



**RULE 9 SUBMISSION TO
THE COMMITTEE OF MINISTERS
COUNCIL OF EUROPE**

D.H. and others v. the Czech Republic
Application No. 57325/00

February 2015

Executive Summary and Recommendations

Almost eight years ago, the European Court of Human Rights' Grand Chamber delivered its judgment in *D.H. and Others v. the Czech Republic*. The Court held that the disproportionate placement of Romani children in "special schools" – where they, along with children with disabilities, are segregated from their mainstream peers and taught to a limited curriculum – constituted unlawful discrimination. The Czech government was ordered to end the violation and remedy its damaging effects. On 10 February 2015, the Czech authorities submitted its fourth "Revised" Action Plan, which is still inadequate to ensure full execution of the judgment.

Notwithstanding the Plan's other deficiencies, described below, we welcome one promising development, which has occurred in the process of amending the Education Act; this is the omission of the problematic definition of "mental disability." We believe that the amendments to the Act, as passed by the Chamber of Deputies, should be approved by the Senate and President. Otherwise, we remain concerned that the Revised Action Plan still fails to address

- A plan as to how schools and school counseling facilities will adapt to the new education system introduced by the legislative changes;
- The financial reform needed to bring about meaningful change, as one of the biggest obstacles to inclusive education is the complex way in which schools apply for resources for the education of pupils with special educational needs;
- Evidence of the necessary political will (by way of legislation) to instruct the Czech School Inspectorate (CSI) to collect ethnically disaggregated data on children entering the different branches of education.

In light of the foregoing, we urge the Committee of Ministers to make the following recommendations to the Czech government:

- Submit a comprehensive, detailed implementation plan by 30 June 2015 regarding the adaptation of the schools and school counseling facilities to the education system put in place by the new amendments, and make a public political commitment toward this end;
- Submit a detailed financial reform plan to enable schools and school counseling facilities to adapt to the changes in the education system by the end of 30 June 2015;
- Implement sufficient safeguards and guidance for the appropriate use of revised diagnostic tools;
- Establish and meet numerical targets demonstrating that the number of Roma children educated according to a limited curriculum is decreasing in real term (i.e. a reduction in both percentage *and* number of children) on an annual basis;
- Establish a standardized methodology for the collection of disaggregated data on the numbers and ethnicity of children being educated according to special educational needs and explain the findings and the methodology used by the CSI for comparing the numbers in the 2013 and 2014/15 surveys.

Developments since June 2014

In response to the previous “Updated Action Plan” (UAP) submitted by the Czech government in April 2014, the Committee of Ministers called upon the Czech government to provide information on the following issues:

- The status of the amendments to Decrees Nos. 72/2005 and 73/2005 abolishing the possibility of short-term placement of “socially disadvantaged” pupils in groups or classes for children with “mild mental disability,” and the content of the amendment to Article 16 (on pupils with special educational needs) of the Education Act;
- The status of adoption of measures to improve the effectiveness of the new diagnostic tools and reassessment of the pupils, especially in relation to the monitoring of pupils who after their reassessment had been transferred to the mainstream educational system, and the monitoring of pupils who did not re-sit the tests;
- The most recent statistics concerning the education of Roma pupils in groups or classes for pupils with “mild mental disability.”

Recalling the above, and in the light of the “Revised Action Plan” (RAP), we remain concerned about the implementation of the measures undertaken by the Czech authorities. The brief analysis of the RAP and the concerns arising in relation to it are presented below, mirroring the format of the RAP.

A. Legislative support for the education of Roma pupils

Amendments to decrees (no 72/2005 and 73/2005) on the education of children, pupils and students with special educational needs and exceptionally gifted children, and on the provision of counseling services at schools and in school counseling facilities

Although with a significant delay, (they were originally scheduled for September 2013), the above amendments finally came into effect on 1 September 2014. The amendments abolished the possibility of short-term placement of children unable to cope with mainstream schools (who are mostly classified as being “socially disadvantaged”) in groups, classes, or schools established for children with mild mental disability. However, despite abolishing this practice, neither this amendment nor the amendments currently proposed to the Education Act define the category “schools and classes established for pupils with mild mental disability.” The lack of a precise definition of these schools or classes in the text of the law creates the risk of a problematic interpretation by school counseling facilities. This would be problematic in any country. It is particularly so in the Czech Republic, in view of the decades-long history of racial segregation of Roma students into inferior classes and schools. Absent a clearly articulated prohibition, the channeling of Roma pupils into special schools will therefore continue.

Changes to the Education Act

With respect to the amendment of the Education Act, the legislative process is expected to come to an end in the spring of this year, and the changes are scheduled to enter into force from 1 September 2016. We welcome that the amendments propose a transition from a system diagnosing disabilities and disadvantages to one in which the individual needs of children are identified and supported. Nonetheless, it is alarming that the Czech government – particularly the Ministry of Education – has not presented to date any specific implementation plan with respect to how schools and school counseling facilities will adapt to this new system. The government must submit a detailed implementation plan with a timeline and make a public

political commitment to this end. The government must also allocate adequate resources for the realization of the special educational needs of children as outlined in the amendments. Unless the government's budget follows the measures introduced by the amendments to the Act, effective implementation remains elusive.

B. Increasing the efficiency of school counseling facilities and school counseling departments

According to the RAP, the Ministry of Education launched a development program in the amount of EUR 80,000 to support the introduction of new or less available diagnostic instruments, including training necessary for their use in practice.¹ Under this program, greatly influenced by the Binet-Simon test, the authorities adapted and put into practice the IDS (Intelligence and Development Scales) diagnostic instrument; they also trained a total of 314 experts for its administration. Nevertheless, the government fails to explain why it has chosen the Binet-Simon test for the development of the IDS, which is known to be out-of-date and controversial by education specialists.

The RAP also mentions standardization of the Cattell Culture Fair Intelligence Test (CFT 20-R – measuring fluid intelligence) in 2013-14 for socio-culturally disadvantaged children. The results of such tests, if used only once, will be determined to a very large extent by prior learning experience. Rather than providing any meaningful measure of abilities, they are better suited to measure discrimination through lack of access to early learning opportunities. Therefore, we urge the government to provide information on how the CFT 20-R method will address this concern.

As part of the above development program, a further 149 experts were trained in the administration of the Woodcock-Johnson test. In this regard we must reiterate the concerns raised in our previous submission² about the unreliability and flaws of this diagnostic tool, which were recognized by the Czech government itself in its 2012 submission.³ In its most recent submission, the Czech government does not present any information as to why this test has remained in use or how it has been revised to ensure that Romani children are no longer being channeled into sub-standard education settings. We further note that the figures presented by the government on the numbers of experts trained for the use of the above-mentioned diagnostic tools are meaningless, as they do not reveal any information regarding their responsibilities and decision-making authority, nor do they specify their geographic spread.

We welcome the National Institute for Education's efforts in preparing the methodological standard for counseling staff about diagnosing cognitive skills of children with special educational needs coming from a socially different background. However, the Czech authorities must ensure these principles are phrased in a clear and unambiguous manner to avoid their arbitrary interpretation. They should closely cooperate in this endeavor with inclusive child education experts.

The RAP includes information on the government's already adopted and planned measures in relation to the training of counseling staff in the use of diagnostic instruments and interpretation of the results. Here, the government needs to provide more specific information on the content of current and future trainings, and it also needs to set a specific action plan for the counseling staff's continued professional development. The government

¹ See *Communication from the Czech Government on 10 February 2015 "Revised Action Plan for the Execution of the Judgment of the European Court of Human Rights in the Case of D.H. and Others v. the Czech Republic"*, at page 5, point B.1.

² See *Open Society Justice Initiative submission to the Committee of Ministers of November 2013*, at page 5

³ See *Communication from the Czech Government Concerning the Case of D.H. and Others against the Czech Republic (Consolidated Action Plan)*, DH-DD(2012)1074, on 16 November 2012, at page 6.

also must develop an action plan for the training of pedagogues, as teachers should be able to use formative assessment guidelines to support their students' learning in an appropriate manner.

Finally, we are concerned by the lack of information from the Czech government as to how (particularly, when, by whom, and how often) any of the diagnostic instruments described in the RAP will be administered. As all of these questions have a significant bearing on the interpretation of test results, the government must urgently address them.

C. Supervisory mechanisms in the area of diagnostics and counseling facilities

The RAP does not respond to the Committee of Ministers' request for information in relation to how the Czech authorities monitor children who were transferred to the mainstream educational system, as well as children who did not re-sit the tests. Meanwhile, as stressed in our previous submission, the structural problem with respect to diagnostic practice persists: school counseling centers are charged with assessing children for the existence of mental disabilities. These centers are integral parts of practical/special schools, with a single director for both the schools and the counseling centers. The potential for a conflict of interest is thus clear: the best interests of the child sent for testing may not be in the best interests of the school to which the counseling center is attached, given that the school is dependent on ongoing diagnoses of "mild mental disability" to receive funding.

The government has provided no indication of its intention to address this structural problem, which has the significant potential to perpetuate the ongoing placement of children into practical/special schools. This concern is made more worrisome by the lack of any provisions related to the change of the financing of the system. As noted above, the question of financing is currently the main barrier to inclusive education.

It is also critical that the government establish systems that provide for mediation or advocate support for parents and legal guardians who are unfamiliar with the new regulations governing the education system, particularly with respect to the assessment of children's special learning needs.

D. Pre-school education and preparatory classes

Instead of forbidding the establishment of preparatory classes at practical/special schools, the Czech government indicates in the RAP that the amended Education Act will make it possible for all pupils – not only those who are socially disadvantaged – to be educated in preparatory classes. The government explains that the purpose of this measure is to eliminate the risk of segregating Roma pupils in pre-school education. The intended introduction of this measure would not change the practice on the ground, which is that children who are not of Roma origin are enrolled into nursery schools instead. Therefore, we maintain our position that the Czech government must abolish the establishment of preparatory classes at practical schools.

Alongside the above proposal, the government plans to further amend the Education Act in 2015 to the effect that it introduces the mandatory attendance of the last grade of pre-school education in nursery schools. If the government introduces this measure, the current system of preparatory classes will become unnecessary. Furthermore, as data have shown, nursery

school attendance has a much greater positive effect on children's development than preparatory classes.⁴

E. Planned changes to the legislation governing the education of pupils with mild mental disability (the revision of the practical curricula - repealing Annex to FEP BE)

We welcome the Ministry of Education's plan to repeal the practical curricula governing the education of pupils with mild mental disabilities (FEP BE – MMD Annex). However, the government has repeatedly stated its intention to revise this Annex since it submitted its Consolidated Action Plan *in 2012* – and has yet to act to do so. As the Public Defender of Rights' made clear of the Annex in her 2014 submission⁵, "it has no factual support in the law and *de facto* allows the existence of a third branch – next to the 'ordinary' and special – of elementary education." Since the Annex is the instrument that, in fact, establishes practical/special schools, whatever action the Ministry proposes to take in relation to its revision or repeal must be prepared in close collaboration and consultation with inclusive education experts and civil society. We therefore urge the government to set up a roundtable consultation for this purpose and to set a clear timeline for the Annex's repeal.

F. Monitoring, Record-keeping and statistics in the area of Roma pupil education (data collection)

The decree (Decree No. 364/2005) on school's record keeping duties was amended in 2013, establishing a specific duty for schools to document the number of children with mild mental disabilities educated according to a limited curriculum. However, schools are not under a duty to collect data on the numbers of Roma children educated according to this curriculum. We urge that the decree be further amended to this effect, while ensuring relevant safeguards.

While we welcome that CSI has continued to collect ethnically disaggregated data from schools in each year, we strongly disagree with the government's contention that the most recent data "clearly show that the Czech Republic is succeeding in reducing the number of Roma pupils educated pursuant to the FEB BE MMD Annex."⁶ In its 2012-2013 submissions, the government drew conclusions from the *change of the share* (the proportion) of Roma pupils in the number of all children educated according to the FEB BE MMD.⁷ However, in 2015, the above 'optimistic' conclusion is drawn from the *change in number* of Roma pupils educated according to the Annex. In order to demonstrate a positive trend, both figures – i.e. the absolute numbers (how many Roma children are educated according to the Annex) and the proportion (share of the Roma children in the number of all children educated according to the Annex) - need to be reduced. As interpreted by the government in the RAP, the number of Roma children educated according to the limited curriculum in school years 2013/14 and 2014/15 represents a decrease from 4198 to 3468.⁸ However, the proportion of Roma children in the number of all pupils educated according to the limited curriculum is still on the rise and is disproportionately high: they still represent 32.4% of all children, which is a 4.2 %

⁴ See Sociological Research Aimed at the Analysis of the Image and Causes of Segregation of Children, Pupils and Young People from the Socially and Culturally Disadvantaging Environment: http://www.gac.cz/userfiles/File/nase_prace_vystupy/GAC_Research_the_segregation_of_children.pdf?langSEO=en&parentSEO=documents&midSEO=nase_prace_vystupy&submidSEO=GAC_Research_the_segregation_of_children.pdf

⁵ See *Communication from the Public Defender of Rights (14/04/2014) DH-DD(2014)569*, at page 6, point G (<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2520487&SecMode=1&DocId=2136456&Usage=2>)

⁶ See *Communication from the Czech Government*, note 1, at page 13.

⁷ See *Communication from the Czech Government (Consolidated Action Plan)*, note 3, and *Communication from the Czech Government on 26 November 2013*, [DH-DD\(2013\)1284](https://www.coe.int/t/e/treaties/2013/20131284).

⁸ See *Communication from Czech Government*, note 1 above, at page 13, Tables No. 1 and 3.

increase from the previous year.⁹ The government's findings, therefore, are not accurate. Furthermore, the surveyed sample of 444 schools were all schools that educated pupils according to the Annex – in other words, they are to be considered the practical schools in the Czech Republic in 2014.

According to the Analysis of the Occurrence of Intellectual Disability in the Czech Republic prepared by ČOSIV (Czech Expert Organization for Inclusive Education),¹⁰ there are significant disparities in the numbers and the proportion of children receiving a diagnosis of mild mental disability among the different regions. The determinants for the differences in the occurrence of mild mental disability are the size of the Romani population in the regions, along with “the higher capacity of segregated schools (especially practical elementary schools) that ‘need’ certain number of children diagnosed with such disorders so that they can continue to function.”¹¹ As the report finds, the prevalence of mental disability changes depending upon the diagnostic procedures used.¹²

In addition, our concern as to the methodology deployed for the collection of ethnic data, expressed in our November 2013 submission, remains unchanged. Accordingly, the number of Roma pupils in individual schools is still determined by the headmaster and risks resulting in unreliable data. Furthermore, the schools that fill in survey data incompletely or incorrectly are visited by the CSI in person and the survey is done directly on site. However, the methods used by the CSI to identify incorrect data collection in schools and the methods used for their ‘correction’ are unclear. The Czech government must reassess and standardize its methodology to ensure quality control and accurate results.

G. Consultations with stakeholders

We maintain our concerns as to the effectiveness and real value of the NGO forums and roundtable discussions on inclusive education. The fact that there was only one national roundtable convened in 2014, and the non-transparent manner in which the larger process has proceeded, has already been publicly criticized by a number of Czech civil society organizations. The unsatisfactory nature of these consultations undermines their original purpose and casts doubt on whether they are genuine.

⁹ See *Communication from Czech Government*, note 1 above, at page 12, Tables No. 1 and 2.

¹⁰ See *Analysis of the Occurrence of Intellectual Disability in the Czech Republic* prepared by ČOSIV (Czech Expert Organization for Inclusive Education)

¹¹ See ČOSIV Report *ibid*, at page 7.

¹² See ČOSIV Report *ibid*, at page 3.

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