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Linguistic Minorities with Disabilities and the Right to Native Language Instruction
Carol Zhang

Abstract

This Comment examines whether international law guarantees for linguistic minorities with disabilities the right to native language instruction. Linguistic minorities with disabilities currently face two challenges: the barriers presented by their disability and the difficulties of learning the majority language. A right to native language instruction would help eliminate this second challenge, removing an obstacle in academic and social development. To determine the existence of such a right, this Comment will first analyze the language rights regime and show that linguistic rights require further evaluation of the specific pragmatic interests involved. Next, this Comment looks at treaty and case law surrounding the education rights of linguistic minorities, finding that courts discuss linguistic rights as a balancing of state and minority interests. Under these principles, this Comment will then examine the education rights of linguistic minorities under the disability law framework. It argues that because states are obligated to provide reasonable accommodations maximizing academic and social development consistent with the goal of full inclusion, a right to native language instruction for linguistic minorities with disabilities does exist.

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Table of Contents

I. Introduction.........................................................................................................................337
II. The Language Rights Regime for Linguistic Minorities...............................................339
   A. Definition of a Linguistic Minority .............................................................................340
   B. Treaties and Declarations Addressing Linguistic Rights ........................................341
      1. International instruments create for linguistic minorities a negative right to use their native languages. ..................................................................................................................342
      2. Regional instruments create further state obligations to protect linguistic rights ..............................................................................................................................343
      3. States balance interests when upholding positive linguistic rights ......................346
III. The Education Rights of Linguistic Minorities..............................................................347
   A. Treaty Law ....................................................................................................................347
   B. Case Law .....................................................................................................................351
IV. The Education Rights of Linguistic Minorities with Disabilities.................................354
   A. Education and Disability Rights pre-CRPD ..............................................................354
   B. Education and Disability Rights under the CRPD ....................................................357
      1. States must provide reasonable accommodation and individualized support measures to maximize academic and social development ..........................................................359
      2. States must provide education consistent with full inclusion ..............................362
   C. Practical Implications and Contours of Such a Right .................................................364
V. Conclusion.........................................................................................................................366
I. INTRODUCTION

For many of us, learning a second language is a choice we make to supplement our education, which we receive entirely in our native language. However, minority language or non-native speakers are often forced to learn a second language in order to access the educational system. Minority language speakers with disabilities must, on top of obstacles created by their disability, also overcome language barriers in school. These students can make up a significant portion of a population: for instance, in 2017, English language learners with disabilities in the United States numbered 718,000, constituting 14.3% of the total English language learner population enrolled in U.S. public schools.\(^1\) In contrast, out of a total of nearly 131,000 public schools in the U.S. in 2017,\(^2\) only 3,000 schools had dual-language immersion programs. Unfortunately, as these dual-language programs become increasingly popular among affluent native English speakers, English learners who stand to benefit significantly from them may be squeezed out.\(^3\)

In 1966, only five nations did not have a linguistic minority equal to at least one percent of their total population, while eighty-four nations had linguistic minorities equaling or exceeding ten percent of their population.\(^4\) Because language serves as a foundation for society, linguistic protection is important. Today, although there are approximately 7,115 languages spoken in the world,\(^5\) linguists predict that at least fifty percent of the world’s languages will disappear by the end of the century.\(^6\) Lack of education, even for minority languages not currently at risk of dying out, exacerbates linguistic inequalities. The right to education—particularly instruction in native languages—is “a cornerstone for [the] social and economic development” of linguistic minorities.\(^7\) Monolingual education in majority languages may lead to “inferior education, [ ] reinforced conditioning to failure, and excessive dropout rates” for minority language

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speakers; for instance, in the U.S., the “proportion of dropouts among Spanish speaking children is far greater in comparison to that of English speaking children.”

Despite continuous emphasis on the need to tailor and specialize programs for people with disabilities to access learning, education systems often fail to provide enough support. The addition of a language barrier further cripples access to learning, making it doubly difficult for linguistic minorities with disabilities to receive an effective education. Nearly one billion people live with a disability. However, ninety percent of children with disabilities in developing countries do not attend school, and the literacy rate for adults with disabilities, according to a 1998 study, may be as low as three percent.

For linguistic minority students with disabilities attending school, requiring that they speak the majority language—supposedly necessary for accessing the curriculum—may also isolate them from their culture and families, especially when their families do not speak the majority language. Linguistic rights in education present complicated obstacles for states trying to integrate minorities while preserving their unique identities, particularly when they view minority languages as threats to the political unity of the state. Some believe that instituting native language support or instruction for minorities, such as bilingual education, will only confuse minority children and prevent them from learning. However, contrary to the perception that monolingual education in the majority language is necessary for advancement, research shows that being exposed to two languages—both the native minority language and the majority language—actually benefits the progress of children with disabilities.

This Comment discusses whether international law guarantees linguistic minorities with disabilities the right to receive native language instruction. Section II analyzes the language rights regime for linguistic minorities by looking at treaties and concludes that, in practice, positive language rights implicate a pragmatic balancing of the state interest against minority interests. Looking specifically at the education rights of linguistic minorities, Section III confirms that courts also employ a balancing or policy-focused approach in deciding when linguistic educational rights can be vindicated. As a result, determining whether linguistic minorities with disabilities are entitled to a positive right of native language

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8 Reeber, supra note 4, at 121–22.
10 Id.
12 Sara E. N. Kangas, “That’s Where the Rubber Meets the Road”: The Intersection of Special Education and Dual Language Education, 119 TCHRS. COLL. REC. 1, 4–5 (2017).
13 Id. at 5.
Native Language Instruction for Linguistic Minorities with Disabilities

Zhang

instruction depends on a balancing of the interests involved. Section IV first explores the treaties concerning disability and education rights. It then argues that linguistic minorities with disabilities are guaranteed a right to education in their native language. Finally, having shown the existence of such a right, this Comment discusses the contours and implications of the right.

II. THE LANGUAGE RIGHTS REGIME FOR LINGUISTIC MINORITIES

An understanding of the language rights regime provides context for determining whether linguistic minorities with disabilities have a right to native language instruction. Such an understanding requires a brief overview of how international law is structured. International law is a decentralized system formed by international norms or rules, which arise out of international conventions and treaties, international custom, general principles of law, and judicial decisions. These international norms can be categorized as legally-binding or non-legally binding. For instance, signed treaties and covenants require explicit consent from the state and are thus legally-binding. Customary rules, while also legally-binding, require enough states to abide by or practice according to the rule for it to become a legally-binding norm.

Non-legally binding norms include declarations, standards, U.N. General Assembly resolutions, and commitments. However, the divide between legally-binding and non-legally binding norms can be minimal: for example, non-binding declarations like the Universal Declaration of Human Rights (Universal Declaration) are widely seen as binding. On the other hand, treaty reservations and optional provisions mean that signatories of a single treaty may actually have different legal obligations.

Linguistic minorities are discussed—but not defined—in a number of international and regional treaties and declarations outlining the international norms surrounding linguistic rights. These instruments include the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration, and the European Charter for Regional or Minorities Languages (ECRML).

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16 Id.
17 Id.
18 Id.
19 Id.
20 Id. at 251.
A. Definition of a Linguistic Minority

One difficulty of defining education rights for linguistic minorities arises out of the ambiguities surrounding minority rights and the definition of minorities. In human rights, the term “minority” usually refers to national, ethnic, religious, or linguistic minorities. However, it is often difficult to identify or organize minority groups; while some groups live in well-defined areas, others may be scattered throughout one or multiple states. Some minorities may be united under strong cultural or historical bonds, while others group together under a more fragmented notion of commonality. There is no consensus as to what the definition of a minority group is, not even among international documents focused on minority protection.

This Comment will use the 1979 definition provided by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in the context of the ICCPR. Capotorti defined a minority group as:

[A] group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members . . . possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Both the objective criterion that a group be in a non-dominant position and the subjective criterion regarding the will of the members of the group remain important in recognizing minority status. The U.N. has focused on protecting national, ethnic, religious, and linguistic minorities; in particular, the U.N. also recognizes the importance of “combat[ing] multiple discrimination and [address]ing situations where a person belonging to a national or ethnic, religious and linguistic minority is also discriminated against on other grounds such as [ ] disability.”

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21 Tesfaye & Kebu, supra note 7, at 317.
23 Id.
26 See Minority Rights Standards and Guidance, supra note 22, at 3.
27 Id.
also, unfairly, overcome language barriers—may have lasting damage on minority groups.\(^{28}\)

Protecting linguistic minorities is important because of the fundamental role language plays in self-conception and community facilitation. To the individual, language is “a culturally inherited trait” affected by other factors like geography, age, occupation, personality, and social status.\(^{29}\) In society, language functions as a medium of communication.\(^{30}\) Historically, language deprivation has been used as a tool of oppression: linguistic imperialism involves the “transfer of a dominant language to other peoples,” as “a demonstration of power” where “aspects of the dominant culture are usually transferred along with the language.”\(^{31}\) International treaties consistently include linguistic minorities within their definitions of “minority” as scholars recognize the importance of linguistic identities—often key to cultural identity and the preservation of communities—and the need to protect linguistic minorities.\(^{32}\)

B. Treaties and Declarations Addressing Linguistic Rights

Although no comprehensive international treaty dedicated to language rights exists, language interests are discussed in a number of major international instruments and regional treaties.\(^{33}\) These include the Universal Declaration,\(^{34}\) the ICCPR,\(^{35}\) the African Charter on Human and Peoples’ Rights,\(^{36}\) the American

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28 Multiple discrimination refers to discrimination that “occur[s] on the basis of more than one perceived characteristic . . . creat[ing] a cumulative disadvantage.” Intersectionality and Multiple Discrimination, COUNCIL OF EUR., https://perma.cc/P33J-M93H.

29 THE USE OF VERNACULAR LANGUAGES IN EDUCATION 8–9 (UNESCO 1953).

30 Id. at 9.


33 Id. at 170.

34 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter Universal Declaration] (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . language.”).


Convention on Human Rights, the European Convention on Human Rights (ECHR), and the ECRML.

1. International instruments create for linguistic minorities a negative right to use their native languages.

While the ICCPR mentions language in Article 26, its general anti-discrimination article, it also contains articles requiring non-discrimination in the protection of children (including on the basis of language) and equal protection of the law. Article 27 of the ICCPR addresses minority rights in particular: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Moria Paz describes Article 27 as notable for—unlike the Universal Declaration—expressing a direct right to language going “beyond a guarantee of non-discrimination and the protection of individual rights.” Article 27 places focus on minority groups’ ability to “enjoy,” “profess and practice,” and “use” their culture, religion, or language, suggesting a broad range of rights that states must respect.

However, the use of the language “shall not be denied,” rather than “shall ensure,” implies that the right is a negative one. Negative rights prevent states from discriminating against the right-holder, while positive rights guarantee that the state will take certain actions on behalf of the right-holder. Thus, while the state cannot take actions that prevent minorities from using their own language, the ICCPR does not require states to take affirmative measures to ensure minorities can use their own language. Furthermore, because states shall not deny linguistic minorities the right to use their own language only when “in community with the other members of their group,” the linguistic right guaranteed under Article 27 may be significantly weakened for minorities that are not concentrated in one well-defined area. These limits in the ICCPR’s language suggest that while Article 27 brings attention to linguistic minorities as a group under special

39 Council of Europe, European Charter for Regional or Minority Languages, Nov. 5, 1992, E.T.S. No. 148 [hereinafter ECRML].
40 ICCPR, supra note 35, at art. 2 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . language . . .”).
41 Id. art. 24.
42 Id. art. 27.
43 Paz, supra note 32, at 171.
protection, it may be, in practice, a “narrow right that imposes on states only a negative duty to refrain from regulating language use” in linguistic minorities’ own communities.\textsuperscript{44}

The 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (U.N. Minorities Declaration) suggests that when it comes to language rights, states’ responsibilities should look more like positive rather than negative rights. Article 2 guarantees that “[p]ersons belonging to . . . linguistic minorities . . . have the right to enjoy their own culture . . . and to use their own language.”\textsuperscript{45} Article 1 requires that states “protect the existence and the . . . linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity.”\textsuperscript{46} These articles remove the language in the ICCPR suggesting the right is a negative right and replace it with a positive obligation to guarantee usage of native languages and to encourage promotion of linguistic identities. For instance, under article 4(3), states “should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.”\textsuperscript{47} However, while the U.N. Minorities Declaration suggests a stronger right to native language use, the declaration is not binding and provides no substantive language rights beyond Article 4(3).\textsuperscript{48}

At the very least, international instruments provide linguistic minorities with a negative right to use their native language: states cannot take actions stripping them of this right. However, determining whether a state has further obligations to provide native language instruction for linguistic minorities with disabilities requires the support of other legal instruments.

2. Regional instruments create further state obligations to protect linguistic rights.

A state may have additional obligations to protect the rights of linguistic minorities under regional legal instruments, which have also included linguistic rights within their protective umbrellas. The African Charter on Human and

\textsuperscript{44} Paz, \textit{infra} note 32, at 173.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} See id.
Peoples’ Rights, the American Convention on Human Rights, and the ECHR all contain provisions mentioning language rights: using similar language, these provisions call for states to not discriminate based on race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. These treaties do not include any provisions similar to ICCPR’s Article 27 or Articles 1 and 2 of the U.N. Minorities Declaration. Instead, the non-discrimination clauses place the language right under a general human rights regime without providing any guidelines or obligations for substantive realization.

In 1992, the Council of Europe adopted the world’s only legally-binding treaty solely addressing linguistic rights. The European Charter for Regional or Minorities Languages (ECRML) includes measures promoting the use of minority languages through aspects like education (Article 8), media (Article 11), cultural activities and facilities (Article 12), and economic and social life (Article 13). These measures imply that states have a positive right to promote and protect minority languages beyond the negative right to not be denied usage. The ECRML preamble identifies “the right to use a regional or minority language in private and public life [as] an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights.” This statement suggests that the parties interpret the ECRML to be a legitimate implementation of Article 27 of the ICCPR, consistent with existing international law rather than inventing new rights. At the same time, Article 4 specifies that the ECRML will “not affect any more favourable provisions concerning the status of regional or minority languages, or the legal regime of persons belonging to minorities which may exist in a Party or are provided for by relevant bilateral or multilateral international agreements.” Thus, the treaty leaves open the possibility that other international law instruments may demand more from states in protecting or ensuring the rights of linguistic minorities.

The ECRML defines “regional or minority languages” as languages “traditionally used within a given territory of a State by nationals of that State who...

49 AfCHPR, supra note 36, at art. 2 (“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as . . . language.”).
50 AmCHR, supra note 37, at art. 1 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language . . . .”).
51 ECHR, supra note 38, at art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . language.”).
52 Id.
53 Id. pmbl.
54 Id. art. 4.
Native Language Instruction for Linguistic Minorities with Disabilities

Zhang

form a group numerically smaller than the rest of the State’s population” that are “different from the official language(s) of that State.”

Consistent with Capotorti’s general definition of minorities, the ECRML’s definition includes the objective criteria of numeric inferiority and non-dominance. However, the ECRML’s definition of language—which in turn defines the linguistic groups affected—does not include the subjective criterion that members intend to preserve their language. As a result, the definition excludes dialects of official languages and the languages of migrants.

The treaty also allows States Party considerable leeway in choosing their obligations: States Party must commit to, at a minimum, thirty-five paragraphs or sub-paragraphs from Part III, out of eighty-nine total sub-paragraphs. Moreover, parties take on obligations per each minority language in their territory, specified at the time of ratification.

The ECRML categorizes the protection and promotion of minority languages as “an important contribution to the building of a Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity.” However, it also states “that the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them.” Combined with the opt-in structure of the treaty, this statement suggests that while linguistic minorities have a negative right to use their own language, any positive rights requiring the state to take action to support their usage must be balanced against other state interests. Thus, although the ECRML sets out provisions dictating positive rights (for instance, a state committing to sub-paragraph 1(b)(i) of Article 8 must “make available primary education in the relevant regional or minority languages”), states may choose which obligations to sign onto for a specific minority language according to their interests.

States have an interest in establishing “national” or “official” languages to “unify and stabilize” their populations and establish centralized systems. The ECRML recognizes this interest by “noting that the protection and

55 ECRML, supra note 39, at art. 1.
56 See Capotorti, supra note 25, and accompanying text.
57 ECRML, supra note 39, at art. 1.
58 Under Article 2, States Party must “apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.” Article 8 deals with education, and Article 12 covers cultural activities and facilities. Id. art. 2.
59 Id. art. 2.
60 Id. pmbl.
61 Id.
62 Id. art. 8.
encouragement of . . . minority languages should not be to the detriment of the official languages and the need to learn them.\textsuperscript{64} Protection of minority languages occurs “within the framework of national sovereignty and territorial integrity.”\textsuperscript{65} Unfortunately, these recognized good-faith state interests also compel minority language users “to learn the [official] language in order to freely function within the domestic political and civil system.”\textsuperscript{66} Those who cannot acquire the national language instead face “linguistic persecution.”\textsuperscript{67} Necessity may force minority language users to give up their languages to conform to the national or official language. Therefore, states need to walk a tight balance between advancing their interests in unity and stability and upholding their obligation to not deny linguistic minorities usage of their native languages.

3. States balance interests when upholding positive linguistic rights.

The difficulties of defining language rights heighten the tension between state interests in unity or stability and the rights of linguistic minorities. Scholar Moria Paz defines language rights as “specific entitlements that protect language-related acts and values,” where “the aim of the legal protection is to ensure both that individuals enjoy a safe linguistic environment in which to speak their mother tongues and that vulnerable linguistic [ ] groups retain a fair chance to flourish.”\textsuperscript{68} Her definition covers only “pure” language rights, which do not include language rights that enable the exercise of other substantive rights. For example, requiring special educational support for linguistic minorities due to their inability to speak the majority language is an educational right rather than a language right, since language is “a barrier they must overcome in order to enjoy equal opportunities in education.”\textsuperscript{69} Linguistic differences play into every facet of interaction with society and the state: because of the uniquely pervasive nature of language, it can be difficult to separate out “pure” language interests.

While states must, at minimum, not deny linguistic minorities the right to use their language, states have discretion over balancing which interests to advance and which to forgo when it comes to language rights connected to other rights (such as through the scheme created by Article 2 of the ECRML). Paz argues for breaking down the panoply of language rights into more specific rights to create a “collection of narrower, more particular interests, only some of which (and likely not most) are entitled to absolute protection under the law.”\textsuperscript{70} Narrowing the

\textsuperscript{64} ECRML, supra note 39, at pmbl.
\textsuperscript{65} Id.
\textsuperscript{66} Ball, supra note 63, at 763.
\textsuperscript{67} Id.
\textsuperscript{68} Paz, supra note 32, at 168.
\textsuperscript{69} Id. at 169 (citing Lau v. Nichols, 414 U.S. 563, 566–68 (1974)).
\textsuperscript{70} Id. at 213.
discussion to one specific interest helps clarify exactly which rights states must uphold; in particular, this Comment determines whether linguistic minorities with disabilities are entitled to legal protection of their right to native language instruction.

III. THE EDUCATION RIGHTS OF LINGUISTIC MINORITIES

Because the right to be provided education in one’s native language implicates a balancing of the state unity interest against the linguistic minority’s interest (not a “pure” language right), a discussion of the right to education and its intersection with language helps further flesh out what this balancing looks like in increasingly multilingual societies. Such an analysis must first look at treaty law surrounding the educational rights of linguistic minorities and then at case law from the U.N. Human Rights Committee and the European Court of Human Rights.

A. Treaty Law

A number of international and regional legal frameworks provide for the right to education specifically. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) emphasizes the universality of the right to education.71 Articles 28 through 30 of the Convention on the Rights of the Child (CRC) and Article 24 of the Convention on the Rights of Persons with Disabilities also contain provisions on the right to education.72 While the ICESCR does not mention language rights as applied to education,73 both the ICCPR and the CRC give linguistic minorities language rights as part of a broad protection of human rights without specifying exactly how they intersect with educational rights.74

Drafted by the U.N. Educational, Scientific and Cultural Organization (UNESCO), the 1960 Convention against Discrimination in Education (Discrimination in Education Convention), signed by 106 states, includes a provision recognizing “the right of members of national minorities to . . . , depending on the educational policy of each State, the use or the teaching of their own language.”75 However, this right must (1) not prevent linguistic minorities

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72 Id.


from understanding the majority language and participating in the community, or prejudice national sovereignty; (2) not create a lower standard of education than the general standard of education; and (3) make attendance at minority-language schools optional.76 Thus, similar to the qualifying language found in the ECRML’s preamble,77 the Discrimination in Education Convention suggests that the right to education in linguistic minorities’ native languages is again a positive right under state discretion to balance against other interests.

Nevertheless, according to Article 4 of the 1992 U.N. Minorities Declaration, “[s]tates should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.”78 This Article, although non-binding, suggests that linguistic minorities may be entitled to being educated or taught in their native languages, not merely to teach or use their native languages with each other. While it does give states some discretion by allowing for “appropriate measures,” it does not include the qualifying language found in the Discrimination in Education Convention.

Furthermore, the CRC reinforces the idea that language is an important factor to be considered by the state. Education must be aimed at the “development of the child’s personality, talents and mental and physical abilities to their fullest potential,” which includes the child’s language skills.79 Education must also develop “respect for the child’s cultural identity, language and values,” which implies a linguistic identity different from the official or majority language.80 Education systems fail to respect a child’s language if assimilation into the majority language due to monolingual education erases the child’s native minority language. Language attrition, the “gradual reduction or loss of linguistic knowledge and skills in an individual . . . caused . . . by a change in one’s contact with the language(s) in question,”81 may lead a child to lose their native language under a monolingual majority language education system.

Studies show that, generally, the younger an individual migrates from their native language environment to a new linguistic environment, the “quicker and the more severe the extent of language loss.”82 Monolingual education leading to the loss of the child’s native language may also impact their ability to communicate

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77 The ECRML notes “that the protection and encouragement of . . . minority languages should not be to the detriment of the official languages and the need to learn them.” ECRML, supra note 39, at pmbl.
78 U.N. Minorities Declaration, supra note 45.
79 CRC, supra note 74, at art. 29.
80 Id.
82 Id. at 6.
with family members. Article 30 of the CRC mandates that if “linguistic minorities . . . exist” in a state, children “belonging to such a minority . . . shall not be denied the right, in community with other members of his or her group . . . to use [their] own language.” States shall not deny linguistic minorities the use of their language in community with each other. If language attrition significantly frustrates linguistic minority children’s ability to use their language, severing their ability to communicate with family members who do not speak the majority language, states may fail to uphold this right.

Other treaties like the ECRML similarly reflect a mandate for states to balance relevant interests in recognizing language as part of linguistic minorities’ education right. Although the ECRML has only a monitoring system and no judicial enforcement mechanism, it “provides a set of values, [or] international norms, that guide European states in their policies towards minority languages,” setting forth a normative interpretation of the right of language use first stated in the ICCPR. Under the ECRML, parties must choose at least three paragraphs or sub-paragraphs from Article 8 (education) to comply with. States may choose to “undertake [certain provisions], within the territory in which such languages are used, according to the situation of each of these languages, and without prejudice to the teaching of the official language(s) of the State.” For instance, states may choose:

i) to make available primary education in the relevant regional or minority languages; or
ii) to make available a substantial part of primary education in the relevant regional or minority languages; or
iii) to provide, within primary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or
iv) to apply one of the measures provided for under i to iii above at least to those pupils whose families so request and whose number is considered sufficient.

Out of seventy-two sets of provisions submitted by states regarding various minority languages in their territories, fifty-eight sets signed on to at least one of the above options for primary education. Similar choices also exist for secondary,

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83 CRC, supra note 74, at art. 30.
84 R. Gwynedd Parry, History, Human Rights and Multilingual Citizenship: Conceptualising the European Charter for Regional or Minority Languages, 61 N. Ir. LEGAL Q. 329, 334 (2010); see Section II.B.1; ICCPR, supra note 35, at art. 2.
85 ECRML, supra note 39, at art. 2.
86 Id. art. 8.
87 Id.
88 In choosing which provisions to sign on to, a plurality of sets submitted chose the least restrictive option, ¶ iv. For instance, under Article 8(1)(b) addressing primary education, nineteen sets selected...
technical, and vocational education.\footnote{ECRML Declarations, \textit{supra} note 88, ECRML, \textit{supra} note 39, at art. 8.} Outside of territories where regional or minority languages are traditionally used, parties may sign on to Article 8(2), which requires that states “allow, encourage or provide teaching in or of the regional or minority language” when “the number of users of a regional or minority language justifies it.”\footnote{Id.} Out of the seventy-two different sets of provisions, thirty-nine parties signed onto Article 8(2).\footnote{ECRML, \textit{supra} note 39, at art. 8.} States have discretion over when they believe the number of linguistic minorities justifies implementing education in or of those minority languages. States are also free to choose their obligations according to a certain language in a specific part of their territory: for instance, the Czech Republic’s declaration of ratification signed onto different provisions for the Polish language in the Moravian-Silesian Region and the Slovak language all throughout the territory.\footnote{Id.}

Twenty-five European states have ratified the ECRML, with eleven states submitting different provisions for different languages and territories within their boundaries (making for a total of seventy-two different sets of provisions).\footnote{Id.} The piecemeal application of the treaty to education rights suggests that European states are balancing different needs and interests in different areas as they consider the implementation of the right of language use first stated in the ICCPR. Critics of the ECRML argue that such broad state discretion gives states too much power to choose and apply provisions according to their political goals.\footnote{Parry, \textit{supra} note 84, at 332.} However, the ECRML’s “flexibility can also be a virtue” in Europe’s complex and diverse linguistic landscape.\footnote{Id.} Given the practical complexities of providing education in minority languages (for instance, training teachers or dealing with areas with multiple minority languages), encouraging “gradual, progressive compliance” may lead to better compliance long term.\footnote{Id.} Unreachable short-term goals may result in states simply failing to meet their obligations.

In general, the complexity of linguistic education rights for minorities, even within smaller regions, due to lack of consensus on what is protected may explain the conditioned approaches taken by treaty law. Minority languages span from migrant minority languages—imagine a young Hungarian child who moves from Hungary to live in Romania—to indigenous languages, which are often discussed
separately. In Europe, majority-language speakers in one country may become minority-language speakers in another country without becoming a regional minority. The already narrowed linguistic educational right may be further limited by distinctions amongst minority languages: the European Court of Justice tended to give privileges to migrant minority-language E.U. speakers, recognizing “a clear connection between . . . Union citizenship on the one hand and language rights (or, respectively, minority rights) on the other.” 97 Unfortunately, no similar protections guarantee “mother-tongue education [for] ‘traditional’ minorities” who are not majority-language speakers in another European Union country. 98

B. Case Law

Cases decided by international courts help explain how language rights are actually implemented beyond the broad conceptions laid out by human rights treaties. Protection for minority languages under treaties (excluding the ECRML) usually appears as negative obligations to prohibit discrimination against linguistic minorities, rather than positive obligations requiring affirmative action to encourage minority language usage in the public sector. 99 Case law reveals that courts, in line with the pragmatism underlying treaty law, act like policy makers in balancing the rights and interests at stake. 100

Cases concerning linguistic minorities have been brought to both the U.N. Human Rights Committee (UNHRC) and the European Court of Human Rights (ECHR). In Mavlonov v. Uzbekistan, the UNHRC considered the denial of re-registration of a newspaper published in the minority language of Tajik by Uzbekistan authorities. 101 The publication was distributed to schools using Tajik as the language of instruction and contained educational materials, reports on matters of cultural interest, and samples of student work. 102 These schools faced “shortages in Tajik-language textbooks, low wages for teachers and the forced opening of Uzbek-language classes in some Tajik schools.” 103 The UNHRC found a violation of Article 27 of the ICCPR, since the “challenged restriction [had] an impact so substantial that it [ ] effectively den[jed] to the complainants the right to enjoy their cultural rights.” 104 This denial violated linguistic minorities’ negative right to use their language, which constitutes part of their culture. The UNHRC

97 Guliyeva, supra note 11, at 234.
98 Id.
99 See Ball, supra note 63, at 770.
100 See Paz, supra note 32, at 187.
102 Id. at ¶ 2.2 (Apr. 29, 2009).
103 Id. at ¶ 8.7.
104 Id.
noted that “in the context of Article 27, education in a minority language is a fundamental part of minority culture.”\textsuperscript{105} Although the UNHRC ruled on the basis of the denial of the cultural right—a lesser infringement on Tajik education may not have resulted in the same ruling—the case affirms the importance of minority language instruction to linguistic minority groups.

In \textit{J.G.A. Diergaardt et al. v. Namibia}, authors of the complaint argued that they had been denied use of their native language in “administration, justice, education and public life.”\textsuperscript{106} The UNHRC held that the state violated Article 26, which prohibits discrimination on the basis of language, since the state “barr[ed] the use of Afrikaans [not only] to the issuing of public documents but even to telephone conversations.”\textsuperscript{107} Because the authors of the complaint did not argue that their language rights under Article 27 were denied, the UNHRC did not examine the Article 27 issue.\textsuperscript{108} The UNHRC did not comment on the education point raised either—likely because the substantial denial of any use of Afrikaans made it easy for the UNHRC to find a violation without going into the details. In both \textit{Mavlonov} and \textit{J.G.A. Diergaardt}, the substantiality of the infringement on the negative right to language usage played a part in the UNHRC’s findings, such that the court did not need to consider the complexities of the positive right to education conducted in minority languages.

In the \textit{Belgian Linguistic Case}, “Francophone parents argued that Belgium implicitly violated the rights of French-speaking minority parents living in Flanders by offering education in state-financed schools in Dutch only, while also withdrawing subsidies from private schools operating in French in that region.”\textsuperscript{109} The ECtHR found language to be distinct from identity—unlike religion—such that “requiring children to assimilate against their wishes, into the sphere of the regional language cannot be characterized as an act of depersonalization.”\textsuperscript{110} This ruling suggests that assimilation itself, without the severe consequences in \textit{Mavlonov} and \textit{J.G.A Diergaardt}, does not automatically imply a violation of the negative right to language usage. The Court noted that Belgium’s purpose was “to achieve linguistic unity within the two large regions of Belgium in which a large

\begin{footnotesize}
\begin{enumerate}
\item J.G.A. Diergaardt \textit{et al.} \textit{v.} Namibia, Communication No. 760/1997, \textit{U.N. Doc. CCPR/C/69/D/760/1997, ¶ 10.10} (Jul. 25, 2000). Only 0.8 percent of the population spoke English as their mother tongue; nonetheless, the government set English as the only official language and refused to establish legislation allowing for the usage of other languages. \textit{Id.} at ¶ 3.4.
\item \textit{Id.} at ¶¶ 10.6, 10.10.
\item \textit{Id.} at ¶ 3 (Jul. 25, 2000) (P.N. Bhagwati, Lord Colville & Maxwell Yalden, dissenting).
\item Paz, \textit{supra} note 32, at 181.
\item \textit{Id.}.
\end{enumerate}
\end{footnotesize}
majority of the population speaks only one of the two national languages.”  

Belgian policies thus served the corresponding public interest “that all schools dependent on the State and existing in a unilingual region conduct their teaching in the language [ ] essentially of the region.” In fact, the Court found that the ECHR “implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights.” The passage of the ECRMIL, three decades later, may better detail such a balance.

The ECtHR in Oršuš v. Croatia similarly considered the interests of the state and the individuals. In Oršuš, Roma children were barred from Croatian-language classes due to their insufficient Croatian language skills and put into segregated Roma-only classes; these classes implemented a 30% reduced version of the Croatian full curriculum. Rather than order Croatia to boost their Roma-language classes to meet the same standards of the Croatian-language classes, the Court found that Croatia was obligated to “take appropriate positive measures to assist [Roma pupils] in acquiring the necessary language skills . . . so that they could be quickly integrated into mixed classes.” Given that Roma children were being left behind by the Croatian education system, the Court prioritized assimilation as the solution: placing pupils in Roma-only classes was only legitimate if it helped “bring [ ] their command of the Croatian language up to an adequate level” to secure “immediate transfer to a mixed-class.”

The ECtHR’s approach both in Oršuš and the Belgian Linguistic Case suggests that balancing education and language rights only leads to what Paz calls “speedy assimilation on fair terms.” The treatment of the Roma pupils implies that minority language groups’ spaces of native language instruction are “protected by the law only so long as they are unable to speak the majority language.” The Court’s analysis of language rights sponsors “a policy that allows the State to incentivize assimilation of fair terms, transforming a diversity-protecting impulse into an integrationist regime.” Courts may interpret language claims by

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112 Id.
113 Id. at 861.
116 The Court characterized the Roma students as having “linguistic deficiencies.” Id. at ¶ 167.
117 Id. at ¶ 172.
118 Paz, supra note 32, at 187.
119 Id. at 204. Under the Oršuš framework, linguistic minorities are provided native language instruction to the extent that it allows them to expeditiously reach fluency in the majority language. Once they reach that goal, native language instruction vanishes as they are assimilated into the majority language education system.
120 Id. at 201–02.
balancing the facts, economic and political circumstances, and normative stakes. Determining whether linguistic minorities with disabilities may have a right to native language instruction will require further balancing of the state’s interests in assimilation and unity against the rights implicated by treaties on disability rights. When state action or inaction looks more like a substantial violation of the negative right to language usage, courts are more likely to find the state in the wrong.

IV. THE EDUCATION RIGHTS OF LINGUISTIC MINORITIES WITH DISABILITIES

While the right to use one’s native language is an inalienable negative right, the right of linguistic minorities with disabilities to native language instruction is a positive right that states may balance against other interests. Combining disability rights and education rights exposes how courts may interpret a case involving the rights of linguistic minorities with disabilities to native language instruction. Such an analysis must also consider the practical consequences such rights may have on educational policy.

No treaty specifically mentions the educational rights of linguistic minorities with disabilities, although overlaps exist between linguistic rights, disability rights, and educational rights. However, the disability rights framework—composed of both soft law created before the Convention on the Rights of Persons with Disabilities (CRPD) and the CRPD itself—provides enough guidelines to determine what interests are at play when it comes to linguistic minorities with disabilities.

A. Education and Disability Rights pre-CRPD

While Section III examined the intersection of the right to education with linguistic rights, an analysis of the intersection of the right to education and disability rights first requires determining the goals of education. The right to education is “one of the most universally recognized rights in national constitutions in the world today,” and “[e]ven when not explicitly identified in the constitution, the right to education can be considered as an essential component for the enjoyment of other rights.” Article 13 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) established that “education shall be directed to the full development of the human personality and

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121 Paz, supra note 32, at 165.
the sense of its dignity, and . . . shall enable all persons to participate effectively in a free society.”

The 1989 Convention on the Rights of the Child (CRC) provided a framework for children’s rights internationally: the CRC is the most widely ratified international human rights treaty, with every single country except the U.S. having ratified it. Article 28 guarantees all children access to education “on the basis of equal opportunity;” in particular, states shall provide free compulsory primary education, encourage the development of secondary education (including vocational education), and higher education “accessible to all on the basis of capacity.” Under Article 29, a child’s education must, among other goals, “be directed to” the “development of the child’s personality, talents and mental and physical abilities to their fullest potential” and the “development of respect for the child’s parents, his or her own cultural identity, language and values.”

The CRC also offers specific protection to children with disabilities. Article 23 broadly recognizes “that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.” As a result, States Party must “recognize the right of the disabled child to special care . . . , subject to available resources.” In particular, states must offer assistance “designed to ensure that the disabled child has effective access to and receives education . . . in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including [their] cultural and spiritual development.” This requirement echoes Article 28 and 29 but specifies that the “fullest potential” for children with disabilities means the “fullest possible social integration and individual development.”

While the CRC does not describe what such special education would look like and limits any special care to available resources, it nevertheless establishes that states must provide an education tailored to help the child’s individual progress. Moreover, by including “cultural and spiritual development” within

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123 Article 13 also included more specific provisions in pursuit of full realization of the stated right, including free compulsory primary education, generally available and accessible secondary education, and the development of a system of schools at all levels. The Article reserved for parents the right to choose their children’s schools, as long as the schools met minimum standards approved by states. ICESCR, supra note 73, at art. 13.
125 Id. art. 28.
126 Id. art. 29.
127 Id. art. 23.
128 Id.
129 Id.
130 Id. arts. 23, 28–29.
“individual development,” the CRC suggests that state-provided education for children with disabilities extends beyond improving mental and physical abilities to also include accessing all aspects of the child’s personal life.

Before the CRPD came into force in 2008, a soft law regime created in 1993 governed international law surrounding disability rights. The U.N. Standard Rules for the Equalization of Opportunities for Persons with Disabilities (“Standard Rules”) created twenty-two guidelines on preconditions, target areas for equal participation, and implementation measures. The Standard Rules required that the education of persons with disabilities be integrated into mainstream education and afforded the same amount of educational resources as those for students without disabilities; they also include support services designed to meet the needs of students with different disabilities. Although mainstreaming necessarily implies integration, integration may not always lead to equal participation for linguistic minorities with disabilities—especially when mainstreaming comes at the cost of losing home support systems.

For instance, a 2005 study showed that when parents of bilingual children with autism stopped using their native language in their home, parent–child bonds were weakened due to parents’ limited proficiency in English, which “lessen[ed] the pragmatic models accessible to the child [ ] and exacerbate[ed] the child’s social isolation in the home.” For deaf children, “mentor programming that created a bilingual, both sign and spoken languages, and a bi-cultural environment was found to have had a considerable influence on the deaf child’s language development in both expressive and receptive language, including grammar, vocabulary, and general attitudes.” Similarly, a 2010 study showed that, in reading and math, bilingual students with disabilities who participated in a two-way immersion program (where half of the school day was done in English and the other half in the student’s native language) outperformed bilingual peers with disabilities who were enrolled in other kinds of language programs. Such empirical evidence suggests that language is instrumental in helping linguistic minorities with disabilities access their education and preserve the support of their home communities and organizations.

132 Id.
134 Kangas, supra note 13, at 5.
136 Kangas, supra note 13, at 5.
Despite reaching a quasi-binding character, the Standard Rules did not spur progress towards the accessibility and equality that advocates hoped for. As a result, the Convention on the Rights of Persons with Disabilities was drafted between 2002 and 2006.

B. Education and Disability Rights under the CRPD

Attitudes on disability rights have shifted significantly since 1989. Rather than “viewing persons with disabilities as ‘objects’ of charity, medical treatment and social protection,” the international community started seeing “persons with disabilities as ‘subjects’ with rights . . . capable of claiming those rights and making decisions for their lives based on their free and informed consent.”

In 2006, the U.N. adopted the Convention on the Rights of Persons with Disabilities (CRPD), the most comprehensive human rights treaty on disability rights. Drafted between 2002 and 2006, it was a compromise between activists who wanted a CRC-style full treaty (instead of a solely anti-discrimination model) providing affirmative rights and others who wanted only a short additional protocol on disability attached to some existing convention. As a result, while the CRPD is a convention detailing civil, political, economic, social, and cultural rights, its “drafters were clear that no new rights were being created;” instead, “accessibility would foster the ability of people with disabilities to access existing services.” Not only was the CRPD the fastest negotiated human rights treaty, but it was also signed on opening day by the highest number of signatories to a U.N. Convention in history (eighty-two signatories), suggesting widespread acceptance of the norms it embodies. As of today, 182 countries are party to the CRPD and 164 countries are signatories. Ninety-four have also signed onto the Optional Protocol on enforcement and reporting measures.

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137 Sabatello, supra note 135, at 1045.
138 See Malhotra & Hansen, supra note 131, at 78.
141 Malhotra & Hansen, supra note 131, at 79.
142 Id.
144 Id.
145 Id. The U.S. is not a signatory. However, many of the rights in the CRPD were taken from U.S. law, including the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act. See David L. Hutt, The Disability Rights Treaty and Advocacy Strategies Using International Human Rights, 48 CLEARINGHOUSE REV. 4, 5 (2014).
The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.” This Comment uses the CRPD’s definition of persons with disabilities: persons with disabilities are “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” In essence, “disability results from the interaction between persons with impairments and attitudinal and environmental barriers.” Instead of placing the problem solely on persons with disabilities, the CRPD’s definition places equal weight on society’s attitudes, conditions, and policies. The drafters also recorded “concern[] about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion . . . or other status.”

Within this new framework and definition of disability, States Party to the CRPD must “recognize the right of persons with disabilities to education . . . without discrimination and on the basis of equal opportunity.” Like the CRC, it requires states to direct education to, among other goals, the “development by persons with disabilities of their personality, talents and creativity, [and] . . . mental and physical abilities, to their fullest potential.” However, the CRPD goes beyond the CRC by expanding on how states should realize this educational right. Article 24(2) requires States Party to ensure that:

(a) Persons with disabilities are not excluded from the general education system on the basis of disability;
(b) Persons with disabilities can access an inclusive, quality and free and 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.

UNESCO has advocated a human rights-based view of education requiring equal educational opportunities to all, such that the right to education is inclusive

146 CRPD, supra note 140, at art. 1.
147 Id.
148 Id. pmbl.
149 Id. (emphasis added).
150 Id. art. 24.
151 Id.; see also CRC, supra note 74, at art. 23.
152 CRPD, supra note 140, at art. 24.
of all marginalized or vulnerable groups.\textsuperscript{153} Thus, the CRPD “seeks to incorporate difference into the education system so that persons with disabilities learn the skills to participate effectively in a free society while enabling learners without disabilities to benefit from the experiences of students from diverse backgrounds.”\textsuperscript{154} The treaty does not seek to eliminate differences or “fix” disabilities: UNESCO notes that “[i]ndividual differences should [] become opportunities to enrich learning rather than problems to be fixed.”\textsuperscript{155}

1. States must provide reasonable accommodation and individualized support measures to maximize academic and social development.

To provide “inclusive, quality and free . . . education on an equal basis,” the CRPD requires states to provide “[r]easonable accommodation of the individual’s requirements” and “[e]ffective individualized support measures . . . that maximize academic and social development, consistent with the goal of full inclusion.”\textsuperscript{156} Full and effective participation in a free society necessitates further analysis, as it exposes tensions between mainstreaming and language preservation. However, for linguistic minorities with disabilities, reasonable accommodation and maximizing academic and social development both require consideration of their native languages.

Article 2 of the CRPD defines “reasonable accommodation” as “necessary and appropriate modification[s] and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”\textsuperscript{157} This definition suggests a familiar kind of balancing—in light of the goal of equality, states are to consider the necessity and appropriateness of a modification against the burden and cost it imposes. Although the CRPD does not further define what constitutes a disproportionate or undue burden, other provisions of the treaty help show what is not a disproportionate or undue burden.

To ensure “full and equal participation in education and as members of the community,” States Party must take the following measures for persons who are blind, deaf, or deafblind:

a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

\hspace{1cm}\textsuperscript{153} UNESCO Overview of Measures, supra note 71, at 3.
\textsuperscript{154} Id. at 6.
\textsuperscript{155} Id. at 6–7.
\textsuperscript{156} CRPD, supra note 140, at art. 24.
\textsuperscript{157} Id. art. 2.
b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

c) Ensuring that the education of persons, and in particular children who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.\textsuperscript{158}

Furthermore, States Party must also “take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education.”\textsuperscript{159} All of these provisions—facilitating the learning of “native” languages of Braille and sign language, trying to find and accommodate for best modes of communication, providing for qualified teachers—are necessarily considered reasonable under the CRPD.

It could be argued that the absence of a provision on language rights for linguistic minorities, given the consideration put in place for the deaf and blind, is a conscious decision to exclude. The Convention defines “language” to include “spoken and signed languages and other forms of [non-spoken] languages.”\textsuperscript{160} However, it is also likely that the CRPD defined “language” as such because the traditional definition of “language” did not include signed and non-spoken languages: for instance, under the previous ICCPR regime, deaf individuals were only included in protections of linguistic minorities if states chose to consider them as a linguistic minority.\textsuperscript{161} Therefore, the emphasis on the languages of the deaf and blind is likely due not to a denial of rights for linguistic minorities, but rather due to the need to clarify a previously non-explicit right.

One could also argue that special protections are offered for Braille and sign language because individuals who are blind, deaf, and deafblind have no other options for accessing mainstream curricula, and thus analogous measures for linguistic minorities—who can assimilate, even if undesirable—would be disproportionate or unduly burdensome. However, the harms associated with assimilation for some linguistic minorities with disabilities are grave enough to make assimilation sufficiently impossible if states do not provide equal educational opportunities. For instance, linguistic minorities with communication or learning disabilities may be doubly challenged. Studies show that the “efficiency of one’s native language skills plays a large part in the success or failure of [second] language learning.”\textsuperscript{162} Requiring a child who already has difficulties with their native language to assimilate into the majority language—by having singular input

\textsuperscript{158} CRPD, \textit{supra} note 140, at art. 24(3).

\textsuperscript{159} \textit{Id.} art. 24(4).

\textsuperscript{160} \textit{Id.} art. 2.

\textsuperscript{161} Ball, \textit{supra} note 63, at 772.

\textsuperscript{162} Lenore Ganschow et al., \textit{Learning a Foreign Language: Challenges for Students with Language Learning Difficulties}, 1 DYSLEXIA 75, 78 (1995).
of the majority language in school—may result in both attrition of the native language and the incomplete acquisition of the majority language.\textsuperscript{163} The child’s loss of the native language—especially in households with limited proficiency in the majority language—may “lessen the pragmatic models accessible to the child \[\] and exacerbate the child’s social isolation in the home.”\textsuperscript{164}

For linguistic minorities with communication or learning disabilities, such a scenario would also violate CRPD’s requirement that “effective individualized support measures [be] provided in environments that maximize academic and social development.”\textsuperscript{165} Aside from the harms caused by lack of native language support, native language support helps maximize academic and social development: empirical research shows that when native languages are used as “medium of instruction for at least 6–8 years,” results included “enhanced self-confidence, self-esteem and classroom participation by minority children, lower dropout rates, higher levels of academic achievement, longer periods in school, better performance in tests and greater fluency and literacy abilities for minority . . . children in both the mother tongue and the official or dominant language.”\textsuperscript{166} A 2000 study in Mali showed that children taught in their own language passed their end-of-elementary examinations at a nearly 20% higher rate than those taught only in French, the official language.\textsuperscript{167} Both UNESCO and the Special Rapporteur for Minority Issues have noted that “[t]he benefits of education in the mother language are now fairly well established scientifically through studies of minority children in different parts of the world.”\textsuperscript{168}

Although these studies describe linguistic minority children in general, rather than linguistic minority children with disabilities, it is unlikely that having a disability would categorically make it easier for children to succeed in the official language only. Research like the 2005 study of bilingual children with autism and the 2010 study of students with disabilities in dual immersion programs\textsuperscript{169} suggests that native language support is crucial to both social and academic development. Moreover, research shows that sequential bilinguals (children who learn a new language on top of their home or native language) with communication disorders are more vulnerable to regression in their native language.\textsuperscript{170} Under language attrition theory, monolingual education can have a negative impact on the home

\textsuperscript{163} See Park, supra note 81, at 1; Ganschow, supra note 162, at 78.
\textsuperscript{164} See Sabatello, supra note 135, at 1045, and accompanying text.
\textsuperscript{165} CRPD, supra note 140, at art. 24.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 16.
\textsuperscript{169} See Section IV.A.
\textsuperscript{170} Kathryn Kohnert & Amelia Medina, Bilingual Children and Communication Disorders: A 30-Year Research Retrospective, 30 SEMINARS SPEECH & LANGUAGE 219, 223 (2009).
environment, even if a child’s parents continue to speak to the child at home in their native language.  

2. States must provide education consistent with full inclusion.

Linguistic minorities with disabilities are not simply persons with disabilities who also happen to be linguistic minorities. Because language differences exacerbate barriers created by disability rather than pose entirely unrelated obstacles, the CRPD’s provisions for individual support must include language as well. Involving language rights requires states to balance goals of national unity or assimilation with the important interests protected by the CRPD.  

Within education, these effective individualized support measures must be provided “consistent with the goal of full inclusion.”

“Full inclusion” could be interpreted to mean mainstreaming children with disabilities within regular school classrooms: in other words, keeping children with disabilities together with their classmates as much as possible. Mainstreaming creates tension with the language right: specialized support for native languages could make the child feel different from others in the classroom. While full inclusion here more likely refers to the principle of “full and effective participation and inclusion in society” in Article 3, full inclusion in society—hinting at assimilation—also creates tension with the language right as it requires linguistic minorities with disabilities to acquire the dominant language to access much of society.

One might make the counterargument that providing native language instruction will hinder rather than improve full participation and inclusion in society because it may slow down the learning of the majority language, which likely dominates most aspects of general society. The example of the Roma children in *Oršuš* suggests that when segregated by language, states may make policy that effectively results in linguistic minorities being left behind in the education system. Not prioritizing learning the majority language could lead to linguistic minorities with disabilities being isolated from the greater society, frustrating the goals of equal opportunity, inclusion, and participation. However, the goal of participation is one of effective participation. Effective participation depends on the circumstances of each individual—denying linguistic minorities with disabilities native language support in favor of advancing monolingual learning fails to recognize the costs imposed on students. If monolingual education in the majority language leads to incomplete understanding of both the majority and native language, combined with severance from the home

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171 See Park, supra note 81, at 6.
172 See Section II.B.3.
173 CRPD, supra note 140, at art 24.
174 Id. art. 3.
community, linguistic minorities with disabilities (who are thus hindered by linguistic differences) may not be able to participate effectively or meaningfully. Moreover, such arguments depend on the incorrect idea that native languages and majority languages are effectively involved in a zero-sum game, where adding support for the native language undermines the majority language. First, in Oršuš, the Roma children were left behind primarily because their curriculum was not as robust as the Croatian-language curriculum, not because they spoke Roma instead of Croatian. Second, available empirical evidence shows “that a bilingual environment does not, in and of itself, put children with communication disorders [who some might suggest are more challenged by multilingual input] at a disadvantage.” Rather, harm is done when children are faced with monolingual input in a second language. Clinicians suggest that “it would be illogical to recommend that input be reduced from two languages to one because bilingualism does not present an additional risk factor and it may present significant social advantages.” Thus, concerns that native language instruction undermines the majority language are largely unfounded. Instead, studies show that monolingual majority language instruction undermines the native language.

For linguistic minorities without disabilities, the tradeoff between the loss of language and the gained access to society may balance out to favor assimilation, like in the Oršuš case. Linguistic minorities may lose aspects of their linguistic proficiency, their culture, and links to their own communities, but like courts recognized, they also stand to gain from acquiring the dominant language. Such gains include access to institutions, politics, and majority culture. However, for linguistic minorities with disabilities—particularly disabilities that affect social, communication, and learning abilities—not only are the costs associated with language attrition greater, but the benefits of assimilation for some linguistic minorities with disabilities are also lesser. For instance, social development may be a primary goal for students with severe disabilities; thus, the home environment is crucial for providing a supportive base. For linguistic minorities with disabilities that affect social, communication, and learning abilities, sacrificing home communities due to lack of native language support could lead to “inclusion” in greater society, but the emotional and social damage done likely negates any possibility of “full and effective participation.”

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175 See Section IV.B.1.
177 Kohnert & Medina, supra note 170, at 223.
178 Id.
180 See CRPD, supra note 140, at art. 3.
This Comment has, so far, addressed disabilities broadly. However, a balancing of the interests and harms involved for linguistic minorities with disabilities must also take into consideration different kinds of disabilities. Linguistic minorities with physical disabilities will not face the same difficulties as linguistic minorities with communication, learning, or social disabilities. In the CRPD’s special protections for the blind, deaf, or deafblind, who face communication obstacles, states are to deliver education “in the most appropriate languages and modes and means of communication for the individual.”181 At the very least, for linguistic minorities with disabilities whose linguistic differences exacerbate their disability (such as communication, learning, or social disabilities), states should provide instruction in the most appropriate language—their native language—to meet their obligation to provide an environment that maximizes academic and social development.

If states withhold all native language support, linguistic minorities with disabilities may lose the ability to use their native language without benefiting from assimilation—not quite the “assimilation of fair terms” supported by courts like the ECtHR.182 The balancing involved is more similar to Mavlonov and J.G.A. Diergaardt, where the UNHRC found a substantial denial of language use that had severe consequences and little benefit, than the Belgian Linguistic Case, where the ECtHR determined the assimilation interest to outweigh the rights of French-speaking children to go to a French school in their neighborhood.183 The addition of the disability rights framework suggests that a court must ensure that any balancing of the assimilation or unity interest and the linguistic minority right also meets states’ obligations under the CRPD to maximize academic and social development while ensuring effective participation and inclusion in society.184 Given the harms that monolingual education in the dominant language may inflict on linguistic minorities with disabilities, courts would need to find that some right to native language instruction exists to reach a fair balancing of the language, education, and disability rights against states’ unity, assimilation, and burden interests.

C. Practical Implications and Contours of Such a Right

Such a right would require states to provide some form of native language instruction; neglecting to offer any linguistic support at all would violate the rights of linguistic minorities with disabilities. However, more work needs to be done to discern what kind of support states would need to implement to comply. Given

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181 See CRPD, supra note 140, at art. 24.
182 See Section III.B; Paz, supra note 32, at 201–02.
183 See Section III.B.
184 See Section IV.B.
the difficulties and costs involved in changing current education systems, any natural trend (aside from court proceedings) towards multilingual education and native language support for linguistic minorities with disabilities may be slow. However, implementing minority language instruction is possible: for instance, in India, “more than thirty minority languages are used as the medium of instruction in public schools, [with] usually Hindi or English gradually introduced in later years of schooling.”

States should take an open-minded approach to determining what kinds of support best meet the needs of linguistic minorities with disabilities. Native language instruction could range from bilingual special education—whether full time or part time—to translation and interpretation, paraprofessionals, or some combination. These choices should also be tailored to fit the kind of disability; for instance, more intensive support might benefit those with communication disorders.

Some scholars make the case for bilingual education generally, not just in special education. For instance, Christopher Reeber argues that “[i]f educated bilingually, linguistic minorities will not be deprived of their particular heritage yet will be able to communicate and effectuate their ideas to all citizens of their nation.” Reeber’s view rests on his claim that “linguistic minorities need some usage of their native language during their primary education in order to prevent future discrimination,” but also need to rapidly acquire the majority language. However, he does not explain how such bilingual education would be implemented, or how states would choose which languages to teach, especially in multilingual regions. Neither does he mention special education, nor how that might look different from general bilingual education.

Special education may pose unique challenges for bilingual education, given that classrooms are smaller and depend on the needs of the children with disabilities, rather than any arrangement by linguistic identity. In classrooms where students all share a single minority native language, bilingual education may be possible by hiring a bilingual special education teacher. However, because one classroom may have more than two native languages, hiring a multilingual special education teacher, in some cases, may simply be impossible. Nonetheless, states should not be free to disregard their obligations due to a lack of professional staff. Long-term measures designed for compliance may involve training more bilingual or multilingual special education teachers. Such measures might also, in the long

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185 Practical Guide, supra note 166, at 20 (includes examples of other countries’ minority language instruction policies).
186 Such tailoring, unlike offering support for the blind and deaf but not linguistic minorities, would not violate the CRPD principle of non-discrimination on basis of disability because it works to individualize instruction rather than categorically deny a right.
187 Reeber, supra note 4, at 130.
188 Id. at 117.
189 Id. at 130.
term, involve increasing the number of dual-immersion programs in general education to boost the number of bilingual people in the workforce.

Short-term measures could involve hiring paraprofessionals fluent in the child’s native language to accompany and assist children at school, such that multiple minority languages could be accommodated in a single classroom without requiring a teacher fluent in all of the languages. If, in the short term, schools are unable to find therapists, speech-language pathologists, and psychologists who are bilingual or multilingual in the child’s native language, they should find interpreters, translators, or paraprofessionals to assist with this element of special education as well.

Other problems may arise for linguistic minorities with disabilities who are mainstreamed in general education classrooms, where they receive support but otherwise attend the same classes as children without disabilities. This Comment does not consider whether children in general have a right to native language instruction. It is possible that an integrated classroom may have a linguistic minority student with disabilities entitled to native language instruction in some form, and a linguistic minority student without disabilities who does not have that same right. Administering native language support without frustrating the goals of integration for linguistic minorities with disabilities in mainstreamed classrooms may be particularly challenging. Nevertheless, the possibility of a legal right being vindicated in an international court—even if states cannot, at the time of judgment, immediately correct violations of linguistic minorities with disabilities’ right to native language instruction—could help raise awareness and push states further forwards in developing more linguistically equitable special education.

V. CONCLUSION

Linguistic minorities with disabilities currently face two major challenges: the impairment caused by the interaction of their disability and various barriers in society and the costs of compelled assimilation into educational institutions dominated by the majority language. Although linguistic minorities are guaranteed a negative right to use their native language, states have discretion to balance interests like national unity against the interests of linguistic minorities when it comes to positive rights, where the language right is tied to another right. This finding suggested that an analysis of linguistic minorities with disabilities’ right to native language instruction required looking closely at the education interests involved. By using the CRPD as a framework for discussing the education rights of linguistic minorities with disabilities, the state’s obligation to provide reasonable accommodation maximizing academic and social development in consideration of the goal of full inclusion created a right to native language instruction for linguistic minorities with disabilities. Balancing could depend on how linguistic needs interact with the disability—for instance, language needs may more severely
impact linguistic minorities with communication or learning disabilities. Finally, this Comment made a number of brief suggestions for policies states could implement to ensure such a right and flagged some of the challenges involved. Future research could include fleshing out the policy and legal boundaries of each of these suggestions, analyzing how certain disabilities may trigger specific implementations of the right, and what steps the international community could take in combating multiple discrimination.