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Universal and Equal Right to Access to Education for People with Disabilities in the Light of Polish and International Law

Keywords: the right to education, inclusive education, equality before the law, discrimination

Słowa kluczowe: prawo do nauki, edukacja włączająca, równość wobec prawa, dyskryminacja

Abstract

The right to education for persons with disabilities results from the constitutional principle of universal and equal access to education, however, it frequently encounters difficulties in implementation. This issue is particularly important not only from the point of view of Polish law but also due to international guarantees of universal access to education and activities aimed at the elimination of all forms of discrimination. They were included in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on Human Rights. European standards in this respect are set, first of all, by the Charter of Fundamental Rights of the European Union, EU regulations and directives, as well as by the case-law of the Court of Justice of the European Union. Moreover, the issue of the universal and equal right to education was also raised in the documents of the Council of Europe: the European Convention on Human Rights and the European Social Charter, judgments of the European Court of Human Rights, and decisions of the European Committee of Social Rights.

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Streszczenie**Konstytucyjna zasada powszechnego i równego prawa do
wykształcenia osób z niepełnosprawnościami w świetle
aktów prawa polskiego i międzynarodowego**

Realizacja prawa do edukacji przez osoby z niepełnosprawnościami, choć wynika z konstytucyjnej zasady powszechnego i równego dostępu do wykształcenia, w praktyce niejednokrotnie napotyka na trudności w realizacji. To zagadnienie szczególnie istotne nie tylko z punktu widzenia prawa polskiego, ale również z uwagi na międzynarodowe gwarancje powszechnego dostępu do kształcenia oraz działania zmierzające do eliminacji wszelkich przejawów dyskryminacji. Zostały one zawarte w Powszechnej Deklaracji Praw Człowieka, Międzynarodowym Pakcie Praw Ekonomicznych, Socjalnych i Kulturalnych oraz Konwencji o Prawach Człowieka. Europejskie standardy w tym zakresie ustanawiają przede wszystkim Karta Praw Podstawowych Unii Europejskiej, rozporządzenia i dyrektywy unijne, a także orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej. Ponadto kwestię powszechnego i równego prawa do wykształcenia podjęto również w dokumentach Rady Europy: Europejskiej konwencji praw człowieka i Europejskiej karcie społecznej, orzeczeniach Europejskiego Trybunału Praw Człowieka oraz decyzjach Europejskiego Komitetu Praw Społecznych.

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The universal and equal right to education for every citizen, combined with the simultaneous compulsory schooling up to the age of 18, is ensured by the Constitution of the Republic of Poland of 1997 (Art. 70)² and stipulated in Chapter II which is devoted to freedoms, rights, and duties of a man and citizen. The legislator did not enumerate in this part all the freedoms and rights of an individual, but only those that were considered rights of fundamental social importance. The right to education was placed in the group of freedoms and rights related to the economic, social, and cultural domains. Article 70 indicates not only the right to education and its basic guarantees but also the freedom to choose the type of school, the free of charge educa-

² The Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78, item 483).

tional services (as a part of public education)³, freedom to choose schools other than public ones, the right to establish non-public schools by citizens and the autonomy of universities. In connection with the above legislation, there are also other regulations: freedom of teaching and scientific research (Art. 73), the principle of neutrality of public authorities (including schools) in terms of religious, worldview, and philosophical beliefs (Art. 25 (2)) and parents' right to ensure their children a moral and religious upbringing and teaching according with their convictions (Art. 53 (3)), related to the right to teach the religion of a church or other legally recognized religious organization in schools (Art. 53 (4))⁴.

The principle of universal and equal access to education applies to education in public schools. The right to universal education means that each student under 18 years of age is under compulsory education⁵, is ensured the opportunity to study in a public school, although their parents or legal guardians may resign from it in favor of education in a non-public school. On the other hand, state authorities are obliged to organize and maintain an appropriate number of schools and to enforce the actual implementation of compulsory education (failure to do so is subject to administrative enforcement). Equal access to education, as a consequence of the general principle of equality enshrined in the constitution in Art. 32 is to provide everyone with the same opportunity to study at school while prohibiting legal discrimination of a discriminatory nature⁶. The obligation to ensure equal access to education, like the obligation to ensure the universality of education, rests with the public authority and – according to Leszek Gar-

³ H. Zięba-Załucka, *Nieodpłatność nauki w szkołach publicznych (art. 70)*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, eds. W. Skrzydło, S. Grabowska, R. Grabowski, Warsaw 2009, pp. 254–255.

⁴ L. Garlicki, *Artykuł 70*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. III, ed. L. Garlicki, Warsaw 2003, p. 3.

⁵ The right to education does not only apply to children and young people. The constitution grants them to everyone, including adults, who want to get additional education or improve their qualifications. Up to the age of 18, each citizen may obtain secondary education (vocational or general secondary education). W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Zakamycze 2002, p. 84.

⁶ *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. III, ..., p. 7.

licki – takes the form of “compensatory preference”⁷. Apart from the necessity to eliminate the actual inequalities in access to education (existing between the city and the countryside), it also includes an order to conduct compensatory measures, manifested in the creation and support of financial and organizational assistance systems (Art. 70, section 4), provided to pupils and students from public funds⁸. In particular, equal access to education may not be differentiated by any feature, including disease or disability. For neither the Constitution of the Republic of Poland, nor any other legal act make the possibility of education dependent on the state of health, leaving the decision on the impact of the learning effort on the health condition of students to themselves or their parents and legal guardians⁹.

Apart from the basic law, the basic normative act ensuring access to education for children and young people in conditions appropriate to their psychophysical abilities is the Education Law Act of December 14, 2016¹⁰. In art. 1, it states that the education system ensures: a) the implementation of education according to the age and development of the student, b) forms of didactic work to be adjusted to students’ psychomotor capacities as well as the possibility of using psychological and pedagogical counseling and special forms of teaching, c) the possibility of learning in all types of schools by disabled children and young people, according with individual development and educational needs, as well as predispositions, d) caring for students with disabilities by enabling them to carry out an individualized education process, forms, and curricula as well as revalidation classes¹¹. Detailed obligations of schools and educational institutions in the scope of implementing the education of children with disabilities are regulated by the provisions of two executive acts: the Regulation of the Minister of Education of August 9, 2017 on the principles of providing and organizing psychological and pedagogical assistance in public kindergartens, schools and institutions, and the Regula-

⁷ *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warsaw 2019, p. 237.

⁸ J. Bucieńska, *Zasada powszechnego i równego dostępu do wykształcenia w polskim porządku konstytucyjnym*, “Roczniki Nauk Prawnych” 2007, vol. XVII, No. 1, pp. 99–100.

⁹ Judgment of the Provincial Administrative Court in Bydgoszcz of September 8, 2010, file ref. II SA/Bd 418/10, LEX No. 752050.

¹⁰ Consol. text Dz.U. 2020, item 910 as amend.

¹¹ Art. 1 point 1, 5, 6 the Law of December 14, 2016. Act on the Education System.

tion of the Minister of Education of August 9, 2017 on the conditions for organizing education, upbringing and care for disabled, socially maladjusted children and young people and at risk of social maladjustment¹².

The Polish legal solution sanctioning equal access to education regardless of the student's dysfunctions is in line with international regulations regarding the analyzed issue. Already, the Universal Declaration of Human Rights, adopted by the UN General Assembly by Resolution 217 A (III) on December 10, 1948, guaranteed in Art. 26 that everyone has the right to education, which is free and compulsory at the primary level¹³. The declaration also emphasizes that the purpose of teaching is the full development of human personality and reinforce respect for human rights and fundamental freedoms.

Since the mentioned document was not binding, its decisions were copied and specified in the International Covenant on Economic, Social and Cultural Rights, adopted in 1966 by the General Assembly of the United Nations. The pact entered into force in 1976, binding 164 countries, including Poland, with its provisions. Its regulations include the right to education (Art. 13), guaranteed for everyone, and related to the prohibition of discrimination based on any circumstance (Art. 2, point 2). It aims to fully develop the personality and sense of human dignity and to reinforce respect for human rights and fundamental freedoms. Education should enable everyone to participate effectively in society, develop understanding, tolerance, and friendship between all nations, racial, ethnic, or religious groups, and be compulsory and free at least on a primary level¹⁴.

In a similar approach, the right to education was introduced in the Declaration of the Rights of a Child, adopted by the UN General Assembly on No-

¹² Regulation of the Minister of National Education of August 9, 2017 on the rules of organizing and providing psychological and pedagogical counselling in public kindergartens, schools and institutions (Dz.U. 2020, item 1280), Regulation of the Minister of National Education of August 9, 2017 on the conditions for organizing education, upbringing and care for disabled, socially maladjusted children and adolescents and at risk of social maladjustment (Dz.U. 2020, item 1309).

¹³ Universal Declaration of Human Rights (Paris, 10.12.1948), <http://libr.sejm.gov.pl/tek01/txt/onz/1948.html> (12.11.2020).

¹⁴ The International Covenant on Economic, Social and Cultural Rights opened for signature in New York on December 19, 1966, <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19770380169> (12.11.2020).

vember 20, 1959. It referred to the Universal Declaration of Human Rights and its guarantees of freedoms for every human being, emphasizing that children's rights extend for all children, "without distinction of any kind, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status, and this principle shall be applied both to the child and to its family"¹⁵. The document emphasizes that the child has the right to education, which should be free and compulsory, at least at the primary level. Education should raise the general culture of the child and enable it, under conditions of equal opportunities, to develop its abilities, develop common sense and a sense of moral and social responsibility, and also become a useful unit of society¹⁶. Further on, it was pointed out that the responsibility of bringing up the child rests primarily with the parents, but society and the state should facilitate both the exercise of the child's right to education and to play.

Significant solutions relating to equal access to education, applicable in the international space, are also enshrined in the UNESCO Convention against Discrimination in Education, adopted at the United Nations General Conference for Education, Science and Culture held at the 11th session in Paris from November 14 to December 15, 1960. The document stated that "the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, color, sex, language, religion, political or other opinions, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education, in particular: a) restricting an individual or a group individuals access to education of any degree or type, b) restriction access to education for any person or group of persons to primary level, c) the establishment or maintenance of separate educational systems or establishments for any person or group of persons, except as provided for in the article 2 of this Convention; or d) to place any person or group of persons in a situation incompatible with human dignity"¹⁷. To eliminate or prevent discrimination in education, the

¹⁵ Declaration of the Rights of the Child (adopted by the UN General Assembly on November 20, 1959), <http://libr.sejm.gov.pl/tek01/txt/onz/1959.html> (12.11.2020).

¹⁶ Ibidem.

¹⁷ Convention against Discrimination in Education, <http://libr.sejm.gov.pl/tek01/txt/onz/1960.html> (10.11.2020).

states were obliged to repeal legal provisions and to stop administrative practices of a discriminatory nature in the field of education, to introduce, if necessary, legislative solutions aimed at eliminating discrimination during recruitment processes, and to prevent the differentiation of students in the scope of school fees, granting scholarships, and other forms of assistance to students, apart from differentiating due to the progress in education or justified needs, not allowing for the differentiation of assistance from state authorities for educational institutions due to the fact that students belong to a specific group, and also allowing foreign students, residing in a certain country, the same access to education as for those who are nationals. Moreover, the obligations of the signatory states include taking actions aimed at introducing compulsory and free primary education, disseminating it in various forms at the secondary level, and ensuring access to higher education for all, based on full equality and depending on individual capacity. Important issues also include the need to ensure the compulsory education provided for by law, the equalization of the level of education in all state educational institutions so that education can ensure the full development of the human personality and respect for human rights and its fundamental freedoms. Education should foster mutual understanding, tolerance, and friendship between all nations, racial and religious groups while maintaining the right of parents and legal guardians of children to freely choose between education in public and private schools, raise their children in conformity with their moral and religious beliefs¹⁸.

Guarantees of the equal right to education, reinforced by the prohibition of discrimination based on sex, race, color, language, religion, political and other beliefs, national or social origin, membership of a national minority, economic status, birth, or any other grounds, are also ensured by regional legal systems operating in compliance with the Council of Europe and the European Union.

The basic treaty for the protection of human rights, ratified by states gathered in the Council of Europe, i.e. the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, 1950), originally did not provide for guarantees for the equal right to education. They were introduced a little later in Art. 2 of Additional Protocol

¹⁸ Ibidem.

No. 1 of March 20, 1952, which guarantees the universal and equal right to education and obliges the signatories to respect the religious and philosophical beliefs of parents in the process of upbringing and educating their children¹⁹. According to the jurisprudence of the European Court of Human Rights, this obligation should be understood broadly, as it does not only refer to the content and implementation of the school curriculum but also applies to all functions performed by the state. It therefore includes organizing and funding public education, curriculum design and planning, and passing knowledge in an objective, critical, and pluralistic manner. In art. 14 of the above document, a prohibition of discrimination was formulated, which can be applied to all areas of social life, including education.

Further regulations on this issue are introduced by the European Social Charter, adopted on October 18, 1961, in which the amendments of May 3, 1996 obligated Member States to take “all necessary and appropriate measures to (...) provide children and adolescents with free education at the level of primary and secondary education, and to take measures to promote regular school attendance” (Art. 17, point 2). These obligations were specified in the ruling of the European Committee of Social Rights of June 3, 2008, in particular concerning the equal right to education, excluding any discrimination, including on the grounds of health: the integration of children with disabilities in mainstream schools “should be the norm, and in special schools, it must be an exception”, although the European Social Charter allows for the distinction between disabled and non-disabled children²⁰. To properly implement the education of children with disabilities and their integration in the school environment, it was recommended to use special solutions “to meet their specific needs”²¹.

The necessity to ensure full access to education for people with disabilities is also included in Recommendation No. R (92) 6 of the Committee of Ministers to member states on a coherent policy for people with disabilities, adopt-

¹⁹ Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Paris on March 20, 1952 (ratified by Poland on July 26, 1994) (Dz.U. 1995, No. 36, item 175).

²⁰ EKPS, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, No. 41/2007, June 3, 2008, point 35, after: *Podręcznik prawa europejskiego dotyczącego praw dziecka*, Luxembourg 2019, p. 151.

²¹ *Ibidem*, p. 152.

ed by the Committee of Ministers on 9 April 1992 at the 474th meeting of the Vice Ministers. In the appendix to the above-mentioned document, it was emphasized that states should strive to conduct a coherent and comprehensive policy towards persons with disabilities, in particular in the field of education, by providing the disabled with access to general or specialist education according with their needs (point 4h). Chapter V of the document indicates that education should enable people with disabilities to achieve the highest possible level of personal development, to gain access to learning in conditions adapted to their disability and with the use of aids that facilitate learning, and to accept their disability and acquire the ability to overcome obstacles that they encounter²². Moreover, it was emphasized that contacts between disabled and non-disabled children constitute a significant stimulus for mutual integration, therefore the possibility of learning in public schools was recommended whenever possible, providing appropriate help, support, and care for young people with disabilities, as well as enabling them to use special therapeutic, technical and educational aids to meet their specific needs. The numerous recommendations also included encouraging cooperation between mainstream and special schools, as well as transferring children with disabilities to mainstream schools, if possible. It was noted that all children with disabilities, regardless of the nature of their disability, have the right to education in an appropriate environment, according with the needs and wishes of the family.

Mainstream schools should be adequately adapted to the needs of children with disabilities, by ensuring the availability of medical and therapeutic services and psychologist consultations, an appropriate number of classes, during which the teacher would be accompanied by additional, appropriately qualified staff, having buildings and equipment adapted to the needs of disabled children, along with facilities in the field of physical access and transport, the use of specially modified teaching methods, materials, teaching programs and examination rules, as well as the implementation of additional counseling programs, taking into account a specific type of disability²³. The

²² Annex to Recommendation No. R (92) 6 of the Committee of Ministers to member states on a coherent policy for disabled persons, adopted by the Committee of Ministers on 9 April 1992 at the 474th meeting of the Ministers' Deputies, [in:] *Prawa dziecka. Dokumenty Rady Europy*, ed. P.J. Jaros, Warsaw 2012, p. 671.

²³ *Ibidem*, pp. 672, 673.

above activities are aimed at ensuring and implementing equal access to education and a sense of responsibility for one's own life.

The Committee of Ministers of the Council of Europe made specific recommendations to the member states on the education and social inclusion of children with autism spectrum disorders, emphasizing their right to enjoy a full life in a non-discriminatory environment and the need to combine therapy and education in the education system. The appendix to the recommendation states that education must not discriminate against people with disabilities, including those with autism spectrum disorders, by providing them with equal opportunities and appropriate education programs. This mainly concerns their inclusion in education in mainstream schools, with the recommendation to ensure access to a special curriculum. These activities are aimed at acquiring skills allowing for their involvement and social inclusion²⁴.

The key principles concerning the functioning of education were also formulated in the Charter of Fundamental Rights of the European Union, adopted in 2000 during the European Council summit in Nice. The document recognizes the child's right to benefit from compulsory and free education (Art. 14, section 2), the freedom to establish educational institutions with respect for democratic principles, and the freedom of parents to raise their children and choose a school for them according to their religious and philosophical and pedagogical convictions. Article 21 specifies the prohibition of discrimination on grounds of sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, economic status, birth, disability, age or sexual orientation (Art. 21)²⁵. As regards disability, the Court of Justice of the European Union found that EU legislation also protects against "discrimination by association", which means discriminating against a person related to another

²⁴ CM/Rec Recommendation (2009) of the Committee of Ministers of the Council of Europe on the education and social inclusion of children with autism spectrum disorders (adopted by the Committee of Ministers on 16 June 2010 at the 1088th meeting of Ministers' Ministers), [in:] *Prawa dziecka...*, pp. 721, 722.

²⁵ Charter of Fundamental Rights of the European Union, European Documentation Centre, http://oide.sejm.gov.pl/oide/?option=com_content&view=article&id=14428&Itemid=422 (4.11.2020).

person “having a protected characteristic” (an example would be the mother of a disabled child)²⁶.

The right to universal and equal access to education is one of the essential human rights in the modern world. Provisions on free and compulsory education for all, excluding any discrimination, including on the grounds of health, have found their guarantees in both national and international legal systems. The educational standards adopted in them are aimed not only at implementing inclusive education, but also at building an inclusive society, based on solidarity and guaranteeing full participation of the individual in public life. Even though in the discussed legal status there are no legal barriers in the field of access to education for people with disabilities, in practice, meeting the educational needs of people with disabilities is still a significant problem²⁷.

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²⁶ *Podręcznik prawa europejskiego dotyczącego...*, p. 60.

²⁷ A. Wojciechowska, *Prohibition of discrimination on the basis of disability under the European right to educate children*, “Toruńskie Studia Polsko-Włoskie” 2019, No. XV, p. 190; S. Jarosz-Żukowska, Ł. Żukowski, *Prawo do nauki i jego gwarancje*, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 652.