

Opinion of the Public Defender of Rights

on fulfilment of the revised Action Plan for Enforcement of the Judgement of the European Court of Human Rights in Case D. H. and Others v. the Czech Republic “Equal Opportunities”

A. Legislative support for the education of Roma pupils (former measures A and B)

The Czech Government summarises the measures that have been included in three amendments to Decrees No. 72¹ and 73/2005 Coll. since 2011. However, in reality, the ²expected effect³ failed to appear. As I describe in detail in Section F of this opinion, the adopted integration measures benefit primarily children from the majority population rather than Roma children.

I inform the Committee of Ministers that, as of 1 September 2014, it is still possible (even though in very narrowly defined circumstances) to place a child with a health disadvantage in a school, class, or a study group for pupils with disabilities. Thus, the Ministry of Education, Youth and Sports (hereinafter the “Ministry”), as the body responsible for the Decree, exceeded its powers, since the Schools Act⁴ (superior rule of law) does not permit this. Therefore, I consider this situation to be inconsistent with the constitutional order of the Czech Republic.⁵ My predecessor⁶ drew the Ministry’s attention to this fact and, last year, I did too. The recommendation of the Defender was not taken into consideration. Therefore, this practice continues in academic year 2014 / 2015, and jeopardises the access of Roma pupils to quality education.

Furthermore, I would like to add that the concept of a diagnostic stay should have been eliminated from Decree No. 73/2005 Coll. without replacement under the original version of the Action Plan. However, this had not happened as of 1

¹ Decree No. 72/2005 Coll., on provision of counselling in schools and school counselling facilities, as amended.

² Decree No. 73/2005 Coll., on education of children, pupils and students with special educational needs and exceptionally gifted children, pupils and students, as amended.

³ Transfer of children from the reduced educational programme to the educational programme for standard elementary schools.

⁴ Act No. 561/2004 Coll., on pre-school, elementary, secondary, higher vocational and other education (the Schools Act), as amended.

⁵ More details in http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Survey_Ethnic_Special_schools.pdf (pgs. 16-17 of the survey report).

⁶ JUDr. Pavel Varvařovský, former judge of the Constitutional Court, held the office of the Public Defender of Rights from September 2010 to December 2013.

September 2014. According to the amended Decree, it is still possible to carry out diagnostic stays with the exception of “schools, classes and study groups for pupils with mild mental disabilities”. I note, however, that such schools exist neither *de jure* nor *de facto* and the Ministry and the Czech School Inspectorate (hereinafter the “CSI”) are not able to monitor compliance with the above specified restriction.⁷ The results of the inspections made in the autumn of 2014 mentioned by the Czech Government⁸ are not publicly available.

Therefore, I dare say that this change was only formal and made in an attempt to defuse the tense international situation with respect to segregation of Roma children; my findings show that it had no real consequences.

Changes in the implementing legal regulations are yet to be completed as the Czech Government stated in the autumn of 2012. I recommend that the Czech Government comply with its original obligations and implement legislative measures in the implementing regulations, which will ultimately lead to elimination of obstacles preventing Roma children from entering mainstream education.

B. Increasing efficiency of school counselling facilities (former measure (C))

Even though the Czech Government submits a detailed analysis of implementation of new diagnostic instruments, it does not mention any specific results of this approach in daily practice (measurable impact). By this, I mean specific numbers of children who were re-examined thanks to these new instruments and who were recommended for transfer to another school or educational programme. At the same time, it is desirable that the Czech Government present to the Committee of Ministers the number of cases in which the recommendation of the counselling facility to transfer to another school or educational programme was in fact acted upon. If a recommendation was not acted upon, the Czech Government should document the manners in which it protected the best interest of the child from inactivity or omission on the part of his/her guardian.

It is also unclear to what extent the use of an entire series of new diagnostic instruments (tests) is compatible with the amendment to the Schools Act, which will bring as of 1 September 2016 a change from “labelling children into three

⁷ A pupil with mild mental disability does not always have to be educated under the Framework Educational Programme for Basic Education – the Annex governing the education of pupils with a mild mental disability (FEP BE MMD). He or she may be individually integrated in an elementary school and educated according to an individual education plan. Therefore, it is impossible to determine with certainty the school, class or study group where diagnostic stay cannot be carried out.

⁸ See pg. 3 of the revised Action Plan for Enforcement of the Judgement of the European Court of Human Rights in case D. H. and Others v. the Czech Republic – “Equal opportunities”.

categories”⁹ to a system of supporting measures for all children with special educational needs.

However, I consider the most problematic the unfulfilled promise that the CSI and the National Institute of Education would carry out investigations in school counselling facilities with an emphasis on correct use of the new diagnostic instruments.

In this connection, I would like to take the liberty of informing the Committee of Ministers that I issued an opinion on 10 September 2014 which relates to the competence of the CSI with respect to school counselling facilities.¹⁰ I believe that the CSI is competent to inspect professional procedures and conclusions of the staff in educational facilities, especially in the area of social pedagogy and psychology, even within inspections based on instigations or complaints (e.g. of Roma parents or Roma NGOs). On 14 January 2015, I received a statement of the CSI, stating that my interpretation of the competence of the CSI varies from the interpretation of the Ministry and the CSI. In other words, both the above administrative bodies believe that the CSI may not inspect the correctness of the results of counselling (reports and recommendations). We have yet to resolve this apparent difference of opinion between the Ministry and the national equality body (the ombudsman). I also consider it important that the CSI visit counselling facilities accompanied by clinical psychologists and psychiatrists to examine the manner in which children with special educational needs (in particular Roma children) are tested and the degree of support in school recommended to these children.

The Czech Government failed to submit any measurable results in the area of diagnostic instruments that would allow us to conclude that there is, beyond any doubt, a direct connection between the introduction of new diagnostic instruments and the gradual integration of Roma children in mainstream education. Simultaneously, I emphasise that a discrepancy in interpretation exists on the national level with respect to the competence of the CSI. The Czech Government assumes obligations on the international level that it subsequently refuses to implement on the national level.

C. Supervisory mechanisms in the area of diagnostics and counselling facilities (former measure D)

In accordance with the amendment to the Schools Act, which will soon be discussed in the upper chamber of the Parliament of the Czech Republic, the National Institute of Education is to play the role of a review body and I do not have any objections in this respect.

⁹ Health disability, health disadvantage and social disadvantage.

¹⁰ The opinion is filed under File No. 44/2014/DIS/HP. Publicly available in the Czech language at: http://www.ochrance.cz/fileadmin/user_upload/STANOVISKA/Ostatni-organy/44-14-DIS-HP_S.pdf.

However, I must point out that the National Institute of Education will only be able to review the results of counselling based on an application¹¹ (incidence) rather than ex officio (in general). Therefore, I consider it necessary that general inspection of quality of professional work of school counselling facilities be carried out by the CSI; this is closely related to fulfilment of measure B.

I have repeatedly expressed my objections to the fact that the prepared amendment to the Schools Act fails to address the connection between the staff of school counselling facilities and the respective schools where children with special educational needs are educated.¹² In the autumn of 2012, the Ministry planned to address this problem (conflict of interests) by unified registration of school counselling facilities in a registry or by granting accreditation. I regret to note that the situation will not change when the amendment to the Schools Act comes to effect (September 2016). Resolution of this issue is also vital for proper enforcement of the judgement in case *D. H. and Others v. the Czech Republic*. However, the competent bodies do not pay sufficient attention to it.

The Czech Government has yet to fulfil this important measure closely related to segregation of Roma children. I recommend that the Government resolve the connection in staff of school counselling facilities and schools in which children with special educational needs are educated in the course of 2015.

D. Pre-school education and preparatory classes (former measure F)

After years of discussion among experts, it seems realistic that the Government will submit the amendment to the Schools Act embedding a mandatory year of pre-school education for interdepartmental comment procedure in the spring of 2015. I very much welcome this initiative and I am convinced that this is one of the steps that will lead to enforcement of the judgement in case *D. H. and Others v. the Czech Republic*.

The only risk I see here is the announced intention of the Ministry that pre-school education should also be provided in preparatory classes in elementary schools. As the national equality body, I oppose this intention. My reasons are essentially as follows:

In November 2014, I initiated research on equality in pre-school education. Using electronic questionnaires, I contacted the total of 799 kindergartens selected by random stratified selection (based on the size of the region) of the total of 5,224 kindergartens registered in the Register of Schools and Educational Facilities of the Ministry of Education, Youth and Sports. A total of 638 kindergartens filled out the questionnaire (80 %). Thus, statistical error does not exceed approximately ± 3.6 %.

¹¹ The application may be filed by the child's guardian, the school, the CSI and a body for social and legal protection of children.

¹² In practice, the same body determines the child's education needs and makes decisions on his or her transfer to a reduced educational programme.

As to preparatory classes in elementary schools, it follows from preliminary results¹³ that 22 % of elementary schools with preparatory form located near a kindergarten (if any) are practical elementary schools or “segregated schools” (attended mainly by Roma children). I infer from the above that provision of pre-school education in preparatory classes could jeopardise the purpose of pre-school education, namely to integrate Roma children in the society and prepare them for entry into elementary (non-segregated) education.

Even though the Government hopes that, based on the amendment to the Schools Act (with effect from September 2016), children without “social disadvantages” will also attend preparatory classes, I believe the simultaneous introduction of a mandatory year of pre-school education will lead to the exact opposite given the territorial, historical and socio-cultural context. A considerable part of Roma children participates in pre-school education in preparatory classes of elementary schools (practical elementary schools or “ghetto schools”), which may significantly damage the course of their education.

I would like to take the liberty of reiterating that, in accordance with current legislation (i.e. without the amendment to the Schools Act), the government can influence the decision as to which schools will open preparatory classes. This is the case since head teachers of schools are obliged to request consent of the Regional Authority,¹⁴ which is active as a central government body when granting the consent (rather than a regional self-governing body). Thus, the Ministry can directly influence the education policy in the individual regions through its bodies. It may, once again, use the inspection body (the CSI) that the Ministry controls to obtain the relevant information.

I am convinced that, if passed into law already in 2015, the intention of the Czech Government to introduce a mandatory year of pre-school education will lead to enforcement of the judgement in case *D. H. and Others v. the Czech Republic*. The Czech Government must fully support the expansion of kindergartens so as to ensure that it is never necessary to use the existing capacities of preparatory classes offered by elementary schools. Otherwise the effects of this important step could be counterproductive in terms of introducing segregation in pre-school education, which would only make the already difficult situation of Roma children even worse.

E. Position of Annex FEP BE MMD (former measure G)

As early as August 2013, the Ministry promised to revise the Annex but this is yet to materialise. In the meantime, on the meeting held on 23 October 2014, the Government Council for Roma Community Affairs (an advisory body to the Government) adopted resolution No. 10/2014 recommending the Government to stop

¹³ I will publish the survey report by the end of June 2016.

¹⁴ Section 47 of the Schools Act.

systemic discrimination of Roma pupils in education by tasking the Minister of Education, Youth and Sports to repeal the Annex by 31 August 2015. The draft Government Resolution tasks the Minister of Education, Youth and Sports to prepare a schedule for implementation of this Act no later than by the date of adoption of the amendment to the Schools Act; the schedule is to focus on transformation of the elementary schools teaching with accordance to FEP BE MMD. The Government is yet to adopt this resolution.

I remind the Committee of Ministers that the Czech Schools Act contains only two framework educational programmes (one for elementary schools and one for special elementary schools) which can be considered “internal regulations”, i.e. regulations immediately effective only the within the system where legal relationships of superiority and subordination exist between its units.¹⁵ The existence of a separate Annex regulating education of children with mild mental disability has no basis in the Act and thus in fact enables a third branch within elementary education in which Roma children are being concentrated in significant numbers.

The Czech government is in delay with implementation of this step, which is hard to justify given the fact it is a matter of expert (not political) opinion. I recommend that the Ministry prepare, as soon as possible, a detailed work schedule for repealing of Annex FEP BE MMD. I fully support the opinion of the Government Council for Roma Community Affairs.

F. Monitoring, record-keeping and statistics in the area of Roma pupil education (former measure E).

The Czech government states in the report that the current data clearly show the number of Roma children educated under the educational programmes for pupils with mild mental disability is decreasing in the Czech Republic. However, there are two major caveats with respect to the part of the report dealing with statistical data:

- (1) the interpretation of the data is incomplete and omits an important indicator, which may cause it to be misleading; and
- (2) the data collection method is not sufficiently transparent.

Re 1. Problems in data interpretation

There are two ways of understanding the data on education of Roma pupils. The following matters are of some concern:

- a) the absolute **number** of Roma pupils educated under FEP BE MMD; and

¹⁵ Cf. the Supreme Administrative Court judgment of 30 March 2011, Ref. No. 1 Ao 1/2011-49, available at <http://www.nssoud.cz>.

- b) the **share** of Roma pupils in the total number of pupils who are educated under FEP BE MMD.

The action plan stipulates that the target indicator is a gradual falling trend in the number of Roma pupils until the achievement of a proportion that corresponds to the number of Roma pupils in the population as a whole (currently approx. 3 %). In other words, in order to be able to conclude that the Czech Republic is successful in implementing the Action Plan, both the absolute number of Roma pupils educated under FEP BE MMD and their share in the overall number of pupils (Roma and non-Roma) educated under FEP BE MMD must be falling.

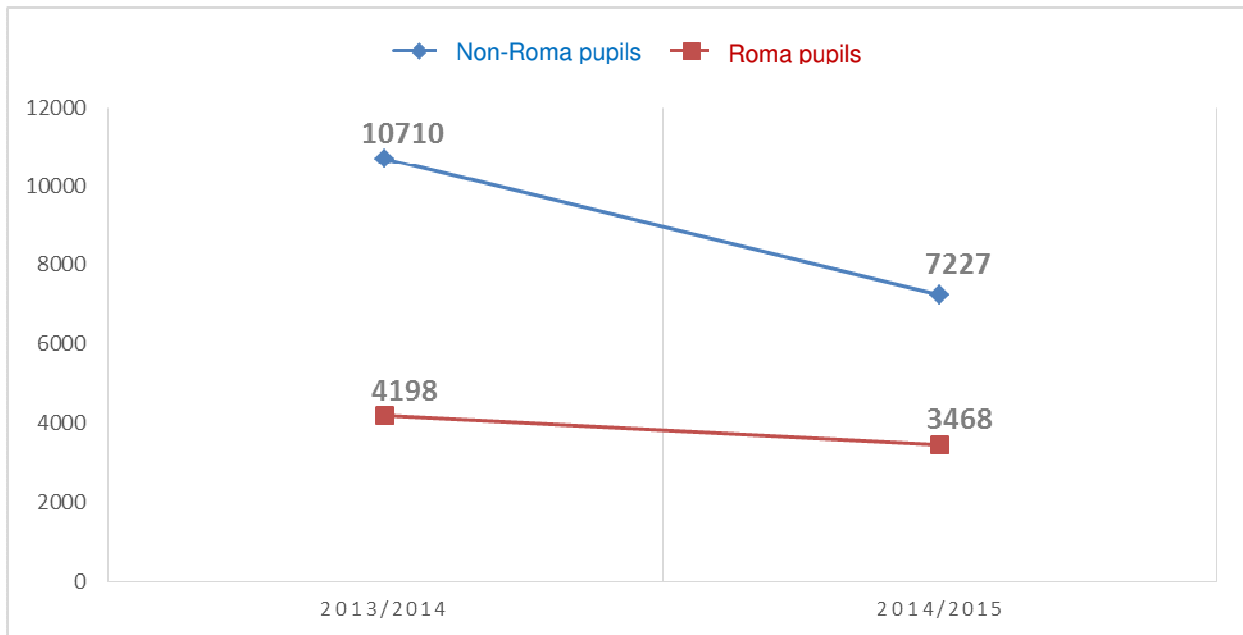
So far the latter indicator, i.e. the share of Roma pupils, has been the basis for conclusions. It formed the basis of the judgment in case *D.H. and Others v. the Czech Republic*, the Ombudsman's survey and the 2012 and 2013 Report of the Czech Republic on Implementation of the Action Plan. The share is a better indicator than the absolute number since unequal treatment and discrimination are better discernible from the proportion of Roma and non-Roma pupils than from the absolute number of pupils in each of the categories. However, the latest report of 10 February 2015 contains an interesting shift in interpretation. The conclusions completely ignore the share of Roma pupils – they are based solely on their absolute number.

How should the data be understood? One thing to consider is the numbers of Roma (and non-Roma) pupils educated under FEP BE MMD. Firstly, there was a considerable decrease in the overall number of pupils educated under FEP BE MMD, by 4,213 pupils (from 14,908 to 10,695). This corresponds to a year-by-year decrease of 28 %. However, given the fact that only 375 pupils were integrated into mainstream education in 2014, this raises the question of what happened to the remaining pupils. Their fate remains unclear.

Secondly, the trend of rapid decrease in the number of pupils educated under FEP BE MMD benefits chiefly non-Roma pupils: in their category there is a 33% decrease (from 10,710 to 7,227) whereas the decrease in the number of Roma pupils corresponds only to 17 % (from 4,198 to 3,468).

Therefore, it appears that while the Czech Republic is successful in reducing the number of pupils educated under FEP BE MMD, the decrease concerns primarily non-Roma students, by a factor of two – see Figure 1.

Figure 1 – the number of Roma and non-Roma pupils educated under FEP BE MMD

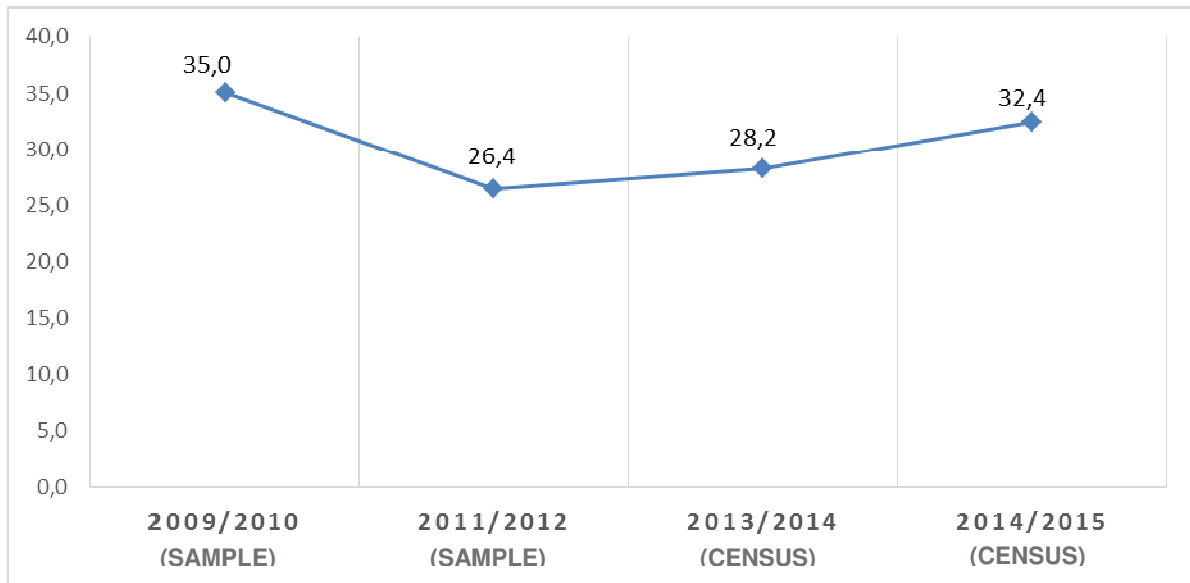


It is then necessary to evaluate the change in the share of Roma pupils in the total number of pupils educated under FEP BE MMD.

The Report on Implementation of the Action Plan contains this data, but it does not take it into consideration. The likely reason is the fact that the share grew by another 4 % – see Figure 2.

Although the Report on Implementation of the Action Plan contains optimistic conclusions regarding the fulfilment of its goals, one of the two indicators set forth in the Action Plan (which is also the indicator used in the judgment in case *D.H. and Others v. the Czech Republic*) shows that the situation of Roma pupils is not improving but rather getting worse. I infer from the indicators that the overall situation is improving, but it benefits largely non-Roma pupils.

Figure 2 – the share of Roma pupils in the total number of pupils educated under FEP BE MMD



Re 2. Problems in data collection methodology

In addition to interpretation of the data, there are unresolved questions concerning the method used to obtain it. My principal complaint is that the specific procedure is not known and a thematic report was not provided with respect to the course and detailed results of the survey [pursuant to Section 174 (9)(c) of the Schools Act].

I add that, as in previous years, this year I was again invited to consult on the survey; nevertheless, I had to decline since the invitation came practically in the 'last minute' – only one day before the survey was about to begin – and there was not sufficient time to study the methodology in more detail and formulate suggestions, let alone for others to take my suggestions into account.

In December 2014, I sent the Czech School Inspectorate a list of main questions which the thematic report should address. However, I am yet to receive a reply. The questions concerned in particular the ways of ensuring the quality of the data collected. Without receiving answers (explanations) from the CSI, I cannot assess the validity and reliability of the data presented. The questions were as follows:

- Who performs the inspection (inspectors only, or also co-opted persons)?
- What are the criteria for selection of schools for inspection?
- What is the total number of schools inspected, how and in what stage of the survey is this determined?
- What methods are used in the inspection (e.g. does the person performing the inspection observe the pupils)?
- In how many cases did the CSI find discrepancies with the data provided by a school head teacher and how was it taken into account in the computation of the final results?

- What method is used to collect data in schools which failed to fill in the questionnaire and what provisions are made for this data in the final results?

The statistics presented by the Czech Government do not make it clear who, how and in how many cases reviewed the quality of the data provided nor what were the results of these reviews. The interpretation of the data presented is newly based on the change of the absolute number of Roma pupils educated under the Annex (expressed in percent) and ignores the second indicator set forth in the Action Plan, i.e. the share of Roma pupils in the overall number of pupils educated under FEP BE MMD. Year-by-year, this share grew by 4 %, meaning the Czech Republic did not succeed in implementing the Action Plan. While the Czech Republic is successful in reducing the number of pupils educated under FEP BE MMD, the decrease concerns primarily non-Roma students, by a factor of two.

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(the document bears an electronic signature)