

RULE 9 SUBMISSION TO THE COMMITTEE OF MINISTERS

D.H. AND OTHERS V. CZECH REPUBLIC
(APPLICATION NO 57325/00)

MAY 2018

Executive Summary and Recommendations

More than ten years have passed since the European Court of Human Rights issued its landmark judgment in the case of *D.H. and Others v. Czech Republic* (“*D.H.*”) on November 13, 2007. Despite continuous efforts by civil society organizations to promote full implementation of this judgment, systematic discrimination against and segregation of Roma pupils persists.

The Committee of Ministers (CoM) has called on the Czech government repeatedly to implement this judgment in full. In June 2017, the CoM expressed its hopes that “...increasing numbers of children with special educational needs will receive support measures allowing them to integrate into mainstream schools or classes, and statistical data at the end of 2017 will reflect this process...”¹ These hopes have been dashed by recent data from the Ministry of Education, which indicates that the number of Roma pupils subjected to a reduced educational curriculum is virtually unchanged in the past five years.² The Czech Republic Government’s submission of a Revised Action Plan on February 14, 2018 contains little new information and does not substantially change the situation on the ground for Roma pupils.

The Czech Government’s promotion of educational “progress” must be seen for what it is: largely on paper, with little positive impact on the deeply marginalized Roma communities whose children are in desperate need of equal access to quality education. In its next debate of the *D.H.* judgment at the June 2018 CM-DH meeting, we urge the CoM to call upon the Czech authorities to:

1. **Provide detailed guidance to schools and counselling centers relating to the provision of support measures for pupils with special needs, and ensure as a matter of priority that adequate funding is available for such measures.**
2. Increase the number of counselors at local counseling centers, and the number and capacity of nursery schools throughout the country. Provide anti-discrimination training to teaching assistants and special education teachers, with a particular focus on Roma, starting with those mainstream schools that have begun to implement principles of inclusive education.
3. **Submit a detailed report by the Czech School Inspectorate by February 1, 2019, evaluating the actual, on-the-ground impact of recent educational reforms in ending discrimination and segregation of Roma children.**
4. **Publish anonymized data of the National Institute Education’s review body, including the number of decisions that overturn or uphold adverse diagnostics of mild mental disability, disaggregated by region and by category of claimant (parents, school or counselling center).**
5. **Amend the Anti-Discrimination Act so that it allows for action in the public interest (*actio popularis*) and class action procedures to challenge institutionalized forms of discrimination.**

¹ See Ministers’ Deputies Decisions, CM/Del/Dec (2017)1288/H46-12, available at <http://bit.ly/2tQTqnP>.

² Communication from the Czech Republic concerning the case of *D.H. and Others v. Czech Republic* (Application No. 57325/00), 1310th meeting (March 2018) (DH) - Action plan (15/02/2018).

The current situation for Roma pupils

In 1999, when eighteen Roma children first challenged discrimination in education in Czech courts, Roma pupils were 27 times more likely to be sent to “special schools”—where they were taught to a limited curriculum—than their non-Roma peers. Denied a remedy, the students and their families filed a petition against the Czech government in the European Court of Human Rights (ECtHR), arguing that the disproportionate placement of Roma children into special schools without objective and reasonable justification amounted to unlawful discrimination. In November 2007, the ECtHR agreed, finding systemic discrimination in the Czech schooling system. The Grand Chamber ordered the Czech government to halt the violation of Roma children’s rights and to redress, so far as possible, the effects of past discrimination.

More than a decade later, discrimination against Roma pupils persists. According to January 2018 statistics published by the Ministry of Education, 29.5% of all pupils with mild mental disability are Roma and educated according to an inferior curriculum, even though only 3.6% of all pupils in Czech schools are Roma.³

Furthermore, in 77 schools across the country, Roma students represent more than 50% of the student body; 30 of these schools are populated with 75% or more Roma pupils, and 12 of these schools host 90% or more Roma children.⁴

Recent data illustrates the lack of progress engendered by the 2015/2016 education reforms. Clearly, legislative reform is not enough. Rather, the Czech Government needs to demonstrate concrete political will—including collecting proper data to assess barriers to progress; offering sufficient policy guidance and training to schools, counselling centers, and teachers; and providing adequate funding. Anything less perpetuates the status quo, and the status quo for Roma children sets yet another generation of Roma pupils behind.

Support measures for children with special educational needs must be properly and consistently implemented

In September 2014, the European Commission launched infringement proceedings against the Czech Government for its failure to comply with its obligations under the European Union Racial Equality Directive to cease the educational segregation of Roma children.⁵ In 2015 and 2016, the Czech Government introduced a series of legislative reforms in an effort to address these deficiencies.⁶ The 2015 Amendment to the Education Act (the “Amended Act,” entering into effect in 2016) promised free support measures to children with special educational needs (those who require additional help to “fulfil their educational opportunities or for the enjoyment or exercise of their rights on an equal basis with others”), such as teaching assistants and individual educational plans and materials. The Amended Act also stipulated that only pupils with “mental, physical, visual or hearing impairments, severe learning disabilities, severe development disorders, multiple disabilities or autism can be placed into special schools or

³ Communication from the Czech Republic concerning the case of D.H. AND OTHERS v. the Czech Republic (Application No. 57325/00), 1310th meeting (March 2018) (DH) - Action plan (15/02/2018).

⁴ Ministry of Education: Report from the qualified estimates of Roma pupils in elementary schools in the school year 2017/2018, November 2018 (Czech translation: *Ministerstvo školství, mládeže a tělovýchovy: Zpráva ze zjišťování kvalifikovaných odhadů počtu romských žáků v základních školách ve školním roce 2017/2018, listopad 2018*).

⁵ 2000/43/EC of 29 June 2000.

⁶ Amendment to the Education Act No 82/2015 and Ministerial Decree No 27/2016 and Framework Educational Program for Basic Education - Annex Specifying the Education of Pupils with Mild Mental Disabilities.

classes.”⁷

The Amended Act was clearly intended to enable pupils who need additional support to receive it wherever they go to school, and to eliminate the placement of children into special schools absent significant learning challenges. Previously, special education schools were dependent on diagnoses to stay open and receive extra funding. According to a 2015 study by inclusive education experts, special schools under the old legislative regime received 2.2 times more funds for educating a child with mild mental disability than mainstream schools.⁸ With the Amended Act, funding for support “attaches” to the child rather than to the school, thereby eliminating the financial incentive to place a child in a special education school. Since the system equalizes the financial support between mainstream and special education, the reform has the potential to play an important role in desegregation.

However, an Amended Act alone does not create reform. No matter how well intended, the Act must be properly and consistently implemented and fully funded. Support measures for pupils with educational challenges cannot possibly end discrimination if they aren’t funded and delivered to every Roma student who needs them. For the promise of the Amended Education Act to be realized, the government must take seriously the need to implement education reforms through concrete actions, ensuring that all Roma children receive quality education in mainstream schools. In the event Roma pupils are unable to access equal education, they must be able to effectively assert their rights in judicial proceedings through *actio popularis* or class action proceedings. The current legislation fails to provide effective legal protection and remedies for victims of discrimination.

Problematic Supervision of Diagnostics and Counselling Facilities

The Amended Act establishes a review body in the field of diagnostics. According to the 2017 Action Plan, “the amendment to the Education Act stipulates that the NIE, a legal entity established and entrusted by the Ministry of Education, shall serve as a review body. The outputs of activities of school counselling facilities, namely reports and recommendations, will be subject to review from now on.”⁹ The Amended Act also extends the Czech School Inspectorate’s powers in relation to counselling facilities, empowering it to oversee the quality of services provided by counselling centers. Although the adoption of these policies is a welcome step forward toward greater accountability of supervisory mechanisms, their impact is yet to be assessed. To properly analyze whether these policies have helped to reduce the education discrimination systematically afflicting Roma pupils, the NIE’s review body should publish anonymized data on the number of decisions that overturn or uphold adverse diagnostics of mild mental disability, disaggregated by region and by category of claimant (parents, school or counselling center).

We welcome the National Institute for Education’s efforts to introduce new standardized diagnostic instrument for school counselling facilities. However, a 2015 survey of Czech School Inspectorate on school counselling facilities indicates that only a fifth of the facilities take into

⁷Amendment to the Education Act No 82/2, Section 16 ¶9.

⁸ Klusáček and Hrstka, “Nákladnost vzdělávání dětí s lehkým mentálním postižením v základních školách praktických” (2015).

⁹ See *supra* no 1, at page 18.

account the different cultural conditions and socio-cultural environments when interpreting the test results, or perform a qualitative analysis of the results when testing children for mild mental disability. Moreover, the report makes it clear that “there is clearly room for further improvement of the work of school counselling facilities since the different cultural conditions and the socio-cultural environment should be always taken into consideration when interpreting such test results.”¹⁰

As noted in a previous submission, some of the counselling centers, responsible for diagnosing children with mild mental disabilities, are integral parts of special schools, with a single director for both the schools and the counseling centers. Given that special schools are dependent on diagnoses of “mild mental disability” to receive the extra funding attached to those pupils, directors have financial incentive to place children in special schools, regardless of the best interests of the child sent for testing.¹¹ The government must address this structural problem and ensure that the inappropriate placement of children into special schools ends.

The Czech government’s own data indicates significant disparities in the numbers and the proportion of children receiving adverse diagnosis among the different regions. The Ústecký region continues to have twice as many children diagnosed with mild mental disabilities than the average in the Czech Republic. (This region has a large Roma community).

Table 1: Children diagnosed with mild mental disability in the Czech Republic and regions, School Year 2016/2017¹²

	Number	%
Czech Republic	12 561	1,4%
Prague region	785	0,8%
Středočeský region	1 423	1,2%
Jihočeský region	676	1,2%
Plzeňský region	851	1,7%
Karlovarský region	449	1,8%
Ústecký region	2 017	2,7%
Liberecký region	968	2,4%
Královéhradecký region	710	1,5%
Pardubický region	517	1,1%
Region Vysočina	596	1,4%
Jihomoravský region	934	0,9%
Olomoucký region	741	1,4%
Zlínský region	445	0,9%
Moravskoslezský region	1 449	1,4%

¹⁰ Czech School Inspectorate, Survey of activities of school counselling facilities, November 2015, at page 6.

¹¹ Open Society Justice Initiative submission to the Committee of Ministers of February 2015, at page 5.

¹² Czech Society for Inclusive Education, “V běžné nebo speciální škole? Vzdělávání žáků s LMP v aktuálních datech” (2017) <https://cosiv.cz/cs/2017/06/01/vzdelavani-zaku-s-lehkym-mentalnim-postizenim-v-datech-vyvoj-situace/>.

Pre-school education and preparatory classes

Amendments to the Education Act require mandatory attendance for the last grade of pre-school education in nursery schools, an important reform given that research demonstrates the importance of nursery school attendance to children's development and success in education.¹³ The measure, however, will only be effective if the government commits to substantially increase the number and capacity of nursery schools throughout the country. The insufficiency of nursery school seats in the Czech Republic, combined with the permissible waiver of mandatory attendance if parents decide to homeschool their children, give rise to concerns that Roma parents may decide (or be forced) to homeschool their children, resulting in further segregation of Roma children.

The Czech government has a responsibility to oversee the enrollment of Roma children in pre-school education and make sure that Roma parents, especially those living in socially excluded localities, are not forced to homeschool their children.¹⁴ For this to happen, the authorities must collect disaggregated data on the enrollment of Roma children in kindergarten and present a detailed plan for how schools will adapt to the mandatory pre-school education measure and how parents will be made aware of their rights.

Position of the Framework Education Program for Basic Education - Annex specifying the Education of Pupils with Mild Mental Disabilities (FEP BE MMD)

We welcome the abolition of the discriminatory system of separate educational programs or facilities for children with mild mental disabilities (Framework Educational Program for Basic Education - Annex Specifying the Education of Pupils with Mild Mental Disabilities). According to the Public Defender of Rights, this educational program had no basis in the School Act, as it enabled a third (discriminatory) track within elementary education (besides the fully mainstream and fully special education branches) in which Roma children were concentrated in a significant number.¹⁵

As of September 2016, children who are assessed with MMD (who previously would have been taught according to a separate curriculum) are now taught to the same curriculum as all other children. There is an exception for children from second stage of primary schools (grade 6 to 9), who will have an opportunity to finish their school with FEP BE MMD or to be taught to an individual plan, which will enable teachers to better align their expectations for these children's academic performance.

Monitoring, record-keeping and statistics in the area of Roma pupil education

The Czech government's own data indicates that Roma children are frequently and incorrectly classified as children with mild mental disabilities. Roma children make up less than 4% of

¹³ GAC spol. s.r.o., "Sociological Research Aimed at the Analysis of the Image and Causes of Segregation of Children, Pupils and Young People" (2015), available at: 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.

¹⁴ See map of socially excluded localities, GAC spol., s.r.o., 2015, <https://www.esfcr.cz/mapa-svl-2015/www/index.html>.

¹⁵ *Communication from the Public Defender of Rights (Ombudsman) (23/02/2015) in the case of D.H. and Others against Czech Republic (Application No. 57325/00).*

elementary school children in the Czech Republic, yet they represent about 30% of children diagnosed with mild mental disability. This number has not significantly changed over the last five years, the period in which the data has been collected by the Czech School Inspectorate and the Ministry of Education. The number is also similar to estimates from the Public Defender of Rights, who found that in the school year 2011/2012 the share of Roma pupils in the group of children with mild mental disability is between 32% and 35%.¹⁶

Table 2: Children diagnosed with mild mental disability and share of Roma children from school year 2013/2014 to 2017/2018¹⁷

School year	2013/2014	2014/2015	2015/2016	2016/2017	2017/2018
Number of all children with MMD	14,908	10,695	14,810	13,983	14,557
Number of Roma with MMD	4,198	3,468	4,539	4,318	4,290
Share of Roma children with MMD	28.4 %	32.4 %	30.6 %	30.9 %	29.5 %
Number of Roma children in elementary schools	<i>no data</i>	<i>no data</i>	34,191	33,858	33,704
Share of Roma children in elementary schools	<i>no data</i>	<i>no data</i>	3.9 %	3.7 %	3.6

The data from the Ministry of Education provides valuable information on the scale of discrimination of Roma children, but it is only a starting point. More in-depth study is required to evaluate the impact of the education reforms after they have been in effect for two years. The Czech School Inspectorate has conducted such studies in the past, and clearly has the competence to do so again.¹⁸ If the Czech government is truly committed to improving the situation for Roma pupils, it needs accurate data. We therefore urge the Czech School Inspectorate to submit a detailed report by February 1, 2019, evaluating the actual, on-the-ground impact of recent educational reforms in ending discrimination against and segregation of Roma children.

¹⁶ Public Defender of Rights, "Survey into the Ethnic Composition of Pupils of Former Special Schools" (2012), available at: https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Survey_Ethnic_Special-schools.pdf.

¹⁷Open Society Fund- Prague's comparison of data for the period 2013-2017. Sources for comparing the data included: Communication from the Czech Republic concerning the case of *D.H. and Others v. the Czech Republic* (Application No. 57325/00), 1310th meeting (March 2018) (DH) - Action plan (15/02/2018); Communication from the Czech Republic concerning the case of *D.H. and others v. Czech Republic* (Application No. 57325/00), 1280 meeting (7-9 March 2017) (DH) - Action plan (15/02/2017); Communication from the Czech Republic concerning the case of *D.H. and Others against Czech Republic* (Application No. 57325/00), 1222 meeting (10-12 March 2015) (DH) - Revised action plan (10/02/2015).

¹⁸Czech School Inspectorate: Transformation of former special schools in the school year 2011/2012 (in Czech: *Česká školní inspekce: Postup transformace bývalých zvláštních škol ve školním roce 2011/2012, 2012*) and Czech School Inspectorate: Findings on the inspection in former special schools, 2010 (in Czech: *Česká školní inspekce Souhrnné poznatky z tematické kontrolní činnosti v bývalých zvláštních školách, 2010*).

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