



RESOURCE CENTRE FOR PEOPLE WITH MENTAL DISABILITY

## **Access to Employment and Education**

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**[Reasonable Accommodation in Education and Employment in light of the UN CRPD]**

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## Introduction

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Looking at the history of disability rights movement one can see a significant improvement toward inclusion and full participation of disabled people in society. Still, at the beginning of the 20<sup>th</sup> century disabled people were totally isolated. Existence of institutions, special schools, and sheltered works were viewed as a norm. Before, the only concern about disabled people was bettering conditions in these separate institutions. However, the important changes started to take place in the middle of the 20<sup>th</sup> century after formation of United Nation and adoption of UN Declaration on Human Rights (UDCH)<sup>1</sup>, International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>3</sup>. These documents prohibited any discrimination and required states to treat everyone equally. The same equal treatment requirement goes with ECHR. According to Article 14 of the Convention “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination.”<sup>4</sup> Yet, the mere declaration of equality does not provide disabled people with equal opportunities as non disabled. The “cornerstone”, “the most incisive weapon in the fight against disability discrimination” is reasonable accommodation.<sup>5</sup>

One of the greatest achievements for protection of rights of disabled people was adoption of the Convention on the Rights of Persons with Disabilities. As Kofi Annan, the ex Secretary- General said “CRPD is a remarkable and forward looking document that marks the dawn of a new era – an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long”.<sup>6</sup>

The Convention does not only claim equal treatment but also requires State Parties to take “all appropriate steps to ensure that reasonable accommodation is provided”.<sup>7</sup>

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<sup>1</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>

<sup>2</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>

<sup>3</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>

<sup>4</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Art.14, available at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>

<sup>5</sup> Neena Dash “Inclusive Education for Children with Special Needs”, New Delhi, Atlantic LTD, 2006, 2012

<sup>6</sup> Secretary General’s Message on the Adoption of the CRPD, available at: <http://www.un.org/apps/sg/sgstats.asp?nid=2362>

<sup>7</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, Art. 5(3) available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>

Many countries after ratification of CRPD introduced the phenomenon of reasonable accommodation in their national legislation. However, the enactment of the law is only the first step. There is in the country must be an effective mechanism of its realization.

In the following, I will first describe the implementation of reasonable accommodation in education. I will explore the concept of inclusive education. Then I will draw the comparison between inclusive education and integration. I will show the advantages of inclusive education over the special education. Finally, I will define the types of reasonable accommodation that must be provided to disabled children in mainstream schools for successful inclusive education.

In the second chapter I will define the concept of reasonable accommodation in employment according to the US legislation, EU legislation and the national legislation of the member states of the Union. I will describe such issues as qualified individuals, undue burden, cost and identification of accommodation. In the second part I will explore more detailed the phenomenon of supported employment and in particular the work of job coach.

In the third chapter I will explore the models of the quota system of France, Japan, Germany and Austria. First, I will describe the concept of levy system. I will look at the basic principles of the mechanism; describe the amount of levy applied in various countries and the bodies that regulate the process of collecting and distributing of levies. Then I will explore which employers and employees fall within the quota and what kind of incentives the laws provide for employers who meet their quota obligation. Finally, I will look at the methods of assessment of quota system.

## **Chapter1: Reasonable accommodation in education**

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### ***Special Education***

During a long time disabled children were treated as uneducable. In ancient Egypt, Greek and Rome disabled babies were killed because there was a guiding principle that “Nothing imperfect should be brought up”.<sup>8</sup> In the Middle Ages disability was viewed as a punishment of God. The treatment of disabled people was aimed at releasing the evil from their spirit.<sup>9</sup> At that time disabled children could receive education only in institutions organized by charity organizations. The first special school for disabled children was built in Kentucky and it was school for deaf students. The first College with special education started to function in Columbia in 1857. The school was also for deaf students. When it comes to mentally disabled children the first classes for them were arranged in Rhode Island in 1986.<sup>10</sup>

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<sup>8</sup> Neena Dash “Inclusive Education for Children with Special Needs”, New Delhi, Atlantic LTD, 2006, 2012, p.10

<sup>9</sup> Neena Dash “Inclusive Education for Children with Special Needs”, New Delhi, Atlantic LTD, 2006, 2012, p.10

<sup>10</sup> Neena Dash “Inclusive Education for Children with Special Needs”, New Delhi, Atlantic LTD, p.11

### ***Inclusive education***

The phenomenon of inclusive education was introduced only by the end of the 20<sup>th</sup> century. There were a number of international conventions and declarations such as UN Convention on the Rights of the Child (1987)<sup>11</sup>, Jomtien World Declaration on Education for All (1990)<sup>12</sup> and the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993)<sup>13</sup> that called for “ Full inclusion of children with diverse abilities in all aspect of schooling that other children are able to access and enjoy”.<sup>14</sup>

In June of 1994 more than 300 participants representing 92 governments met in Salamanca to “further the objective of Education for All by considering the fundamental policy shifts required to promote the approach of inclusive education”.<sup>15</sup> The outcome of the Conference became the adoption of Salamanca Statement and Framework for Actions which stated that “regular schools with inclusive orientation are the most effective means of combating discriminatory attitude... those with special educational needs must have access to regular schools, which should accommodate them within a child –centered pedagogy capable of meeting these needs”.<sup>16</sup>

Although none of the above noted documents were legally binding they played an important role since they introduced a new policy in the field of education of disabled children that should be followed by states.

### ***CRPD and inclusive education***

Convention on the Rights of Disabled People recognizes the importance of education and requires states to ensure “an inclusive education system at all levels”<sup>17</sup>. One of the principles of the Convention is the “respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.”<sup>18</sup> State parties must take effective measures for “fostering at all levels of the education system, including in all children from an early age, an attitude of respect for

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<sup>11</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>

<sup>12</sup> World Declaration on Education for All and Framework for Action to meet Basic Learning Needs, available at: [http://www.unesco.org/education/pdf/JOMTIE\\_E.PDF](http://www.unesco.org/education/pdf/JOMTIE_E.PDF)

<sup>13</sup> UN “Standard Rules on the Equalization of Opportunities for Persons with Disabilities” 1993, available at: <http://www.un.org/esa/socdev/enable/dissre00.htm>

<sup>14</sup> Neena Dash “Inclusive Education for Children with Special Needs”, New Delhi, Atlantic LTD, 2006, 2012, p-21.

<sup>15</sup> “The Salamanca Statement and Framework for Action on Special Needs Education ” adopted by the World Conference on Special Needs Education :Access and Quality, Salamanca Spain, 7-10 June 1994 , available at: <http://unesdoc.unesco.org/images/0009/000984/098427eo.pdf>

<sup>16</sup> “The Salamanca Statement and Framework for Action Special Needs Education” adopted by the World Conference on Special Needs Education: Access and Quality, Salamanca Spain, 7-10 June 1994, available at: <http://unesdoc.unesco.org/images/0009/000984/098427eo.pdf>

<sup>17</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, Art.24 available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>

<sup>18</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, Art.3, available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>

the rights of persons with disabilities”<sup>19</sup>. The further details concerning education of disabled children are provided in Art.24 which says that “States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels”<sup>20</sup>. State must guarantee that:

- a. Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- b. Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- c. Reasonable accommodation of the individual’s requirements is provided;
- d. Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
- e. Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.<sup>21</sup>

### ***EU policy in inclusive education***

Provision of inclusive education is a part of EU disability policy. As it is stated in the European Disability Action Plan 2003-2010 one of the main goals of the plan is “mainstreaming disability issues within all relevant EU policies”.<sup>22</sup> EU Disability Strategy 2010-2020 views “equal access to education and lifelong learning” as one of the most important factors for enabling full participation of disabled people in society.<sup>23</sup> The EU Education and Training 2010 program pursues the aim to ensure that “European Union’s education and training system became accessible to all”.<sup>24</sup>

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<sup>19</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, Art.8, available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>

<sup>20</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, Art.24, available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>

<sup>21</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, Art.24, available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>

<sup>22</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>23</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>24</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

The national legislation of member states establishes various mechanisms of implementation of inclusive education. As it was noted in the Statement of European Disability Forum “There are different pathways to achieve inclusive education which should be developed within and according to the general education system, traditions and cultures in each country, without any compromises with the principle of equal opportunities”<sup>25</sup>.

### ***Inclusion v. Integration***

One of the main challenges for implementation of inclusive education is lack of awareness by state officials, schools administration and teachers about the core principles of phenomenon of inclusion. “Inclusion is a process. It is not merely about providing access into mainstream school for pupils who have previously been excluded. It is not about closing down an unacceptable system of segregated provision and dumping these pupils in an unchanged mainstream system. Existing school systems- in terms of physical factors, curriculum aspects, teaching expectations and styles, leadership roles-will have to change. This is because inclusive education is about participation of all children and young people and removal of all forms of exclusionary practices.”<sup>26</sup> “Inclusion without resources, without commitment, without a vision statement, without restructuring, and without staff development won’t work.”<sup>27</sup> So, inclusion is much more than just involving disabled children in a mainstream schools. Inclusion is about meeting and accommodating their special educational needs and thus providing them with equal opportunities with non disabled. So, in this approach the emphasis is made on the school. The school must adapt its curriculum in order to meet the needs of every child.<sup>28</sup>

However, when it comes to integration it is more of diagnostic approach. This approach “...relates disability to individuals` inabilities and associates schools difficulties with the latter. It does not present diversity as a core issue for the education system and access to education then depends on individuals` ability to adapt to the system and cope with existing norms.”<sup>29</sup> This approach makes emphasis on a child and “expect [him/her] to fit into existing curriculum”.<sup>30</sup>

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<sup>25</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>26</sup> Neena Dash “Inclusive Education for Children with Special Needs”, New Delhi, Atlantic LTD, 2006, 2012, p.22

<sup>27</sup> Mara Sapon-Shelvin (2003) ([www.uni.edu/coe/inclusion/strategies/inclusiveclassroom.html](http://www.uni.edu/coe/inclusion/strategies/inclusiveclassroom.html)).

<sup>28</sup> Neena Dash “Inclusive education for children with Special Needs”, New Delhi, Atlantic LTD, 2012, p.27

<sup>29</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>30</sup> Neena Dash “Inclusive education for children with Special Needs”, New Delhi, Atlantic LTD, 2006,2012, p.26



### ***Inclusive education v. Special Education***

Most proponents of special separate schools claim that even being involved in mainstream schools disabled children still experience segregation and isolation. With such an approach it means that further isolation of people with disabilities in institutions, sheltered works also benefit disabled people. It is hard to agree with this position. Of course the present system of inclusive education is not perfect. However, it does not mean that society must go back to the principals of separate education. To the contrary, the inclusive education system must be improved and new methods that will contribute to the establishment of closer relations among disabled and non disabled students must be applied. Exactly interaction between disabled and non disabled children is one of the main advantages of inclusive education. If the present system has disadvantages then the efforts must be made to eliminate these disadvantages, but not to destroy the system.

Another issue is the quality of education. Although some countries including Sweden, Norway and UK have one state educational Curriculum which has to be applied both in mainstream and special schools.<sup>31</sup> Still, in most countries the quality of education in special schools is much lower than in mainstream. The low quality of education in special schools creates barriers for future education of disabled students in high institutions or involvement in mainstream labor market.

Moreover, special education is more costly. With separate education there is a need for special buildings, teachers. There is no special education school in every neighborhood and thus disabled children must be provided with transport that will take them to school and back home.

Finally, for many years people were struggling for elimination of any forms of discrimination on the ground of gender, religion, race, culture, political views, etc. So, why then disabled people must be still subject to discrimination and segregation. “If a society supports integration of all individuals, then segregated schools and classrooms have no place in that society. There is no defensible rationale, excuse, nor scientific research that can be conducted that will in the final analysis justify segregation”.<sup>32</sup>

### ***Student with special educational needs***

There are different approaches to the identification of students with special educational needs (SEN). Some countries including Austria, Denmark, Germany, Greece, Hungary and Iceland describe SEN students as “children who have a light, mild or severe functional or structural impairment and who might be more generally called disabled

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<sup>31</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>32</sup> Stainback,S and Stainback, W. (1990) “Support Networks for Inclusive Schooling: Interdependent Integrated Education”, Baltimore, Pauls Brookes, p.1-56



children”.<sup>33</sup> Other countries for example Norway, UK, Estonia, Finland, Ireland and Latvia have a wider scope of the concept of SEN which includes not only disabled children but also other children who have learning difficulties such as immigrant students, those facing social disadvantages, etc.<sup>34</sup> UK is one of the exceptional countries which has a legal definition of SEN. The UK Education Act defines SEN as “learning difficulty which calls for special education provision to be made for him or her”<sup>35</sup>.

### ***Teachers***

Teachers are one of the key actors in inclusive education. According to the estimation given by David Mitchell in his guidance book for inclusive education the success of inclusive education depends on the following factors:<sup>36</sup>

- 50% of achievement depends on the student
- 30% - teacher
- 5-10 % -school
- 5-10% - peers
- 5-10% - home

However, one of the main challenges is that most teachers in mainstream schools do not have appropriate knowledge in the field of disability. Many countries still apply a two tracks approach according which general education teachers and special education teachers are educated separately. It is only special education teachers who receive training in special education needs. Such a policy is not very efficient for the provision of inclusive education. It will be much better if all teachers will receive some training in special education needs. In Sweden, for example according to the new policy all teachers must have compulsory trainings in Special Educational Needs.<sup>37</sup>

Thus, lacking much knowledge in the field of disability mainstream teachers tend to treat disabled children as a group of uneducable or hardly educable children. Still, one of the

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<sup>33</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at:

[http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>34</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at:

[http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>35</sup> ANED country report on equality of educational and training opportunities for young disabled people, Mark Priestley, Sue Pearson, Angharad Beckett and Sarah Woodin, May 2010, available at: <http://www.disabilityeurope.net/content/aned/media/Report%20on%20equality%20of%20educational%20and%20training%20opportunities%20for%20young%20disabled%20people%20-%20United%20Kingdom.pdf>

<sup>36</sup> David Mitchell “What Really Works in Special and Inclusive Education, Using evidence –based teaching strategies”, London and New York, Routledge, 2008, p. 2.

<sup>37</sup> Kajsa Jerlinder and Berth Danermark, ANED country report on equality of educational and training opportunities for young disabled people, Sweden, May 2010, available at: <http://www.disabilityeurope.net/content/aned/media/Report%20on%20equality%20of%20educational%20and%20training%20opportunities%20for%20young%20disabled%20people%20-%20Sweden.pdf>

main factors concerning the education of disabled children is avoiding generalization. It is important to have an individual approach to each and every child. This notion of individual approach may sound a bit frightening for teachers. Yet, in most cases it is not such a difficult and time absorbing thing as it may seem. Individual approach means application of some additional methods for accommodation of necessities of a particular child. For example, children with dyslexia may need more time for coping information from a board. Using different colors of chalks while writing something on a board will help children with dyslexia better concentrate and understand the written information.

There can be different methods of collaborations applied in inclusive education depending on the severity of the illness. In cases with children who have severe mental retardation it is good to apply co-teaching method. According to this method both general education teacher and special education teacher present in the class and work together. However, when a mentally disabled student has a mild mental retardation or behavioral disorder, then it is better to apply a consultation method. In such a case special education teacher provides a general teacher with consultation outside of the classroom.<sup>38</sup>

Besides a general teacher and special education teacher there are at school must be such professionals as psychologist, psychiatrist, and speech-language therapist. It is not only disabled students but also non disabled who will benefit from such a policy. For instance, any child may have problems with speech.

### ***Individual Education Plan***

Individual Education Plan (IEP) plays a crucial role in the process of successful inclusive education. The IEP is aimed at meeting the “unique educational needs of the child”.<sup>39</sup> The content of the plan includes: “the nature and degree of the child’s abilities, skills and talents; the nature and degree of the child’s SEN and how those needs affect his/her educational development; the child’s present level of educational performance; the support services to be provided to the child to enable him/her to benefit from education and to participate in the life of the school.”<sup>40</sup> The plan establishes the goals that should be achieved by a disabled child within the general curriculum. “The IEP should only records that which is additional to or different from the differentiated curriculum plan that is in place as part of normal provision.”<sup>41</sup> The IEP has an annual goal and short term objectives. A goal describes “what the student can reasonably be expected to accomplish by the end of the school year or (semester) in a particular subject, course, or alternative

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<sup>38</sup> Lani Florian and Margaret J. McLaughlin (Editors), *Disability Classification in Education, Issues and Perspectives*, Thousand Oaks, CA 91320, 2008, p.63-63

<sup>39</sup> Code of Federal Regulation, available at: <http://www.gpo.gov/fdsys/pkg/CFR-2007-title34-vol2/xml/CFR-2007-title34-vol2-sec300-320.xml>

<sup>40</sup> Summary Report “International Experience in the Provision of Individual Education Plans for Children with Disabilities”, Dec.2005, available at: [http://www.nda.ie/cntmgtnew.nsf/0/393FEBD9B935DE01802570660054EC18/\\$File/IEP\\_Summary\\_PD\\_F.pdf](http://www.nda.ie/cntmgtnew.nsf/0/393FEBD9B935DE01802570660054EC18/$File/IEP_Summary_PD_F.pdf)

<sup>41</sup> Special Education Needs, Code of Practice, available at: <https://www.education.gov.uk/publications/eOrderingDownload/DfES%200581%20200MIG2228.pdf>

skill area.”<sup>42</sup> For example, in the IEP for a student with a learning disability the annual goal may be that the student will be able to write an organized piece containing four paragraphs and the short term objective -writing a short paragraph about himself/herself by the end of the semester.<sup>43</sup>

The IEP must be developed by a team that includes: a general teacher, a special teacher, disabled pupil`s parents, someone from the school district who is not the student`s teacher but who can speak for the administration of the school and say which resources the schools possesses for accommodation of student`s needs; and some other people, for example translator in case parents are foreigners and need translation; specialist in education of disabled children, etc. The student must be also invited to the meeting since it is important to take into account his/her interests, wishes.<sup>44</sup>

After a certain period of time the team must present the assessment report. The report must reflect the achievements gained during this period of time. The assessment must be precise. It should not be written in a vague way. All teachers that participate in the education process of a student with special needs must be introduced to the IEP and base their work with the student on it.<sup>45</sup>

### ***Class size and indoor environmental quality***

A class size plays an important role for a high quality of education both for disabled and non disabled students. In cases with mentally disabled students the negative effect of big size classes may be more significant. Mentally disabled students usually need more teachers` attention. However, in classes with a big number of students teachers do not have possibility to provide disabled children with additional help and support. Still, as I have already noted before it is not only mentally disabled children who will favor from the small sized class. More teacher`s attention will benefit all students.

The same goes with the indoor environmental quality. Unfortunately, many class rooms, especially in developing countries do not meet the minimum standards of normal class environment. The bad conditions of classrooms have a negative impact on the education of the students. One of the UK recent researches showed that because of the noise in the class all students had a bad test scores.<sup>46</sup> The US reports have similar dates. They compared the reading scores of students who studied in a classroom that was close to the elevated urban train tracks to scores of those students whose class was in a calm place far

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<sup>42</sup> Individual Education Plan, available at: [http://www.ontariodirectors.ca/IEP-PEI/IEPPEI\\_Eng\\_Downloads/learning%20disability%20-%20elem.pdf](http://www.ontariodirectors.ca/IEP-PEI/IEPPEI_Eng_Downloads/learning%20disability%20-%20elem.pdf)

<sup>43</sup> Individual Education Plan available at: [http://www.ontariodirectors.ca/IEP-PEI/IEPPEI\\_Eng\\_Downloads/learning%20disability%20-%20elem.pdf](http://www.ontariodirectors.ca/IEP-PEI/IEPPEI_Eng_Downloads/learning%20disability%20-%20elem.pdf)

<sup>44</sup> Special Education Needs, Code of Practice, available at: <https://www.education.gov.uk/publications/eOrderingDownload/DfES%200581%20200MIG2228.pdf>

<sup>45</sup> Special Education Needs, Code of Practice, available at: <https://www.education.gov.uk/publications/eOrderingDownload/DfES%200581%20200MIG2228.pdf>

<sup>46</sup> Shield, B. and Dockrell, J.(2005). “Environmental noise and children`s academic attainments”. Paper presented at ASA/CAA 05 Meeting, Vancouver, Canada, May 2005

from the train tracks. The result showed that children who studied in the class close to tracks had worse reading scores than those whose class was far from the noise.<sup>47</sup>

However, when it comes to mentally disabled students the negative consequences of poor class environment may be even more serious. Excessive heat, for example is an unpleasant condition for every student. Yet, for children with multiple sclerosis it is twice more difficult than for non disabled to concentrate in such a condition.<sup>48</sup>

Thus, as we can see the accommodation of needs of disabled students in most cases does not require some extraordinary changes or adaptations. In many cases all that must be done is the creation of normal conditions which include such minimal things as walls and ceiling isolation for the prevention of extra noises; keeping doors and windows closed, if there is a noise outside; provision of good ventilation, air-conditioning system and optimal acoustic, etc. It will be good if a school may afford a microphone with speakers. The clear speech of the teacher in the microphone will help children with learning disabilities, attention deficit hyperactivity disorder (ADHD) or hearing disabilities better receive and understand information. Moreover, other student will benefit from such a policy as well, especially children for whom English is a second language. Finally, using the microphone the teacher will not have to talk very loudly and strain the vocal cords.<sup>49</sup>

### ***Social skills deficits***

One of the biggest challenges faced by disabled children in mainstream schools is the negative attitude of their non disabled classmates. Lack of acceptance by non disabled peers is brought as one of the main arguments by proponents of separate special education. They claim that inclusive education is primarily about inclusion not mere placement of a disabled child in a mainstream class. Thus, the presence of a disabled child in the mainstream class with the lack of communication and integration with the rest of the class does not make any sense of inclusive education.<sup>50</sup>

The reason for a negative attitude toward disabled students by non disabled peers is not the educational difficulties of disabled children, but rather the lack of basic social skills. It is generally the case with students who have learning disabilities or behavioral disorder. Children with learning disabilities may not know such basic things as greeting a person, combing hairs before going out, not to wear dirty or crumpled clothes, etc. Or, some more complicated things as body awareness skills, organizational skills, personal space awareness, etc. They may come too close and make inappropriate touching. Moreover, while speaking they generally do not use introductory or polite words and that

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<sup>47</sup> Bronzaft, A.I. and McCarthy, D.P.(1975) "The effect of the elevated noise on the reading ability", *Environmental Behavior*,7(4), 517-528

<sup>48</sup> Okano, K. and Tsuchiya, M. (1999), "Education in contemporary Japan, Inequality and diversity", Cambridge: Cambridge University Press.

<sup>49</sup> Kay Marner "Microphones, Classroom solution for ADHD, APD, LD and 'Typical' students?", available at: <http://www.additudemag.com/adhdblogs/5/print/7280.html>

<sup>50</sup> Peter Clough and Jenny Corbett "Theories of Inclusive Education a student's guide", Washington DC, Sage Publication 2000, p.148.

is why their speech sounds direct and rude.<sup>51</sup> For example, they will put the sentence in such a way as “Give me the pen”, instead of “Could you please give me the pen?”

Thus, children with learning disabilities must learn a big range of social skills most of which are already well known to non disabled. The school must arrange additional classes of social skills for disabled students. During these classes such methods as self talk “Since I am going out I should comb my hair. Okay, I have combed my hair, now I look nice and I can go out” or role playing “What will you do if a friend of yours will start to make fun of you?” should be applied. It is good if every episode is repeated several times. The learning of social skills by disabled children is a time taking process. That is why there is a lot to be done by parents at home as well. When doing at home such basic things as having dinner, cleaning the flat, brushing teeth parents must explain the child how and why these things are done.

When it comes to children with behavioral disorder social skills deficit may be shown in the form of aggressive behavior toward others, refusing to obey the rules. Children with behavioral disorder may have tendency to use drugs, alcohol, etc.

Thus, in case of students with behavioral disorder the solution will be the introduction of general classes where students will be taught how to find a win- win solution, react on aggression, act in conflict situations. Besides that, it would be good to have a private conversation with a disabled student. The conversation may be hold by a teacher or psychologist. Moreover, it is very important to inform parents about the disorder of their child and explain them the way the child should be treated at home.<sup>52</sup>

### ***Transition planning***

Transition planning is a very important tool for successful further education or employment of disabled students. Unfortunately, this mechanism is not widely spread and UK and Denmark are the exceptional countries that have a developed system of transition planning.<sup>53</sup> According to the UK SEN Code of Practice the Transition Plan “should draw together information from a range of individuals within and beyond school in order to plan coherently for the pupil’s transition to adult life”.<sup>54</sup> The plan should be written after 9<sup>th</sup>, 10<sup>th</sup> or the last year of school and contain such information as future educational or working aspirations of a disabled student; assessment of further education or working abilities made by specialists; type of support a disabled student need for

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<sup>51</sup> Marnell L.Hayes “Social Skills: The Bottom Line for Adult LD success”, 1994, available at: <http://www.ldonline.org/article/6176/>

<sup>52</sup> David Mitchell “What Really Works in Special and Inclusive Education, Using evidence –based teaching strategies”, London and New York, Routledge, 2008, p. 113

<sup>53</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>54</sup> Transition planning – Guidelines for School, available at: [https://czone.eastsussex.gov.uk/specialneeds/assessmentreview/Documents/Transition\\_plans\\_guidance\\_for\\_schools.pdf](https://czone.eastsussex.gov.uk/specialneeds/assessmentreview/Documents/Transition_plans_guidance_for_schools.pdf)

future education or employment; the professionals that must be involved in the process of transition, etc. There should be a special body that will supervise the process of implementation of the plan. In UK, for example the supervision and coordinating of delivery of the plan is realized by the Connexions Service.<sup>55</sup>

### ***Education of disabled students beyond compulsory education and financial support***

In many countries active state policy toward the inclusive education of disabled children concerns only compulsory primary and secondary schools. However, when it comes to higher education the institutions are only responsible for provision of reasonable accommodation rather than “pedagogical learning support”.<sup>56</sup> Moreover, there are more justification in legislation for failing to provide reasonable accommodation for disabled students in colleges and institutes. For example, the Iceland law states that “...universities may reserve the right to refuse specific supports if these are deemed to be too expensive or impractical, therefore, unreasonable”.<sup>57</sup> In Germany, there is no much state support for disabled students who want to obtain a master degree since according to the state policy the presence of a bachelor degree is enough for involvement in the labor market. In Norway the students with learning disabilities in institutions are not entitled to adapted books.<sup>58</sup>

Another important issue is that provision of reasonable adjustments in high institutions in most cases is not viewed as an anticipatory duty and disabled students should apply for accommodation beforehand. For example, in Denmark the student are expected to apply for accommodation a year before they start their education. So, the university will have time to make necessary adjustments.<sup>59</sup> The Norwegian Higher Education Act requires all institutions and colleges to accommodate needs of disabled students “as far as possible

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<sup>55</sup> Transition planning –Guidelines for School, available at:

[https://czone.eastsussex.gov.uk/specialneeds/assessmentreview/Documents/Transition\\_plans\\_guidance\\_for\\_schools.pdf](https://czone.eastsussex.gov.uk/specialneeds/assessmentreview/Documents/Transition_plans_guidance_for_schools.pdf)

<sup>56</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at:

[http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>57</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at:

[http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>58</sup> Eva Magnus, Christian Wendelborg & Jan Tøssebro, ANED country report on equality of educational and training opportunities for young disabled people, Norway, 2010, available at:

<http://www.disabilityeurope.net/content/aned/media/Report%20on%20equality%20of%20educational%20and%20training%20opportunities%20for%20young%20disabled%20people%20-%20Norway.pdf>

<sup>59</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at:

[http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)



and reasonable”. However, the Act does not provide further qualification and thus, the judgment is made by university`s authorities.<sup>60</sup>

### ***Financial support***

Financial support provided to educational institutions and students is one of the key factors for successful implementation of inclusive education. There is in the country can be efficient legislation. However, the lack of appropriate finances may create a serious barrier for its realization. For example, in Ireland the implementation of the Education Act 2004 was delayed because of the financial difficulties.<sup>61</sup>

Each country establishes its own mechanism for funding inclusive education of disabled people. In most countries provision of compulsory primary and secondary education of disabled children is the responsibility of municipalities. However, when it comes to universities and colleges it is generally the national government who provides supplementary funding to institutions for accommodation of needs of disabled students. Moreover, there can be some additional financial resources provided to students at the “individual level”<sup>62</sup>. In Norway, for example students may receive financial support by means of state loans which are converted into grants after successful passing of exams. However, there are a lot of debates in the country whether the loans/grants system work effectively in respect to disabled students. Disabled students claim that “since they need more time to finish their education, they end up with more loans than their peers”.<sup>63</sup> In any case, financial resources at the individual level are not enough for the inclusion of disabled students if there are no necessary adjustments made by the university.<sup>64</sup>

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<sup>60</sup> Eva Magnus, Christian Wendelborg & Jan Tøssebro, ANED country report on equality of educational and training opportunities for young disabled people, Norway, 2010, available at: <http://www.disability-europe.net/content/aned/media/Report%20on%20equality%20of%20educational%20and%20training%20opportunities%20for%20young%20disabled%20people%20-%20Norway.pdf>

<sup>61</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>62</sup> Eva Magnus, Christian Wendelborg & Jan Tøssebro, ANED country report on equality of educational and training opportunities for young disabled people, Norway, 2010, available at: <http://www.disability-europe.net/content/aned/media/Report%20on%20equality%20of%20educational%20and%20training%20opportunities%20for%20young%20disabled%20people%20-%20Norway.pdf>

<sup>63</sup> ANED country report on equality of educational and training opportunities for young disabled people, Eva Magnus, Christian Wendelborg & Jan Tøssebro, Norway, 2010, available at: <http://www.disability-europe.net/content/aned/media/Report%20on%20equality%20of%20educational%20and%20training%20opportunities%20for%20young%20disabled%20people%20-%20Norway.pdf>

<sup>64</sup> Serge Ebersold “Inclusive education for young disabled people in Europe: trends, issues and challenges”, ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)



## *Conclusion*

After ratification of CRPD most countries included the right to inclusive education in their national legislation. However, the enactment of legislation is only the first step. The phenomenon of inclusive education is a complex mechanism and in order this mechanism will function effectively there are a lot of things to be done. Inclusive education is much more than mere placement of disabled children in mainstream schools. Inclusive education is the accommodation of the necessities of every child. Inclusive education is based on the principals that "...all students may have an educational need in their career and may require some support to be successful in school, independently from the existence of impairment"<sup>65</sup>. Thus, "school must be more receptive to diversity of educational needs and profiles and to commit themselves to become pedagogically, socially and physically accessible"<sup>66</sup>.

One of the main barriers for the effective realization of inclusive education is that teachers in mainstream schools are not "sufficiently trained and equipped to respond to the pedagogical challenges they may face"<sup>67</sup>. Secondly, many schools do not write an Individual Educational Plan for disabled students. The presence of IEP is an important factor since assessment of disabled students must be done not according to the general benchmarks, but according to the goals established in the IEP.

Thirdly, one of the biggest gaps in most countries is the lack of the transition planning from lower secondary education to upper secondary school and higher institutions. Disabled students generally receive only guidance for transition. However, the school must provide disabled students with real coaching rather than mere guidance.

Moreover, it is mostly compulsory primary and secondary schools that are within the state inclusive education policy. When it comes to higher education the requirements to accommodate the needs of disabled students are much lower.

Finally, realization of inclusive education requires appropriate state funding. Unfortunately, many countries justify the delay of the implementation of inclusive education legislation by difficult economic situation.

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<sup>65</sup> Serge Ebersold "Inclusive education for young disabled people in Europe: trends, issues and challenges", ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>66</sup> Serge Ebersold "Inclusive education for young disabled people in Europe: trends, issues and challenges", ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

<sup>67</sup> Serge Ebersold "Inclusive education for young disabled people in Europe: trends, issues and challenges", ANED, 2011, available at: [http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29\\_0.pdf](http://www.disabilityeurope.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20%282%29_0.pdf)

To sum up, inclusive education is a key factor for full participation of disabled people in society. However, the process of inclusive education will not be successful unless the needs of disabled children will be accommodated. Being merely placed in mainstream schools disabled children will not be included in mainstream education. Inclusion is a complex phenomenon and it will take place only when all components of the complex mechanism will be implemented.

## **Chapter 2: Reasonable accommodation in employment**

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### ***Pre-history of Reasonable accommodation***

The term ‘reasonable adjustment’ was born in the United States and initially was applied in relation to accommodation of religious beliefs of employees.<sup>68</sup> Employers were required “reasonably accommodate ... prospective employee’s religious observance or practice unless this would impose undue hardship on the conduct of the employer’s business”<sup>69</sup>. Later that obligation was extended to disabled people. According to the regulation of the Office of Federal Contract Compliance Program (OFCCP) “federal contractors having contracts or subcontracts of 2500\$ or more [have] to make reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor’s business”.<sup>70</sup> The first “explicit statutory reasonable accommodation requirement in the employment context”<sup>71</sup> was established by the Americans with Disabilities Act (ADA).

In the European Perspective it was UK, Sweden and Ireland that established reasonable accommodation obligation in their national disability legislation prior to the adoption of the Framework Employment Directive.<sup>72</sup> However, after the adoption of the Directive all members of the Union had to include the duty of provision of reasonable accommodation in their anti-discrimination legislation.

### ***Reasonable accommodation: favor or anti-discrimination measure?***

Disability anti-discrimination legislation differs from traditional anti-discrimination laws since the first requires something more than a mere equal treatment. Basing on the social model of disability all limitations faced by disabled people are caused by society which

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<sup>68</sup> Anna Lawson “Disability and Equality Law in Britain. The Role of Reasonable Adjustment”, Oxford and Portland, Oregon, Hard Publishing 2008, p.5

<sup>69</sup> Equal Employment Opportunity Act 1972 (amending the Civil Rights Act 1964, 42 USC s 2000-e)

<sup>70</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice”, p.15

<sup>71</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice”, p.15, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/04/reasonaccom.pdf>

<sup>72</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning for the Experience and Achieving Best Practice”, p.8, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/04/reasonaccom.pdf>

does not take into account the needs of disabled people and provision of reasonable accommodation is a “mechanism for addressing extrinsic shortcomings in the external environment”.<sup>73</sup> As it was held by US Supreme Court in *US Airways Inc v. Barnett* reasonable accommodation is an anti-discrimination measure that is aimed to provide equal treatment for disabled employee and “not grant a request that, in violating a disability-neutral rule, would provide a preference”.<sup>74</sup>

When structuring the office or writing a working schedule an employer considers the interests and needs of non disabled employees such as installing air conditioner, buying refrigerator or coffee machine, including the lunch and coffee breaks in the schedule, etc. The same way an employer has to consider the needs of disabled employees. “The reasonable accommodation for workers with disabilities is simply the same type of accommodation that is provided generally, but is tailored to the actual needs of the particular worker for whose benefits it is made”.<sup>75</sup>

Thus, provision of reasonable accommodation for disabled employees is not a more favorable treatment, but anti-discrimination measure for guarantying disabled employees equal opportunities with non disabled.

### ***Who is entitled to reasonable accommodation?***

Only qualified individuals who “can perform the job in its current form” or “whose impairment prevents from performing the job in its current form, but who could perform the job if it were adapted in an appropriate fashion through the making of a reasonable accommodation”<sup>76</sup> can claim discrimination. As it is stated in the EU Employment Directive the employers are not required to “recruit, promote or maintain in employment... [those] who is not competent, capable, and available to perform the essential functions of the post...”.<sup>77</sup>

The UK Disability Rights Commission’s guidance gives the following examples of what constitutes the essential functions of a job. The compliant with epilepsy was not listed as a short-listed candidate for a post of Social Work Assistant because she did not have a driving license. However, the Tribunal held that driving did not constitute the essential part of the job since this function could be fulfilled by a taxi driver. The expenses for a taxi could be covered through the Work Scheme. Thus, the Tribunal found that the

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<sup>73</sup> Anna Lawson “Disability and Equality Law in Britain. The Role of Reasonable Adjustment”, Oxford and Portland, Oregon, Hart Publishing, 2008, p.277

<sup>74</sup> 122 S.Ct.1516 (2002)

<sup>75</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice”, p.32

<sup>76</sup> EU Employment Equality Directive

<sup>77</sup> EU Employment Equality Directive

employer actions amounted to discrimination. The complainant received payment in the amount of £ 2000 and the employer had an obligation to review his recruitment policy.<sup>78</sup>

### *Undue Hardship*

The failure to provide reasonable accommodation may be justified only if an employer can prove that provision of reasonable accommodation will impose an undue hardship on him/her. When Americans with Disabilities Act (ADA) was adopting there was a proposal to test undue burden according to an annual salary of an employee. Thus, any accommodation that will cost more than 10% of an annual salary of an employee had to be perceived as an undue burden. However, this proposal was rejected by the Congress since “it is unfairly to switch the focus away from the resources of the employer and onto the annual salary of the employee”<sup>79</sup>. According to the Congress the emphasis had to be made on the financial resources of the employer not the employee.<sup>80</sup> Thus in the final version of the ADA the undue burden test included such factors as: nature of the cost, financial resource of the facility, the size of the entity, the effect of the accommodation, etc.<sup>81</sup>

The similar approach is relevant to the EU Employment Directive. The Directive says that “in order to determine whether the measure in question give rise to a disproportionate burden, account should be taken in particular of the financial and other cost entitled, the scale and the financial resources of the organization, or undertaking and the possibilities of obtaining public funding or any other assistance”.<sup>82</sup>

Consequently, for the assessment whether the accommodation imposes the disproportionate burden on the employer firstly, the direct cost of the accommodation must be taken into account. Moreover, the Directive says “financial and other cost”<sup>83</sup> and that means that indirect cost such as inconvenience of other staff members caused by the provision of accommodation must be also measured. Then, the possibilities of public funding must be examined. The percentage of the reimbursement received by the employer depends on the national legislation and it varies a lot among EU countries. The Directive does not say anything about the effectiveness of accommodation. Still, it

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<sup>78</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning for the Experience and Achieving Best Practice, p.47, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/04/reasonaccom.pdf>

<sup>79</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning for the Experience and Achieving Best Practice”, p.68, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/04/reasonaccom.pdf>

<sup>80</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning for the Experience and Achieving Best Practice”, p.68, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/04/reasonaccom.pdf>

<sup>81</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336

<sup>82</sup> EU Employment Equality Directive

<sup>83</sup> Maria Ventegodt Liisberg “Disability and Employment. A contemporary disability human rights approach applied to Danish, Swedish and EU laws and policy”, United Kingdom, Cambridge, Intersentia Ltd, 2011, p.208

looks logic that effectiveness of accommodation must be a part of a proportionality test. The more effective is the accommodation the more expenses on it can be justified.<sup>84</sup>

### *Cost of reasonable accommodation*

There are big debates among scholars and practitioners concerning the cost of accommodation. Some are claiming that the state must bear the costs of accommodation since in case disabled people are unemployed they have to be supported by means of social pensions the main source of which are taxes. Thus, it is generally the whole society that supports disabled people when they are unemployed. As it is argued by Wax “fairness (rather than efficiency) may thus require shifting the financial burden of an accommodation, which does not benefit an employer, to society more generally, through, for instance, the tax system.”<sup>85</sup>

According to another point of view the first approach contradicts to the principles of social model of disability and concepts of equality and non-discrimination since: “If accommodations effectuate equality, then it will seem appropriate to lay the costs for those accommodations at the feet of employers”<sup>86</sup>.

Still, there is a third approach according which the issue of primary cost bearer is not important. It does not matter who must bear the cost of accommodation from the stand point of justice. In any case the presence of state funding is a positive factor since “state subsidy toward the costs of accommodations... operates to facilitate and hasten the achievement of equality”<sup>87</sup>.

States have different approaches to this matter. For example, in Denmark it is mostly the public authorities who “carry the burden of disability” and covers the biggest part of expenses on reasonable accommodation.<sup>88</sup> However, in Sweden employers receive much less public support when providing reasonable accommodation.<sup>89</sup>

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<sup>84</sup> Maria Ventegodt Liisberg “Disability and Employment. A contemporary disability human rights approach applied to Danish, Swedish and EU laws and policy”, United Kingdom, Cambridge, Intersentia Ltd, 2011, p.111

<sup>85</sup> Anna Lawson, “Disability and Equality Law in Britain. The Role of Reasonable Adjustment”, Oxford and Portland, Oregon, Hard Publishing, 2008, p. 252

<sup>86</sup> Anna Lawson “Disability and Equality Law in Britain. The Role of Reasonable Adjustment”, Oxford and Portland, Oregon, Hard Publishing, 2008, p.254

<sup>87</sup> Anna Lawson “Disability and Equality Law in Britain. The Role of Reasonable Adjustment”, Oxford and Portland, Oregon, Hard Publishing, 2008, p.255

<sup>88</sup> Maria Ventegodt Liisberg “Disability and Employment. A contemporary disability human rights approach applied to Danish, Swedish and EU laws and policy”, United Kingdom, Cambridge, Intersentia Ltd, 2011, p.208-2010

<sup>89</sup> Maria Ventegodt Liisberg “Disability and Employment. A contemporary disability human rights approach applied to Danish, Swedish and EU laws and policy”, United Kingdom, Cambridge, Intersentia Ltd, 2011, p.210-212

### ***Identification of reasonable accommodation***

The best way to identify reasonable accommodation is conducting of negotiations between an employer and an employee. It should be an employee who shows that his/her needs may be accommodated and it must be an employer who proves that accommodation of needs will result in a disproportionate burden for him/her. Such a negotiating decision making will benefit both sides. It is better for an employer to provide reasonable accommodation since in most cases it is less expensive than entering in costly litigations. When it comes to an employee he/she should try to get an agreement since it is in his/her interest to be employed.<sup>90</sup>

Moreover, employer should consult with professionals and find out their opinion as well. As it was stated by the US Court in *Martolete v. Bolger* “an employer has a duty... to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodation enables the applicant to perform the job safely”.<sup>91</sup>

### ***A special Commission and guidance***

The existence of a special body that may assist disabled employees in cases of violation of their rights is very significant for effective implementation of anti-discrimination legislation. The reason behind is that a disabled person may not be aware that his/her right to reasonable accommodation was violated. Moreover, even being aware about violation a disabled person may have difficulties with all formalities that have to be complied with in order to apply to the court. So, it is important that there is in the country a special body that will assist disabled people in such cases.

In UK, for example there is the Equality and Human Rights Commission which among other rights is also entitled to apply to the Court or assist a disabled person who brings a case to the court. Moreover, the Commission has the power to act even if an employer has not yet violated the rights of a particular disabled person but his/her actions are generally discriminatory and can lead to further violation.<sup>92</sup> For example, an employer makes a job advertisement with the requirements that exclude people with learning disabilities from the list of potential candidates. In such a case the Commission can claim in the court that the actions of the employer are discriminatory.

Another important issue is that for the effective implementation of the rights both the right holder and the duty bearer must be clear about the scope of their rights and correspondent duties. “Effective implementation will happen only if the nature and

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<sup>90</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning for the Experience and Achieving Best Practice”, p.56, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/04/reasonaccom.pdf>

<sup>91</sup> Lisa Waddington “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning for the Experience and Achieving Best Practice”, p.60, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/04/reasonaccom.pdf>

<sup>92</sup> Employment Statutory Code of Practice, available at: [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/employercode.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf)

purpose of the rules are understood ...by those who are entitled to reasonable adjustment, [and] by those who are required to make them...”<sup>93</sup> Thus, the State should enact the guidance that will clearly explain all the issues related to reasonable accommodation. A good example is the UK Employment Statutory Code of Practice. The Code defines and describes various issues related to provision of reasonable accommodation. At the end the Code provides the examples of reasonable adjustments in practice.<sup>94</sup>

In the following I will explore the phenomenon of supported employment and in particular the work of job coach.

### ***Supported Employment***

Supported employment is a “scheme that supports people with disabilities or other disadvantaged groups in obtaining and maintaining paid employment in the open labor market.”<sup>95</sup> The scheme provides support to disabled people before, during and after obtaining a job. The application of Supported Employment mechanism varies a lot among EU countries. In most of them it is still conceived as “some kind of experimental project or pilot project or simply as individual projects”.<sup>96</sup>

One of most developed mechanisms of supported employment program among EU members is introduced in Norway and Sweden.

### ***Norway***

The Norwegian Supported Employment program initially started as a pilot project. However, four years after in 1996 the project was transformed in “a state-financed mainstream national Supported Employment programmer (Arbeid med bistand)”<sup>97</sup>. The target groups of the program are disabled people and other people from socially disadvantages groups. Supported Employment program in Norway is a national labor market service and thus it is included in the budget and covered by the national public funding. There are several organizations who participate in the provision of supported

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<sup>93</sup> Anna Lawson “Disability and Equality Law in Britain. The Role of Reasonable Adjustment”, Oxford and Portland, Oregon, Hard Publishing, 2008, p. 235

<sup>94</sup> Employment Statutory Code of Practice, available at:

[http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/employercode.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf)

<sup>95</sup>“Supported Employment for people with Disabilities in the EU and EFTA –EEA., good practices and recommendations in support of a flexicurity approach” Study Report May 2011, available at:

[http://ec.europa.eu/justice/discrimination/files/cowi.final\\_study\\_report\\_may\\_2011\\_final\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/cowi.final_study_report_may_2011_final_en.pdf)

<sup>96</sup> Supported Employment for people with Disabilities in the EU and EFTA- EEA, good practices and recommendations in support of flexurity approach”, Study Report May 2011, available at:

[http://ec.europa.eu/justice/discrimination/files/cowi.final\\_study\\_report\\_may\\_2011\\_final\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/cowi.final_study_report_may_2011_final_en.pdf)

<sup>97</sup> Supported Employment for people with Disabilities in EU and EFTA EEA, good practices and recommendations in support of a flexicurity approach”, Study Report, May 2011, available at:

[http://ec.europa.eu/justice/discrimination/files/cowi.final\\_study\\_report\\_may\\_2011\\_final\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/cowi.final_study_report_may_2011_final_en.pdf)



employment and one of the main players is the Norwegian Labor and Welfare Administration (NAV).

The monitoring of Supported Employment is provided by Directorate of Labor and Welfare. The results of the monitoring are regularly published. Besides the official statistics there is also independent assessment made by research institutions. The Supported Employment program is available through the whole country and the presence of public funding makes it “financially stable and predictable”<sup>98</sup>.

### ***Sweden***

In Sweden Supported Employment is a national program that is placed under the jurisdiction of the Ministry of Employment and implemented by *Arbetsstyrelsen* (PES). The program is called Special Introduction and Follow-Up Support (SIUS). Along with PES supported employment is also provided by different NGOs and organizations. Although the Swedish system is aimed at supporting of all people with reduced working abilities, still the biggest numbers of clients are mentally disabled people.<sup>99</sup>

The program includes such measures as vocational trainings, rehabilitation, lifelong learning system, job coach assistance, etc. It is hard to follow up the statistic of the Swedish program since it is only SIUS that provides the official data. Information provided by all other organizations is not official. When it comes to funding Supported Employment in Sweden is included in the budget as well as in Norway and is covered by the state.<sup>100</sup>

### ***Job Coach***

For many years one of the most widespread methods for involvement of disabled people in the mainstream labor market was vocational trainings. However, the result was not always very successful since one thing is to learn a theory and another is to apply the knowledge in practice. Vocational trainings are described by Bellamy as “...often being simply placement in training programs to improve skills and work readiness...these programs may take up many years of person`s life and still not lead to a successful employment outcome.”<sup>101</sup>

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<sup>98</sup> “Supported Employment for people with Disabilities in the EU and EFTA –EEA, good practices and recommendations in support of a flexicurity approach”, Study Report ,May 2011, available at: [http://ec.europa.eu/justice/discrimination/files/cowi.final\\_study\\_report\\_may\\_2011\\_final\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/cowi.final_study_report_may_2011_final_en.pdf)

<sup>99</sup> “Supported Employment for people with Disabilities in the EU and EFTA –EEA, good practices and recommendations in support of a flexicurity approach”, Study Report, May 2011, available at: [http://ec.europa.eu/justice/discrimination/files/cowi.final\\_study\\_report\\_may\\_2011\\_final\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/cowi.final_study_report_may_2011_final_en.pdf)

<sup>100</sup> “ Supported Employment for people with Disabilities in the EU and EFTA –EEA, good practices and recommendations in support of a flexicurity approach”, Study Report ,May 2011, available at: [http://ec.europa.eu/justice/discrimination/files/cowi.final\\_study\\_report\\_may\\_2011\\_final\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/cowi.final_study_report_may_2011_final_en.pdf)

<sup>101</sup> Peter Cookson “The Nature of Support. A survey of the support by job coaches from the perspective of people with intellectual disability in open employment”, Lambert Academic Publishing, 2010, p.9

In contrast to vocational trainings with job coaches a disabled person learns how to perform a job in practice. This type of accommodation is very important especially for people with developmental disabilities. Still, the job coach must not do the work instead of a disabled person but should assist him/her. As it was said by one of the coaches in the study provided by Peter Cooks “I do not want acclaim for what I am doing here, I want to help [the worker] to be able to do it for himself. But sometimes I catch myself doing it [for him] and think, get back...”<sup>102</sup>

The scope of functions performed by the job coach is very wide and it is much more than only assistance of a disabled employee at work place. For the effective performance of job functions disabled people may also need support outside of work place with the issues that have a direct influence on their job performance. This additional work related matters include such things as using public transportation to workplace and back home, buying and wearing proper work dresses, waking up on time etc. Of course for many people these things may seem obvious, simple and natural. Still, when it comes to mentally disabled people especially to people with developmental disabilities these things are not so simple and easy to fulfill.

“Endless hours to solve some of these issues. To do with [worker`s] transport, to do with his health, his eye tests, to do with his [accommodation] – absolutely nothing to do with his employment. But, unless we address these issues, [his] work is going to go downhill because he cannot concentrate if the issues are not attended to... it effects his working performance so acutely. We have to work with these...this is a whole person we are talking about.”<sup>103</sup> “This is the sort of thing you spend your time on where it does not seem to have anything with employment. But it does.”<sup>104</sup>

Finally, for the successful cooperation the job coach must be a high qualified professional with the broad range of skills. A good coach must “assume a variety of roles [including] teacher,...vocational evaluator,...industrial engineer, manager,...social psychologist [and] public relations expert”.<sup>105</sup> Still, in most cases job coaches are law qualified and one of the main reasons behind that are the small salaries. According to the results of US national survey “...37 % of job coaches had only a high school diploma and 51 % had received eight hours or less of training before beginning work...40% of job coaches earning less than \$16,000 working full time for 12 months”.<sup>106</sup> As it was commented by one of the job coaches that participated in the study provided by Peter Cookson “If we

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<sup>102</sup> Peter Cookson “The Nature of Support. A survey of the support by job coaches from the perspective of people with intellectual disability in open employment”, Lambert Academic Publishing, 2010, p.40

<sup>103</sup> Peter Cookson, “The Nature of Support. A survey of the support by job coaches from the perspective of people with the intellectual disability in open employment”, Lambert Academic Publishing, 2010, p.47-48

<sup>104</sup> Peter Cookson, “The Nature of Support. A survey of the support by job coaches from the perspective of people with the intellectual disability in open employment”, Lambert Academic Publishing, 2010, p.48

<sup>105</sup> Peter Cookson, “The Nature of Support. A survey of the support by job coaches from the perspective of people with intellectual disability in open employment”, Lambert Academic Publishing, 2010, p.11

<sup>106</sup> Peter Cookson, “The Nature of Support. A Survey of support by job coaches from the perspective of people with intellectual disability in open employment”, Lambert Academic Publishing, 2010, p.11

want to get good quality people as Support Workers then [Agencies] have to be willing to pay a reasonable rate of pay...”<sup>107</sup>

### ***Conclusion***

The provision of reasonable accommodation is a complex process that consists of several components. The first thing that has to be done is the enactment of appropriate legislation or amendment the present one in order it will be in harmony with the Convention. The legislation must clearly define the concept of reasonable accommodation. It must mention that reasonable accommodation is an anti-discrimination measure which must be provided to qualified disabled employees, i.e. those who can perform essential functions of the job with or without accommodation. So, the idea behind is to provide the qualified disabled employee with the same opportunities as non disabled.

Secondly, the law must define an undue burden test. So, it will be clear which conditions must be taken into account when deciding whether the failure to provide reasonable accommodation can be justified under undue burden test.

For better understating of legislation it is good if there is in the country a guidance which explains all matters related to reasonable accommodation. Besides guidance there are in the country should be specialists that employers and disabled employees can consult. The lack of the qualified specialists in the field of disability, especially in matters concerning reasonable accommodation is one of the biggest problems faced by many countries.

Moreover, the law must provide for establishment of the body that will assist disabled people in cases of violation of their rights to reasonable accommodation.

Another important issue is funding. The presence of state funding for provision of reasonable accommodation is an additional incentive for employers to employ disabled people. It is very good if there is in the country a state funded supported employment program. However, the whole policy can never be effective if each and every case of unjustified failure to provide reasonable accommodation will not be followed by serious punishment.

To sum up, after ratification of CRPD most countries included reasonable accommodation in their national legislation as a key factor for involvement of disabled people in the mainstream labor market. However, the enactment of the law is only the first step and there are a lot of other measures that have been done for successful realization of the right. The full enjoyment of the right to reasonable accommodation can be guaranteed only when besides the sufficient law there is also an effective mechanism of its implementation.

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<sup>107</sup> Peter Cookson, “The Nature of Support. A survey of the support by job coaches from the perspective of people with the intellectual disability in open employment”, Lambert Academic Publishing, 2010, p.46

## Chapter 3: Quota system

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### *Introduction*

There was no much concern about employment of disabled people prior to the World Wars. After I and II World Wars the number of disabled people have tremendously increased and the state had to take measures for provision of their employment. Otherwise, being unemployed they had to be supported by means of social pensions. Countries choose various methods for involvement of disabled people in the labor market. One of the most widespread implemented mechanisms was a non binding quota. Initially, it was only war veterans who were covered by the system. Later other categories of disabled people were also included.<sup>108</sup> Nowadays, the quota system is applied in many countries. However, the system varies a lot from one country to another. In the following I will describe quota mechanisms of France, Japan, Germany and Austria since I believe that these countries have one of the most successful quota systems.

### *Quota system France, Japan, Germany, Austria*

#### *France*

The First French Law regulating the employment of disabled people was enacted in 1924. The Law obliged employers to hire 10% of their employees from the category of disabled war veterans. Since 1957 people with disabilities were also included in quota.<sup>109</sup> The next important amendment took place in 1987 with the introduction of the levy system. According to the law all private and public enterprises that had more than 20 employees had to have 6% of their workers as disabled people. Those employers who did not fulfill the obligation had to pay a levy.<sup>110</sup> In 2005 the new law on “Equal rights and opportunities, participation and citizenship of disabled people” was enacted. One of the main aims of the Law is to shift the policy from employment of disabled people in sheltered works to involvement them in the mainstream labor market.

#### *Japan*

Japan was the first country in East Asia that introduced the quota system.<sup>111</sup> The first Law for employment of disabled people was enacted in 1960 “Employment Promotion Act for

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<sup>108</sup> Hasegawa Tamako “Equality of Opportunity or Employment Quotas?- A Comparison of Japanese and American Employment Policies for Disabled”, Social Science Japan Journal Vol.10, No.I,2007, p.41

<sup>109</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds For Persons With Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>110</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds For Persons With Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>111</sup> Fumitaka Furuoka, Beatrice Lim, Khairul Hanim Pazim, Roslinah Mahmud “Employment Situation of people with Disabilities: Case study of US, Japan and Malaysia”, International Refereed Research Journal, Vol-II, Issue-4, Oct.2011, available at: [http://www.researchersworld.com/vol2/issue4/Paper\\_1.pdf](http://www.researchersworld.com/vol2/issue4/Paper_1.pdf)

the Physically Disabled”. As it is seen from the name of the Act it covered only physically disabled people. The Act established quota obligation for public authorities. When it comes to business sector, it had to demonstrate only the “effort toward the goal”.<sup>112</sup> Two significant amendments took place in 1976. Firstly, the employment of disabled people became a mandatory obligation for private sector firms as well. Secondly, the levy system was established.<sup>113</sup>

The next important step was made in 1987 with the enactment of the “Law for Employment Promotion, etc, of the Disabled”. This Law in contrast to the previous ones covered both physically and mentally disabled. However, it was only in 1998 when mentally disabled people were included to the employment mandatory system and subject to calculations into employment rates.<sup>114</sup>

### *Germany*

Initially the quota system in Germany covered only “war victims, victims of industrial accidents and other persons entitled to public pensions”<sup>115</sup>. Other categories of disabled people were included later in 1974 by the Severely Injured Persons Act<sup>116</sup>. According to the Act every employer with 16 jobs or more had to fill 6 % of their jobs with disabled people. Those employers, who did not fulfill their quota obligation, had to pay a levy.<sup>117</sup> The system covered both public and private sectors. In 2001 Severely Disabled Act and Rehabilitation Uniform Act were abandoned and new comprehensive legislation on disability the Ninth Book of the Social Law Code (*Sozialgesetzbuch IX*) was enacted.<sup>118</sup>

### *Austria*

In Austria the quota system was established at the beginning of the 20<sup>th</sup> century and initially covered only war veterans. All private enterprises with the number of employees

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<sup>112</sup> Hasegawa Tamako “Equality of Opportunity or Employment Quotas?- A Comparison of Japanese and American Employment Policies for Disabled”, Social Science Japan Journal Vol.10, No.I,2007, p.42-47

<sup>113</sup> Hasegawa Tamako “Equality of Opportunity or Employment Quotas?- A Comparison of Japanese and American Employment Policies for Disabled”, Social Science Japan Journal Vol.10, No.I,2007, p.42-47

<sup>114</sup> Hasegawa Tamako “Equality of Opportunity or Employment Quotas?- A Comparison of Japanese and American Employment Policies for Disabled”, Social Science Japan Journal Vol.10, No.I,2007, p.42-47

<sup>115</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds For Persons With Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>116</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds For Persons With Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>117</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds For Persons With Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>118</sup> Pr. Dr. Theresia Degner “Germany Baseline – Study”, available at: [http://www.pedz.unimannheim.de/daten/edz-ath/gdem/04/disabfull\\_de.pdf](http://www.pedz.unimannheim.de/daten/edz-ath/gdem/04/disabfull_de.pdf)

more than 20 had to have one disabled employee and one for every further 25.<sup>119</sup> The legal basis for the present Austrian quota system was formed by the Disabled Persons Employment Act (DPEA) that was enacted in 1969. After the amendment of 1975 public sector is also included in quota system. Those employers who do not fulfill quota obligation have to pay a levy.<sup>120</sup>

### *Calculation of the quota*

Establishing the quota system on of the most important thing is calculation of the percentage of the quota. Implementing the quota mechanism the government pursues the aim to provide employment of disabled people and involve them in the mainstream labor market. That is why calculating the quota percentage the legislator must take into account the ration of workable disabled people and number of employers and work places. Thus, the quota percentage must be established in every country according to the particular situation and conditions in the country. Moreover, this number can be changed along with the changing of the circumstances in the country. In Germany, for example initially the quota for employers was 1% and then it rose to 6%. In Japan it was 1.3%, then 1.5% and finally 1.8%.<sup>121</sup>

### *Levy*

“The Levy and Grant System for Employing Persons with Disabilities is based on the principle of collective social responsibility, which claims that the responsibility for employing persons with disabilities must be borne equally by all employers”.<sup>122</sup> The system is established “in order to adjust the imbalance of the financial burden accompanying disability employment and improve the overall disability employment level by collecting levies from the enterprises that fail to satisfy the quota rate and alleviating the financial burden on the enterprises employing many persons with physical, intellectual or mental disabilities.”<sup>123</sup> In countries with the quota levy system the employers have to pay a levy if they do not meet the quota requirement. However, the payment of levy does not release them from their obligation to employ disabled people.

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<sup>119</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds for Persons with Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>120</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds For Persons With Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>121</sup> Patricia Thornton ”Employment Quotas, Levies and National Rehabilitation Funds for Persons with Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>122</sup> Law for Employment Promotion, etc. of the Disabled

<sup>123</sup> Law for Employment Promotion, etc. of the Disabled

Each state establishes the levy according to its national economy. In Germany, for example the employer that has not fulfilled his/her quota obligation has to pay a penalty in the amount of:

- EUR 105 for quota of less than 5% but more than 3%
- EUR 180 for quota less than 3% and more than 2
- EUR 260 for a quota of up to 2%<sup>124</sup>

In France the employers that do not meet quota requirements have to pay the contribution “in the amount of to up to 600 times the French hourly minimal wage (8, 71€ in 2008) for each missing disabled employee. After 3 years, if no effort were made, the compensation fee can go up to 1500 times the minimal wage.”<sup>125</sup> In Japan “for every person with disabilities less than required by the legally defined employment rate, a firm must pay ¥ 50.000 per month”.<sup>126</sup> In Austria employers that do not fulfill their quota obligation have to pay a non-compliance tax.<sup>127</sup> The non-compliance tax is currently 232 €<sup>128</sup> which amount to 6.6% of workers` average monthly salary.<sup>129</sup>

### ***The National Rehabilitation Funds and using of levy***

The collection and distribution of levies is realized by various bodies depending on the national legislation. Some establish a special fund for this purpose. In others the levy system is managed by the Ministry of Labor. In France, for example the private employers pay financial contributions to AGEFIPH (*Association de gestion du fonds pour l'insertion professionnelle des persennes handicappes*), which is a private association. When it comes to public sector they pay contributions to a different fund called (*le Fonds pour l'Insertion Professionnelle dans la Fonction Publique*).<sup>130</sup> In Japan levies are collected by Japan Organization for Employment of the Elderly, Persons with Disabilities and Job seekers.<sup>131</sup> In Austria, the ‘non compliance tax’ is imposed and

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<sup>124</sup> Book 9 of the Social Code, SGB IX, paragraph 77

<sup>125</sup> EBU Legislation and disability available at: <http://www.euroblind.org/convention/article-27--work-and-employment/nr/124#4>

<sup>126</sup> Hasegawa Tamako “Equality of Opportunity or Employment Quotas?- A Comparison of Japanese and American Employment Policies for Disabled”, Social Science Japan Journal Vol.10, No.1,2007, p.48

<sup>127</sup> Rafael Lalive, Jean-Philippe, Josef Zweimüller “Do Financial Incentives for Firms Promote Employment of Disabled Workers? A Regression Discontinuity Approach”, 2008, p. 5, available at: <http://www.laborrn.at/wp/wp0911.pdf>

<sup>128</sup> Austrian Federal Ministry for Social Security

<sup>129</sup> Rafael Lalive, Jean-Philippe, Josef Zweimüller “Do Financial Incentives for Firms Promote Employment of Disabled Workers? A Regression Discontinuity Approach”, 2008, p. 5-6, available at: <http://www.laborrn.at/wp/wp0911.pdf>

<sup>130</sup> Statutory target on employment of people with disabilities in the public sector available at: [http://www.nda.ie/cntmgmtnew.nsf/0/84AA79B029E870AE8025729D0046CAED/\\$File/people\\_with\\_disabilities\\_in\\_public\\_sector\\_04.htm](http://www.nda.ie/cntmgmtnew.nsf/0/84AA79B029E870AE8025729D0046CAED/$File/people_with_disabilities_in_public_sector_04.htm)

<sup>131</sup> Law for Employment Promotion, etc. of the Disabled



collected by Austrian Welfare Office.<sup>132</sup> In Germany, the collection and distribution of levies is realized by *Intergrationsamt* (Integration Office).<sup>133</sup>

For the effective implementation of the levy system there are several important factors. First of all, if there is a special body for administration of National Rehabilitation Fund the body must be subject of monitoring by public authorities. It can be done through the mechanism of improvement of the fund's budget and supervision of its implementation. Moreover, employers must be aware of the existence of the fund's budget and its functions. Being informed about the fund employers can benefit from its activities by means of receiving grants and other means of financial support.

Another important issue is the amount of levy that must be subject to changes in order to fit to the situation in the country. For example, in Japan the levy amount has not been increased even twice during the last 30 years. The negligibility of the sanctions is viewed by many Japanese scholars and lawyers as one of the main reasons of non-compliance of employers with the quota obligation.

Finally, the levy fund should not be viewed as a financial resource for covering state expenses related to the state disability policy. The realization of state disability policy must be financed by state budget. The levy fund must be used narrowly only for the employment issues of disabled people. Moreover, the fund should not be the only financial resource and must be used only in a "subsidiary and supplementary manner".<sup>134</sup>

One of the main aims pursued by state establishing the levy is to motivate employers to fulfill their quota requirements. The policy cannot be aimed at collecting more levies. *Visa versa* the policy must be aimed at collecting less levies and achievement of bigger percentage of employment of disabled people. Thus, even from this perspective the levy fund cannot be viewed as a main source. It is supposed to be the temporary mechanism until there can be reached such a point when all employers will fulfill their quota obligations.

### ***Employers that are subject to quota***

Countries have different requirements to employers covered by quota. In France, every company that employs more than 20 persons has to comply with the quota mechanism.<sup>135</sup> In Austria, the threshold is 25 employees.<sup>136</sup> According to the German Book IX Social

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<sup>132</sup> Rafael Lalive, Jean-Philippe, Josef Zweimüller "Do Financial Incentives for Firms Promote Employment of Disabled Workers? A Regression Discontinuity Approach", 2008, p. 7, available at: <http://www.laborrn.at/wp/wp0911.pdf>

<sup>133</sup> §102 SGB IX

<sup>134</sup> Patricia Thornton "Employment Quotas, Levies and National Rehabilitation Funds for Persons with Disabilities: Pointers for Policy and Practice", Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>135</sup> The Act on equal rights and opportunities, participation and citizenship of disabled people

<sup>136</sup> Disabled Persons Employment Act (DPEA)

Code all employers with the workforce 20 or more are subject to the quota.<sup>137</sup> The Japanese law says that “employer with legal requirement to employ one or more people with disabilities, that is, employers with 56 or more regular workers...employers with more than 200 regular employees, who have failed to achieve the legal employment quota (1.8%) must pay the Levy.”<sup>138</sup> However, from 2012 the threshold will be lowered to employers to employers with 100 employees and more.<sup>139</sup>

In order to motivate employers to employ disabled people national legislation may provide various incentives. For example, according to the Japanese legislation the employer may receive grants in the amount of ¥ 27.000 for “adjustment allowance for employing persons with disabilities”<sup>140</sup> and ¥ 21.000 for every disabled employee employed over the quota. Grants can also be paid for “subsidizing the cost for improvement of work establishment and facilities, or special employment management”.<sup>141</sup> The French law says that “when the extra economic cost associated with the severity of disability is equal to or greater than 20% of the minimum wage, the annual employment subsidy payable is set at 450 times the hourly minimum wage rate including employer's contributions for each fulltime post occupied” or “when the extra subsidy is increased to 900 times the hourly minimum wage rate including employers contribution”.<sup>142</sup>

### ***The Weighting system***

Within the quota system some groups of disabled people can be in a less advantage position than others. It concerns mostly people with more severe disabilities. In order to promote their employment the legislation may provide additional incentives. For example, according to the Japanese law:

- 1) Each employer with severe physical or intellectual disabilities is counted as two persons;
- 2) A short time worker with severe physical or severe intellectual disabilities is counted as one person.<sup>143</sup>

However, in France the weighing system was abolished because this attitude stigmatizes severely disabled people. The French law provides some other incentives for the employment of people with severe disabilities such as covering the expenses of the accommodation if the costs are beyond reasonable or other forms of subsidies.<sup>144</sup>

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<sup>137</sup> Book 9 of the Social Code ( SGB IX)

<sup>138</sup> Law for Employment Promotion, etc. of the Disabled

<sup>139</sup> Law for Employment Promotion, etc. of the Disabled

<sup>140</sup> Law for Employment Promotion, etc. of the Disabled

<sup>141</sup> Law for Employment Promotion, etc. of the Disabled

<sup>142</sup> Work ability in Europe, System in France, available at: <http://www.workability-europe.org/european-systems/france>

<sup>143</sup> Law for Employment Promotion, etc. of the Disabled

<sup>144</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, France, available at: <http://www.disability-europe.net/content/aned/media/FR-9-ANED%202009%20Task%206%20Request-08B-Country%20update%20Employment%20-%20report%20final.pdf>

### *Disabled people eligible for quota*

Each national legislation defines the group of disabled people that fall within the quota and can benefit from it. The Japanese law states that “Identification of persons with disabilities is, in principle, carried out based on the possession of the Identification Booklet for Persons with Physical or Intellectual Disabilities issued by prefectural governor or appropriate institution determining disability”.<sup>145</sup> People with mental disabilities are not included in the scheme. However, “employees with mental disabilities who have the Identification Booklet with Mental Disabilities can be added to the number of persons with disabilities employed in the respective enterprise when calculating the employment rate.”<sup>146</sup>

The Austrian Disabled Persons Employment Act defines the beneficiaries of the quota system as those whose physical, mental, intellectual or sensuous disorder reduce their work capacity at least to 50%. The assessment is made by the medical expert of Austrian Federal Welfare Office (FWO).<sup>147</sup>

In France a disabled worker fall within the quota mechanism if he/she is “recognized as disabled by the Technical Commission for Professional Rehabilitation(COTOREP)” or, “entitled to invalidity pension under the insurance scheme if their capacity to work is reduced by at least two thirds”.<sup>148</sup> In 2005 the French law was amended and two new categories of disabled people were added to the scheme: the holder of the invalidity cards “*la Carte d`invalidite*” and disabled people who are entitled to non contributory disability benefit *L`Allocation aux Adultes Hadicapés* (AAH).<sup>149</sup> These both statuses are provided if a person has 80% of incapacity.<sup>150</sup>

In Germany disability is divided in degrees from 20 to 100. Disabled people with a degree of disability 50 and more are considered a severely disabled and covered by the quota system. The degree is defined by *Versorgungsamt* (Maintenance and Supply Office).<sup>151</sup>

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<sup>145</sup> Law for Employment Promotion, etc. of the Disabled

<sup>146</sup> Law for Employment Promotion, etc. of the Disabled

<sup>147</sup> Rafael Lalive, Jean-Philippe Wuellrich, Josef Zweimüller “Do Financial Incentives for Firms Promote Employment of Disabled Workers? A Regression Discontinuity Approach”, 2008, p. 6, available at: <http://www.laborrn.at/wp/wp0911.pdf>

<sup>148</sup> Work ability in Europe, System in France, available at: <http://www.workability-europe.org/european-systems/france>

<sup>149</sup> Work ability in Europe, System in France, available at: <http://www.workability-europe.org/european-systems/france>

<sup>150</sup> Work ability in Europe, System in France, available at: <http://www.workability-europe.org/european-systems/france>

<sup>151</sup> Martin Kock ” Disability Law in Germany: An Overview of Employment, Education and Access Rights”, German Law Journal, Vo.05,No.11, 2004, p.1376

## *Dismissal of disabled employees*

In order to provide disabled employees with additional guarantees most laws establish special process of their dismissal. According to the Austrian legislation registered severely-disabled employees that are covered by the quota system can be dismissed only after confirmation of the Federal Welfare Office (FWO). Moreover, there must be a four-week probation period and termination can take place only after the probation period.<sup>152</sup>

In Germany, a severely disabled employee may be dismissed only after approbation of *Integrationsamt*. The *Integrationsamt* assess the situation taking into account the interest of both sides and trying to find a balance of these interests. The special termination process is not applied in the following cases: when employment relations last less than 6 months; if a disabled employee is 58 years old or older and he/she receives a compensation payment from a social plan and is not disagree with the dismissal; if termination takes place with the consent of both sides.<sup>153</sup>

The additional guarantee for disabled employees provided by the German Law is the right to ombudsman. If a company hires more than five severely disabled employees these employees are entitled to elect an ombudsman (*Vertrauensmann*). The *Vertrauensmann* protects the rights of disabled employees and has to be consulted in such matters as relocation or dismissal of severely disabled employee. In case the employer will not follow this rule he/she can be fined with the sum up to EUR 10.000.<sup>154</sup>

## *Assessment*

In order to have an efficiently working quota system it is important to hold a regular assessment of its implementation. In Austria, for example data on employment of registered disabled people is annually provided by the Public Employment Service.<sup>155</sup> In Germany the primary source for statistic is the report of the Federal Office of Statistic.<sup>156</sup> In France, the official statistics on implementation of quota system are provided by the Department of the Ministry of Work (DARES), AGEFIPH (the fund that collects and distribute levy among the private sector), and FIPHFP (the fund that collects and distribute levies among public sector).<sup>157</sup>

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<sup>152</sup> Rafael Lalive, Jean-Philippe Wuellrich, Josef Zweimüller “Do Financial Incentives for Firms Promote Employment of Disabled Workers? A Regression Discontinuity Approach”, 2008, p. 7, available at: <http://www.laborrn.at/wp/wp0911.pdf>

<sup>153</sup> Martin Kock ” Disability Law in Germany: An Overview of Employment, Education and Access Rights”, German Law Journal, Vo.05,No.11, 2004, p.1383; §90 para.1 SGB IX

<sup>154</sup> §156 para.1 SGB IX

<sup>155</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, Austria, 2009, available at: <http://www.disability-europe.net/content/aned/media/AT-%20ANED%202009%20Employment%20Report%20Final.pdf>

<sup>156</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, Austria, 2009, available at: <http://www.disability-europe.net/content/aned/media/AT-%20ANED%202009%20Employment%20Report%20Final.pdf>

<sup>157</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, France, available at: <http://www.disability-europe.net/content/aned/media/FR-9->

However, for the sufficient assessment it is important to have both quantitative and qualitative results. Thus, there are in the country must be independent research institutions that will assess not only the quantitative outcomes but also the quality of the applied quota system.<sup>158</sup> In Germany, for example there is a state-funded Institute for Labor Market and Occupational Research which provides the information about the quality of the state disability employment policy.<sup>159</sup>

Still, one of the main problems in all four countries described above is that the statistic they provide is very general. However, for a comprehensive assessment there must be more precise information about the benefits of the quota system for particular groups: youth, women, men, people with physical disabilities, people with intellectual disabilities, etc. Moreover, there is should be data on the type of the jobs disabled people perform. Finally, provided date must show the rate of employment among disabled and non disabled people.

### ***Conclusion***

The establishment of the quota system in France, Germany, Austria and Japan brought significant improvement to the situation of employment of disabled people. The number of disabled people in the mainstream labor market has increased regularly. However, in all four countries the employment rate among disabled people is lower than among non disabled. It is hard to say what exactly is wrong and which amendments must be brought to the mechanism. Each and every country has specific circumstances and the changes must be brought according to these circumstances. Still, there are some basic rules that should be applied to every case for the effective realization of the quota system. The first rule is that the enactment of the quota legislation must be followed by the process of development of effective mechanism of its realization. For example, the national law in Azerbaijan, Tunisia, Thailand, and Morocco establishes the quota levy system. However, there is no efficient mechanism for its implementation and in result the laws are not enforced.

Secondly, the percentage of the quota and the levy must be amended along with the changes in the country.

Thirdly, the law must provide employers with various incentives such as wage subsidies, tax relief, deduction of expenses related to the employment of a disabled person and

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[ANED%202009%20Task%206%20Request-08B-Country%20update%20Employment%20-%20report%20final.pdf](#)

<sup>158</sup> Patricia Thornton “Employment Quotas, Levies and National Rehabilitation Funds for Persons with Disabilities: Pointers for Policy and Practice”, Gladnet Collection, Cornell University, 1998, available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_106625.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106625.pdf)

<sup>159</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, Germany, available at: <http://www.disabilityeurope.net/content/aned/media/DE%20Employment%20report.pdf>

exemption from social security charges This type of incentives will motivate them to fulfill their quota obligation.

Finally, there is must be done periodical quantitative and qualitative assessment of quota implementation. Such an assessment is crucial for identification of drawbacks of the system and its improvement.

However, if the application of the quota system does not bring 100% positive result it does not always means that the system is not efficient. The state cannot solve the problem of employment of disabled people only by means of implementation of the quota mechanism. For the inclusion of disabled people in the mainstream labor market there are in the country must be a complex of various tools. One of the biggest barriers for inclusion of disabled people in the mainstream labor market is the lack of education. For example, during the recent survey in France 60% of employers said that one of the main aspects why they do not employ disabled people is “the lack of working skills among applicant and problems of communications”.<sup>160</sup> The state has to provide high level of education for disabled people. Moreover, there should be arranged various vocational rehabilitation programs financed by state or National Rehabilitation Funds.

Another important issue is the stereotypes and prejudices against disabled people. The cases when employers meet their quota obligation are mostly when an employee became disabled while working in the firm or acquired official disability status after being employed. States has to provide various programs for combating the prejudices and stereotypes against disabled people. For example, one of the main aims of the French law of 2005 was to encourage employers to have at least one disabled employee. The number of companies that employ at least one disabled employee has increased from 53,2% in 2006 to 56,1% in 2007. Still, the rest 36,8% of companies do not have disabled employees.<sup>161</sup>

In addition to the legislation the government should provide different programs that will give more possibilities for disabled people to be involved in the mainstream labor market. German government for example, recently started 3 new programs: “Job without barriers”, “Job 4000”, and “JobBudget”. All these programs are aimed on improvement of situation of disabled people in the labor market by means of providing them with on job trainings, individual support, financial support, opening new jobs, etc. It is hard to assess them since there are mostly no empirical data about the results of the program. However, the government views them as successful bringing the example of particular cases with good results. Although some disability advocates claim that these programs

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<sup>160</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, France, available at: <http://www.disability-europe.net/content/aned/media/FR-9-ANED%202009%20Task%206%20Request-08B-Country%20update%20Employment%20-%20report%20final.pdf>

<sup>161</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, France, available at: <http://www.disability-europe.net/content/aned/media/FR-9-ANED%202009%20Task%206%20Request-08B-Country%20update%20Employment%20-%20report%20final.pdf>



are just a “drop in the ocean” and they do not bring significant changes.<sup>162</sup> Still, I believe that even in the lack of a big impact on the general situation of employment of disabled people in the country disabled people do benefit from these programs since the example of a particular successful case can be an effective tool for combating prejudices against disabled people.

Finally, it is important that there is in the country anti-discrimination legislation and those disabled employees who are not covered by the quota mechanism must be guaranteed employment by general anti-discrimination legislation.

To sum up, the quota system can be an effective tool for the provision of employment of disabled people if the system is well developed and there is an effective mechanism of its implementation. Still, the quota system alone cannot solve the problem of employment of disabled people. It must be a complex of various actions and measures taken by state in order to have a successful result.

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<sup>162</sup> Academic Network of European Disability Experts (ANED), Report on Employment of Disabled People in European countries, Germany, available at: <http://www.disabilityeurope.net/content/aned/media/DE%20Employment%20report.pdf>



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