and evaluated appropriate arrangements, on the other hand, leads to failure because inclusion can only be experienced as a lack of provision.

7.6 Schools in the state of Saxony-Anhalt and Germany are far away from achieving inclusive education. The term "inclusion" is only used once in the 2018 Education Act of the state of Saxony-Anhalt. Only a few of the schools in the state school system have inclusive teaching and learning concepts. Inclusion at school is particularly difficult because there are insufficient resources and no generally recognised educational concept, because the needs of pupils for inclusive education are not assessed and because no common and individual goals have been formulated that are to be achieved at school for all pupils and for individual pupils.

7.7 The discrimination experienced by the authors' son in violation of Article 24 of the Convention is essentially that he did not have access to inclusive, quality and free secondary education on an equal basis with other children in the community in which he lives, contrary to Article 24(2)(b), that no reasonable accommodation was made for him, that he was not provided with the necessary support within the mainstream school system to facilitate his successful education and that he was not provided with personalised support in an environment that allowed for the best possible educational and social development. Instead, the authors spent a long time trying in vain to contact the school authorities to negotiate precisely these conditions. This communication only led to a first meeting a short time before the complainant started secondary school, at which a non-inclusive path was recommended instead of the inclusive path. Although it was claimed that the authors' son could also be educated inclusively at a general education school, this claim was made very late and was not substantiated. Ultimately, what was offered was not inclusive education, but a rudimentary integrative programme that was not based on a concept, at least not one that had ever been presented to the authors in a coherent manner. As far as is known, it did not contain any inclusive elements, neither then nor in the period thereafter. However, article 24 of the Convention is precisely intended to prevent individual pupils from having to decide in favour

<sup>2</sup> In the minutes is not specify whether is two hours per week or per day, it only mentions "2 lessons quota for joint lessons at the school".

of inclusion in an environment in which there is neither a concept nor experience, but at best hopes whose disappointment is foreseeable.

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

### **Consideration of admissibility**

8.1 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 communication is admissible under the Optional Protocol.

8.2 The Committee also takes note of the State party's argument concerning the victim status that, in the present case, it would seem that the victims are the authors of the communication as they claim that they have to bear the burden of paying the costs for transportation and travel assistance and that the aim of the proceedings before the national courts was to achieve the reimbursement of these costs. However, the Committee also takes note of the authors' argument that they were claiming their son's right to inclusive education without discrimination. In that regard, the Committee also notes that Christoph lacks sufficient capacity to consent and that the parents were therefore unable to obtain his consent to submit the communication on his behalf. The Committee considers that it is evident from the present communication that the alleged victim is the authors' son, a person with recognised disabilities within the meaning of article 1 of the Convention, and that he is claiming his right to inclusive education through the authors' representation. Therefore, the Committee concludes that the authors have *ius standi* under article 1 of the Optional Protocol and that it is not precluded from considering the present communication on the basis of this provision.

8.3 The Committee notes the State party's argument that the authors have exhausted domestic remedies only with respect to one specific aspect of the dispute -their request to have the school allocation order amended so that their son be assigned to the private Saale school by the School Authority-, but that they have not exhausted domestic remedies in respect to their request to be reimbursed for the travel to the Saale school and the travel assistant, as the proceedings before the Halle administrative court and the Halle social court were suspended pending the decision of the other proceedings. According to the State party both the decisions of the administrative and social courts will then, in case of need, be subject to further judicial review. The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success, but that mere doubts as to the effectiveness of those remedies do not absolve the author from the obligation to exhaust them.<sup>3</sup> In the present case, the Committee notes the authors' assertion that the reopening of the proceedings would have no prospect of success following the dismissal of their complaint to have the school allocation order amended by the Higher Administrative Court and the Federal Constitutional Court. In that connection, the Committee notes the authors' argument that a formal order from the School Authority assigning him to the Saale school was a mandatory prerequisite for the reimbursement of the travel costs. Therefore, and taking into consideration that the authors have exhausted the domestic remedies up to the Federal Constitutional Court in the proceedings aiming to amend the school allocation order, the Committee considers that the complaint is admissible in accordance with Article 2 (d) of the Optional Protocol.

8.4 The Committee further considers the State party's argument that the communication should be found inadmissible as manifestly ill-founded in accordance with article 2 (e) of the Optional Protocol. However, the Committee considers that the authors have sufficiently substantiated, for the purposes of admissibility, their claims related to their son's right to inclusive education and non-discrimination and therefore considers the communication as admissible and proceeds with its consideration of the merits.

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<sup>3</sup> *D.L. v. Sweden* (CRPD/C/17/D/31/2015), para. 7.3; *A.N.P. v. South Africa* (CRPD/C/23/D/73/2019), para. 5.3.

### Consideration of the merits

9.1 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.

9.2 The main question before the Committee is whether the school allocation order and the subsequent judicial decisions violated Christoph's right, as a child with disabilities, to inclusive education without discrimination. The Committee notes that, through a school allocation order, Christoph was officially assigned to Humboldt school, a mainstream school, or to the Käthe-Kruse-Förderschule, a "specialized" school for children with intellectual disabilities. The allocation order did not raise objections to the authors' son enrolment at the Saale school, a private school, which was the authors' preferred option. The Committee also notes that the official allocation by the school had significant implications for the authors related to the reimbursement of the cost of transportation and transportation assistance as the reimbursement of these costs is only granted for the schools that have been officially assigned in the school allocation order.

9.3 The Committee notes the authors' argument that the State party violated their son's rights to inclusive education because the school allocation order of 16 March 2013 and the subsequent court decisions did not officially assign their son to the Saale school, a private school offering inclusive education, and that the mainstream Humboldt school offered to him as an option for education was not an inclusive school. However, the Committee notes the State party's argument that the authors' son was never denied the possibility of inclusive education in the community where he lived. According to the State party, the authors' son could have attended the Humboldt school in Naumburg, which offers inclusive education, contrary to the authors' assertion. The Committee also notes the State party's argument that the authors have not submitted any conclusive evidence that the Humboldt school was not inclusive. In this regard, the Committee observes that the authors refer to the minutes of a meeting of 2 May 2013 where they were allegedly informed that the Humboldt school did not have the capacity, due to the class sizes and available resources, to offer inclusive education to their son. However, the State party argues that these minutes were only based on the memory of the parents and signed only by them and the head of the Montessori School in Naumburg. The Committee also notes the authors' argument that in the second minutes of that meeting, admission to a "specialized school" is recommended as a better alternative and that the Humboldt school offered only a two-hour slot for common instruction. However, the State party argues that these second minutes were not signed. The State party also refers to a letter dated 8 July 2013, that was made known to the authors, where the school authority informed the Burgenland district that all material and personnel requirements were available at both state schools in Naumburg or would have been made available in case of need in a similar way to Saale school: "the necessary conditions for inclusive education are available at the above-mentioned state schools, or can be created, in a way similar to the Saale School". The Committee also notes the State party's assertion that, in the school years 2013/2014-2015/2016 two trained "special education" teachers and two additional teachers with further training in inclusive education were employed at the Humboldt school. However, the Committee observes that the authors preferred to enrol their son in the private Saale school due to its substantive experience on inclusive education since 2007, and the recognition received. The Committee notes the authors' argument that the school is located 60 km from their home and that they have to bear the costs of transportation and transportation assistant as his son was not officially assigned to the private Saale school in the school allocation order.

9.4 The Committee recalls that considerable weight should be given to the assessment conducted by the State, and that it is generally for the organs of States to review or evaluate the facts and evidence of the case, unless it can be established that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>4</sup>

<sup>4</sup> *N.L. v. Sweden*, (CRPD/C/23/D/60/2019), para. 7.3; *Z.H. v. Sweden*, (CRPD/C/25/D/58/2019), para. 10.3.

9.5 In the present case, the Committee notes that the authors challenged the school allocation order before the courts and requested it to be amended to officially assign their son to the private Saale school, as they considered it to be an excellent school with many years of experience in inclusive education. The Committee notes that the judicial authorities dismissed the complaint arguing that the authors lacked right of action as they could not claim to have any entitlement for the allocation by the School Authority to Saale school as there were no legal basis for such claim and that the education law does not allow the School Authority to allocate private schools. The Committee takes note of the authors' objection that the judicial authorities did not enter into the merits of the case. However, the Committee notes that, from a reading of the decisions in question, it cannot be established that the evaluation of the authorities was clearly arbitrary or amounted to a manifest error or denial of justice because there was no legal basis for the authors' claim. In addition, the authors have not demonstrated that the Humboldt school was not able to provide his son with reasonable accommodation so he could enjoy his right to inclusive education, particularly in light of the State party's uncontested assertion regarding the existence of teachers trained in inclusive and "special education" at the said school. Therefore, the Committee considers that, based on the information on file, it cannot conclude that the school allocation order and the dismissal by the judicial authorities of their request to amend it amounted to a violation of Christoph's rights under articles 5 (3), 7 (1), 9 and 24 (1) and (2) of the Convention. Having reached this conclusion, the Committee cannot conclude either that the State party's failure to reimburse the authors for the transportation costs associated to Christoph's attendance of a different school of their choice amounted to a violation of the latter's rights under the Convention.

9.6 In light of the above, the Committee is of the view that the facts before it do not disclose a violation of 5 (3), 7 (1), 9 and 24 (1) and (2) of the Convention.

## **C. Conclusion**

10. The Committee, acting under article 5 of the Optional Protocol, is of the view that the facts before it do not disclose a violation of articles 5 (3), 7 (1), 9 and 24 (1) and (2) of the Convention.

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