

## National CRC Monitoring Mechanism

# Children's Rights and Alternative Care

Day of General Discussion, September 2021

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June 2021

## 1 Preliminary Remarks

This contribution by the National CRC Monitoring Mechanism (CRC-MM Germany) at the German Institute for Human Rights examines developments in Germany relating to children's rights and alternative care, the topic of this year's Day of General Discussion, spotlighting specific aspects it wishes to draw to the attention of the UN Committee on the Rights of the Child.

The main focus is on the issue of measures that deprive children of their liberty (deprivation-of-liberty measures: DoLM) in child and youth services<sup>1</sup> (CYS) in Germany.<sup>2</sup>

## 2 Coercive Measures in Child and Youth Services

About 250,000 children residing in Germany do not live with their family of origin.<sup>3</sup> Recent years have seen a proliferation of alternative care arrangements and an increase in the use of DoLM. Under the United Nations' Convention on the Rights of the Child (UNCRC), no child may be deprived of their liberty unlawfully or arbitrarily. DoLM must be used in conformity with the law and only as a measure of last resort and of the shortest appropriate duration. Article 41 of the UNCRC also clearly states that nothing within its own provisions can be taken as limiting provisions of national or international law more conducive to the realisation of children's rights. This is of particular relevance here, given the absolute prohibition of DoLM due to the existence of a disability laid down in article 14 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

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<sup>1</sup> The term "child and youth" is frequently used to demarcate areas of public policy/administration in Germany (child and youth [psychiatric] services, child and youth policy, etc.). We use it to refer to those areas herein, in line with the standard English-language usage in Germany, but in all other contexts, our use of the words "child" and "children" herein should be understood to mean persons under the age of 18, as defined in the UNCRC.

<sup>2</sup> See also National CRC Monitoring Mechanism (2020): Children's rights in the Era of the Corona Pandemic. Measures based on children's rights support and protect children and young people at times of crisis. [https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Position\\_Paper\\_Childrens\\_Rights\\_in\\_the\\_Era\\_of\\_the\\_Corona\\_Pandemic.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Position_Paper_Childrens_Rights_in_the_Era_of_the_Corona_Pandemic.pdf) (22 Jun. 2021); Committee on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of Germany, paras. 46-47, 74-75. <https://www.refworld.org/publisher,CRC,,DEU,52f8a2074,0.html> (03 Jun. 2021). Coercive measures in child and youth services is a 2021 focus for MM-CRC Germany, see Monitoring-Stelle UN-Kinderrechtskonvention (2021): Zwangsmaßnahmen in der Kinder- und Jugendhilfe. Eine kinderrechtliche Perspektive. [https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Information/Information\\_Zwangsmassnahmen\\_in\\_der\\_Kinder\\_und\\_Jugendhilfe.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Information/Information_Zwangsmassnahmen_in_der_Kinder_und_Jugendhilfe.pdf) (06 Mar. 2021).

<sup>3</sup> Number encompasses support services under SGB VIII §33–35, for a breakdown see Destatis (2021): Familie, Lebensformen und Kinder 2021, p. 70, Fig. 1.

## 2.1 Basic principles in German law

The provision of services supporting the upbringing of children is addressed in sections 27–35 of the Eighth Book of the Social Code (SGB VIII), which governs CYC. This Book's purpose is to protect the well-being of children (*Kindeswohl*) (§8a SGB VIII) and their rights to support for their development and to be raised to be responsible and community-oriented personalities (§1(1) SGB VIII). An entitlement to educational support services exists if a child's upbringing is not conducive to their well-being (§27 SGB VIII).<sup>4</sup>

A Civil Code provision (§1631b BGB) introduced in 2017 made DoLM (*freiheitsentziehende Maßnahmen*) on children not living with their families subject to family-court approval.<sup>5</sup> Previously, family-court approval was necessary only upon placement in a custodial or locked facility (*freiheitsentziehende Unterbringung*). A guardian ad litem must be appointed in either case.

The explanatory memorandum for the amending legislation defines DoLM as "...[measures] that, for a prolonged period or regularly, deprive persons of liberty by means of a mechanical apparatus, medication or otherwise. As generally understood, this term might cover physically holding someone, restraints, sedation, the use of chair-mounted lap-trays, bedrails, straps, preventative clothing, or confinement in so-called time-out rooms, i.e. protective spaces intended to reduce aggression and avoid any intensifying stimuli."<sup>6</sup> The memorandum also says "...a variety of types [of DoLM] are used in a variety of ways both in child and youth psychiatric clinics and in institutions of CYC and disability services."<sup>7</sup> Court approval is normally limited to six months but can extend to twelve in exceptional cases.<sup>8</sup>

§1631b BGB establishes a link between the child's well-being and the DoLM and identifies the use of a DoLM to avert a danger to the child or another person as permissible. It also indicates that other purposes may be permissible though, without specifying these. As a result, we have seen considerable variation in the provision's implementation in practice depending on the understanding of *Kindeswohl* (best interests vs. well-being) and attitudes of the professionals involved.

## 2.2 Deprivation of liberty: the "grey zone"

In pursuing their mandate under SGB VIII, CYC make an important contribution towards UNCRC implementation. However, the increase in the number of institutionalised children is disturbing from the perspective of human rights,<sup>9</sup> accompanied as it is by an increase in experiences of the restriction or deprivation of liberty. We are also observing a shift from CYC towards child and youth psychiatric services and the placement of children outside their home regions. In the German debate, DoLM no longer figure only as the means of last resort but sometimes also as the means best suited: "optima ratio" rather than merely "ultima ratio".<sup>10</sup>

<sup>4</sup> Author's note: under a May 2021 amendment of the SGB VIII, children with and without disabilities will fall within the competence of the same authorities as of 2027.

<sup>5</sup> Cf. Deutsches Institut für Menschenrechte (2016): Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz eines Gesetzes zur Einführung eines familiengerichtlichen Genehmigungsvorbehaltes für freiheitsentziehende Maßnahmen bei Kindern.

<sup>6</sup> For the original German see: Deutscher Bundestag (2017): Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Einführung eines familiengerichtlichen Genehmigungsvorbehaltes für freiheitsentziehende Maßnahmen bei Kindern, Drucksache 18/11278, p. 14. A 2015 federal court ruling held periods over 30 minutes to constitute deprivation of liberty: BGH (2015): Beschluss vom 7. Januar 2015, XII ZB 394/14, para. 22; c.f. this Higher Regional Court ruling: OLG Hamburg (2020): Beschluss vom 17.11.2020, 12 UF 101/20, paras. 21-25.

<sup>7</sup> Drucksache 18/11278, p. 14.

<sup>8</sup> For original German, see [https://www.gesetze-im-internet.de/bgb/\\_1631b.html](https://www.gesetze-im-internet.de/bgb/_1631b.html) (06 Jun. 2021).

<sup>9</sup> Cf. Fendrich, Sandra et al. (2018): Neue Daten des Statistischen Bundesamtes erschienen. Arbeitsstelle Kinder- und Jugendhilfestatistik, pp. 1, 45. Author's note: an influx of unaccompanied minor refugees contributed to the increase in the period 2014–2016.

<sup>10</sup> Cf. Hoops, Sabrina (2021): "Geschlossene Unterbringung" in Heimen der Kinder- und Jugendhilfe als Reaktion auf Delinquenz? In: Kaplan, Anne/Roos, Stefanie (Eds.): Delinquenz bei jungen Menschen. Ein interdisziplinäres Handbuch. Festschrift zur Emeritierung von Prof. Dr. Philipp Walkenhorst. Wiesbaden: Springer VS, pp. 112 ff.

The German Youth Institute (DJI) speaks of a “grey zone” for the deprivation of liberty. The spectrum ranges from placement in unlocked facilities which operate with restrictions of liberty or with time-out rooms<sup>11</sup> or which are effectively locked because their location prevents contacts with residents’ communities, to placement in facilities which are locked at certain times of day or which can only be left with permission (for certain older children or at certain times), on through to placement in facilities that are partially locked.<sup>12</sup> These arrangements, described as “intensive education” measures, also include facilities that use “level plans” (reward/punishment systems) to elicit “voluntary” behaviours, geographic isolation<sup>13</sup> or similarly restrictive arrangements.<sup>14</sup> The German Ethics Council has criticised such measures, noting that they often involve a system of privileges using a point/level model and emphasising that these cannot be justified, as they do not fulfil their intended purpose: they result in experiences of powerlessness for children and an outward conformance motivated by resignation rather than genuine acceptance.<sup>15</sup>

### 2.3 Alternatives to placement

Some approaches have demonstrated ways to avoid the use coercive measures through, e.g., settings with a social space orientation that can provide individualised needs-based support involving a combination of interlinked supportive measures.<sup>16</sup> A case in point is Hamburg’s Koordinierungsstelle Individuelle Hilfen, a coordination office which supports “complex and problematic” support-service processes by working with the competent authorities and everyone involved and focussing on the individual situation of the young persons and their families.<sup>17</sup>

### 2.4 Foster care

Foster care is a core area of CYS activity: in 2019, 91,176 services relating to full-time care in another family were provided under section 33, SGB VIII, according to the Federal Statistical Office.<sup>18</sup> The foster care system has drawn increasing criticism for a lack of uniform standards and quality criteria and inadequate child protection. Thus far, protection concepts have focussed on organisations (including institutional care /residential care groups).<sup>19</sup>

### 2.5 Increasing political acceptability of DoLM

The variety of DoLM forms and structures in CYS make it clear that they have been gaining greater acceptability among care professionals and in the political arena. Given the gravity of the interference in fundamental and human rights involved, this is an alarming development from the perspective of children’s rights – particularly as the reference to “well-being” is highly problematic, not only with regard to the genesis of the legal concept, but also in relation to current debates.<sup>20</sup>

<sup>11</sup> For further information see: <https://igfh.de/publikationen/kritisches-glossar/time-out> (06 Mar. 2021). The use and provision of such rooms are controversial and should be assessed with respect to UNCRC compatibility.

<sup>12</sup> Cf. Hoops, Sabrina/Permien, Hanna (2006): *Mildere Maßnahmen sind nicht möglich! Freiheitsentziehende Maßnahmen nach §1631b BGB in Jugendhilfe und Jugendpsychiatrie*. Munich: Deutsches Jugendinstitut, p. 28.

<sup>13</sup> Hoops/Permien (2006), *Mildere Maßnahmen*, p. 28: geographic isolation in this sense includes placement in a project in another country or Bundesland.

<sup>14</sup> Cf. Hoops/Permien (2006), *Mildere Maßnahmen*, p. 28.

<sup>15</sup> Cf. Deutscher Ethikrat (2017): *Wohltätiger Zwang in der Kinder- und Jugendhilfe*, <https://www.ethikrat.org/anhörungen/wohltätiger-zwang-in-der-kinder-und-jugendhilfe/> (03 Jun. 2021). See also Drucksache 18/11278, p. 14 and Hoops/Permien (2006), *Mildere Maßnahmen*, p. 28.

<sup>16</sup> Cf. Cinkl, Stephan (2017): “Und da hörte ich eben, dass die Kinder dort gebrochen werden“. *Vermeidung geschlossener Unterbringung durch Betroffenenbeteiligung - eine Einzelfallstudie*. Frankfurt am Main: IGfH; Degener, Lea et al. (Eds.): *Dressur zur Mündigkeit?! Über die Verletzung von Kinderrechten in der Heimerziehung*. Weinheim, Basel: Beltz Juventa.

<sup>17</sup> See <https://www.paritaet-hamburg.de/verband/einrichtungen-und-projekte/koordinierungsstelle-individuelle-hilfen.html> (03 Jun. 2021).

<sup>18</sup> Cf. social.net. *Das Netz für Sozialwirtschaft*. <https://www.socialnet.de/lexikon/Pflegekinderwesen> (03 Jun. 2021).

<sup>19</sup> See Team “FosterCare” et al. (2020): *Qualitätsstandards für Schutzkonzepte in der Pflegekinderhilfe*, 5 / 2020 JAmt. [https://www.dijuf.de/files/downloads/2020/Aufsatz\\_FosterCare\\_JAmt%202020,%20234.pdf](https://www.dijuf.de/files/downloads/2020/Aufsatz_FosterCare_JAmt%202020,%20234.pdf) (03 Jun. 2021).

<sup>20</sup> See BMFSFJ (2013): 14. *Kinder- und Jugendbericht. Bericht über die Lebenssituation junger Menschen und die Leistungen der Kinder- und Jugendhilfe in Deutschland*, p. 350.

### 3 Voices of Young People

Momo e.V. The Voice of Disconnected Youth, a self-advocacy organisation, has called for the closure of all CYS institutions that operate as locked residential facilities and for the abolition of level plans. Momo also advocates the establishment of independent, easily accessible complaints mechanisms, greater say and self-determination, communication in which all involved are treated as equals, and more education about rights and legal options.<sup>21</sup>

At this point, we wish to draw the Committee's attention to a submission by a group of young people from Germany. CRC-MM Germany was able to provide organisational support for it (we had no influence on the content) after issuing a call encouraging young people in residential care to contribute to the DGD.<sup>22</sup>

### 4 Covid-19 Pandemic

Restrictions imposed on schools, day-care and recreational facilities serving young persons by measures to curb the pandemic's spread varied across federal states and with the incidence of the disease. A lack of digital access points and devices hindered the implementation of digital offerings and measures in many CYS institutions. The restrictions on contacts with parents, family members and friends outside the institution also created challenges, as well as considerable uncertainty concerning implementation. The situation exacerbated deficits already evident before the pandemic, such as the shortage of skilled professionals. Independent of alternative care arrangements, the pandemic and the responses to it were associated with increased risks of child poverty, an increase in numbers of children directly affected or exposed to violence and an increased psychological burden on children and their families. In view of this, a re-examination of child and youth policy appears essential. Children's rights-based concepts robust enough to withstand periods of crisis and enabling children's voices to be heard are also needed.<sup>23</sup>

### 5 Strengthening Children's Rights

CRC-MM Germany wishes to introduce the following points to the discussion:

- The UNCRC rights to protection, provision and participation are binding and must be upheld at all times. The children's rights understanding of "the best interests of the child" as a primary consideration must be respected.<sup>24</sup>
- The study "Children Deprived of Liberty"<sup>25</sup> and the UN Special Rapporteur for the rights of persons with disabilities' 2019 report<sup>26</sup> seem to indicate that measures which deprive a child of their liberty or restrict their liberty or which may do so are not compatible with the guiding principles of the UNCRC.

<sup>21</sup> [List of demands of Momo e.V.](#) (03 Jun. 2021). See also Kinder- und Jugendhilferechtsverein e.V. Dresden (2020): [Erfahrungen mit Geschlossener Unterbringung und freiheitsentziehenden Maßnahmen in Jugendhilfe und Psychiatrie. Von Betroffenen für Betroffene.](#) (03 Jun. 2021).

<sup>22</sup> BUNDI (Bundesnetzwerk der Interessenvertretungen in der (stationären) Erziehungshilfe), the Federal Network of Interest Groups for Residential and Non-Residential Child Welfare Facilities represents self-organised interest groups from five of Germany's 16 federal states. [https://www.ivj-nrw.de/media/filer\\_public/70/4f/704fb405-b005-494a-a9cf-4bcb6111d1ec/beitrag\\_bundi\\_dgd\\_en\\_final.pdf](https://www.ivj-nrw.de/media/filer_public/70/4f/704fb405-b005-494a-a9cf-4bcb6111d1ec/beitrag_bundi_dgd_en_final.pdf) (28 June 2021).

<sup>23</sup> Cf. Bundesjugendkuratorium (2020): Kindheit und Jugend in Zeiten von Corona. Stellungnahme des Bundesjugendkuratoriums, <https://www.bundesjugendkuratorium.de/stellungnahmen/kindheit-und-jugend-in-zeiten-von-corona.html> (03 Jun. 2021).

<sup>24</sup> Cf. CRC/C/GC/14, para. 6; the Committee sees a three-fold concept in art. 3(1), UNCRC, encompassing a subjective right of children, a fundamental, interpretive legal principle and a rule of procedure.

<sup>25</sup> Cf. UN Doc. A/74/136.

<sup>26</sup> UN, General Assembly (2019): Rights of persons with disabilities. Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/HRC/40/54, paras. 25–30ff.

- All of the rights enshrined in the UNCRC are of relevance for alternative care. In view of the experiences in Germany, we wish to draw attention to article 25 of the UNCRC: a child who, for reasons of physical or mental health, has been placed in an institution for the purposes of care, to protect their health or for treatment has the right to a periodic review of the treatment provided and of all other circumstances relevant to their placement.
- It is imperative that children not be viewed as forming a homogeneous group that can to be protected by blanket measures; states must ensure that all regulations and decisions take children's diversity fully into account in a non-discriminatory manner. For CYS, this entails individualised needs-based support settings with a fundamentally social-space orientation, which require the interlinking and combination of support measures.<sup>27</sup> Different forms of support should be provided in different cases (principle of the best interests of the child, art. 3, UNCRC). Commensurate resources should be made available.
- Action should be taken at the political level to strengthen the rights of children to participate and have their complaints be heard. Children have the right to express their views as to what high-quality care involves and, should their rights be violated, they should be able to bring complaints to an appropriate body; children must be included in all stages of legal and systemic/structural change processes.<sup>28</sup> DoLM must not be employed as a means of discipline whose use is a priori acceptable across entire structures, for instance, in social work.<sup>29</sup>
- Extensive human rights education and the systematic safeguarding of children's rights are essential. Children's rights can only be implemented if people know about them: children, families and the professionals who work with them, politicians, lawyers, judges, media professionals and others.

We ask the UN Committee on the Rights of the Child to reconsider the permissibility of the use of DoLM as a last resort.

Thank you sincerely for considering our submission.

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<sup>27</sup> See, e.g., Cinkl, Stephan (2017): "Und da hörte ich"; Peters, Maren (2020): Nicht gegen das Autonomiebedürfnis der Kinder und Jugendlichen arbeiten, sondern es verstehen, respektieren und nutzen! In: Degener, Lea et al. (Eds.): *Dressur zur Mündigkeit?!*, pp. 312–320.

<sup>28</sup> See also Düring, Diana (2019): Von der Rede über "Begegnungen auf Augenhöhe" und unerfüllten Versprechen. Was die Kinder- und Jugendhilfe selbst aus Bildungsprozessen mit Adressat\*innen lernen könnte oder lernen müsste. In: Redmann, Björn/von Wölfel, Ursula (Eds.): *Bildung am Rande. Warum nur gemeinsam mit Adressat\_innen in der Jugendhilfe Bemächtigungsprozesse initiiert werden können*. Weinheim, Basel: Beltz Juventa, pp.50–72.

<sup>29</sup> Lindenberg, Michael/Lutz, Tilman (2021): *Zwang in der Sozialen Arbeit. Grundlagen und Handlungswissen*. Stuttgart: Kohlhammer, pp. 135–137.

## Impressum

Deutsches Institut für Menschenrechte  
Zimmerstraße 26/27, 10969 Berlin  
Tel.: 030 25 93 59-0  
info@institut-fuer-menschenrechte.de  
www.institut-fuer-menschenrechte.de

KONTAKT: un-krk@institut-fuer-menschenrechte.de

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November 2020

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