

Opinion of the Public Defender of Rights

on Fulfilling the Plan of Measures for Execution of the Judgement of the European Court of Human Rights in the case of D.H. and others v. the Czech Republic “Equal opportunities”

A. Pupils without any educational indication in group integration with pupils with MMD (with mild mental disability)

The Ministry of Education, Youth and Sports (hereinafter as “the Ministry”) was assigned the task of amending the Decree No. 73/2005 by September 1st so as to make it impossible to place pupils or students without disabilities (i.e. health disadvantaged or socially disadvantaged) in schools, classes or study groups intended for disabled pupils. The above recommendation was already made by my predecessor JUDr. Pavel Varvařovský who addressed it to the Ministry in June of 2012.

In this respect, the Ministry failed to meet one of the key targets of the plan. As a result of that, the practice threatening the access of Roma pupils to quality education still continues in the school year of 2013/2014.

The Ministry even failed to implement the promised measures by the date of presentation of the mentioned opinion of the Secretariat of the Committee of Ministers. The Ministry did present its decree draft amendment in terms of the comments procedure but according to the wording of the draft it will still be possible (after September 1st 2014) to temporarily place a health disadvantaged pupil (which might be even a Roma pupil educated in mainstream education) in a school, class or a group intended for pupils with disability.

<p>I disagree with the above provision because the support to a health disadvantaged child is to be provided by its original school of education, not by a special school. Moreover, both the existing and proposed legal provisions are in contradiction to the Education Act of which the Ministry has been repeatedly advised by the Public Defender of Rights since 2012.</p>
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B. Diagnostic stay

The institute of diagnostic stay was supposed to be removed from the Decree No. 73/2005. This amendment was to become effective as of September 1st 2013. A school is supposed to provide necessary support to the child so as to prevent the need of changing schools and the education programme.

The Ministry failed to implement this measure. It is thus further possible in the school year of 2013/2014 to educate a child without any disability in groups of children with disabilities for a period of up to six months.

The draft amendment to the Decree which was presented by the Ministry in terms of comments procedure in October 2013, however, brings no solution for the Roma pupils. According to the draft amendment it will further be possible to apply diagnostic stays except for “schools, classes and study groups for pupils with mild mental disabilities”. However, such schools *de iure* and *de facto* do not exist and therefore the Ministry will not be able to check the observance of the above limitation.¹ The Public Defender repeatedly advised the Ministry of this fact but his comments went unheard.

C. Diagnostic tools

The Ministry promised to push for the implementation of diagnostic tools in the day-to-day operation of advisory facilities which (unlike the most commonly used WISC III test) will be oriented on the pedagogical aspects of the problem. That hasn't happened so far.

In my opinion, the ideal condition would be if the advisory facilities abandoned the practice of “pigeonholing” the children in three categories (disabled, health disadvantaged, socially disadvantaged) and started determining the extent or degree of their support at their schools of education (according to the approved scale of supporting and compensatory measures). Although this philosophy is the underpinning of the entire amendment of the Education Act, it can hardly be expected to become effective before September 1st 2015. Until then, the methodical direction of the advisory departments has to be improved on the part of the National Institute for Education (NÚV) and of the inspecting activities of the Czech School Inspectorate (ČŠI) as the quality of counselling services differs significantly across the regions.

However, I do appreciate the fact that the Ministry managed to train a significant number of workers from the advisory facilities in using its diagnostic tool (Woodcock-Johnson). If this tool will help remedy or prevent errors (especially the social disadvantage of Roma pupils being substituted for mild mental disability) remains to be seen in the future. The impact of the above activity can not be detected in the short term. However, I tend to be rather sceptical as the mentioned tool again evaluates the intellectual abilities of the child (i.e. works on the same basis as the criticized WISC III).

¹ A pupil with mild mental disability does not always have to be educated according to the Framework education programme for the elementary education – annex providing for the education of pupils with MMD (FEP BE MMD). A pupil can be individually integrated in an elementary school and be educated according to the individual education plan. Thus it is impossible in practice to clearly determine in which school, class or a study group it will not be possible to perform a diagnostic stay. The Public Defender requested a list of such schools but the Ministry failed to provide it.

On March 11th 2014 I was informed by the Deputy of the Minister of Education of the impacts of re-diagnosing and I was presented with 2014 statistical data. I am really pleased to see that the advisory facilities perform re-diagnosing. However, I couldn't but notice that a significant number of pupils (over 400) failed to attend a repeat examination upon the invitation of the advisory facility. In these cases, the advisory facilities should immediately contact the school and the Body of Social and Legal Protection of Children which, to my knowledge, did not happen. The state thus fails to execute its elementary regulation powers authorities.

As regards the total number of children who were recommended a transfer from the reduced education programme² to the standard education programme (a total of 149 children), it is not yet clear if their transfer actually took place. Mere examination and recommendation by the advisory facility department, however, does not automatically ensure the child better education (transfer to the standard programme). It is because the initiative is supposed to be on the part of the parents who should inform the head-master of the school where the child is being educated.³ Failing that, the state bodies (the Czech School Inspectorate, Authority of Social and Legal Protection of Children) have to intercede with the parents and try to explain to them all the circumstances related to the education of their child. The state has objective responsibility for fair and equal access to education and is obliged to act in cases where the actions (or omissions) of a legal representative are contrary to the best interest of a child. The Ministry thus has to encourage cooperation between the legal representatives, school head-masters, Czech School Inspectorate and the Authorities of Social and Legal Protection of Children in the mentioned cases. This is not happening so far, which is where I see the main weakness of the entire system of legal guarantees created after the ruling was delivered in the case of *D.H. and others v. the Czech Republic*.

I hereby summarize that I do not consider the statistics on re-diagnosing presented to me very revelatory for the purpose of execution of the judgement. Moreover, the advisory facilities do not monitor the ethnicity of the children⁴, which further debases the presented data in the context of Roma issues.

D. Supervision mechanisms of diagnostic and counselling services

According to the original plan, the Czech School Inspectorate was supposed to acquire the competence of the so-called audit body with respect to the outcomes of school advisory facilities effective from January 1st 2014.

² By this I mean the Framework education programme for elementary education – the annex providing for the education of pupils with mild mental disorder (FEP BE MMD).

³ The effective legal provisions prevent the advisory facility from informing the school where a pupil is educated about the recommendation. This flaw should be removed by the amendment to the Education Act which, however, has not been presented to the government.

⁴ Here, of course, they can give the Ministry a non-personalized estimate of how many of the stated number were of Romany origin.

The Czech School Inspectorate (CSI) failed to acquire this competence. However, under the existing legal conditions, the CSI may, with the participation of experts, perform inspections in the advisory facilities, which, to my knowledge, it does not do in the extent corresponding to the seriousness of the issue in question (it does not intervene with the expert aspects of examination reports or recommendations). I therefore consider it important that the CSI performs visits to advisory facilities together with clinical psychologists and psychiatrists and examines the ways in which the children with special education needs (focusing on Roma children) are tested and what degree of support is recommended to them in their school.⁵

According to the Education Act amendment, the role of the revision body is to be entrusted to the National Education Institute to which I have no objections.

However, I do have reservations regarding the fact that the prepared amendment does not deal with the personnel interconnection of the school advisory facility and the school where children with special education needs are educated.⁶ The Ministry planned on solving the above issue (conflict of interests) by a unified entry of the school advisory facility in the register or, as the case may be, by awarding it an accreditation. However, having repeatedly studied the draft amendment⁷ after the comments procedure was finished, I regret to state that the situation in the future will not change. The solution of this issue is also crucial for appropriate execution of the judgement of D.H. and others v. the Czech Republic. However, there is not adequate attention paid to the issue by the responsible bodies.

E. Records and statistics in the area of the ethnicity of pupils according to the FEP BE-MMD

The Ministry with the assistance of the Czech School Inspectorate collects ethnicity data on the numbers of pupils educated as per FEP BE-MMD. It thus implements the above measure. However, I see a significant shortcoming in the fact that this collection method only consists in questionnaire surveys. The questionnaire respondents are the school head-masters or the class teachers. The Ministry relies on data obtained from a single source and there are reasonable concerns among experts that a part of the teachers in the schools tend to provide rather lower numbers of Roma pupils educated according to the reduced education programme. Also cases of special needs teachers using the public media for their own defence are not uncommon.

⁵ This should apply at least until the Education Act amendment becomes effective (September of 2015)

⁶ In practice, one and the same entity determines the education needs of the child and simultaneously decides on its transfer to the reduced education programme.

⁷ of June 2013

In order to prevent future distortions of reality in Czech elementary schools, the Ministry should also collect data on the ethnicity of pupils in the form of non-personalized determination by a third person.⁸ To do that, the CSI should visit, in cooperation with invited persons (from the non-governmental sphere), randomly selected schools and carry out estimates of the numbers of children of Roma ethnicity educated according FEP BE-MMD.⁹ The data obtained by both methods can then be better interpreted and it will be easier to detect if there was a deterioration/improvement or stagnation in the situation in relation to Roma pupils. I personally recommended the combination of both methods to the Ministry during our talks held on March 11th 2004. I believe that the Ministry (jointly with other government partners) will lend an ear to my suggestions being the national equality body.

F. Preparatory classes and nursery schools (NS) at practical basic schools

The Ministry promised to deal with the ban on establishing preparatory classes and nursery schools at practical elementary schools. Although a suitable legislative solution was proposed by the Office of the Government of the Czech Republic¹⁰, the Ministry dismissed his proposal. The prepared amendment to the Education Act¹¹ thus fails to fulfil the mentioned measure. Nevertheless, the Ministry has not provided a satisfactory explanation as to the reasons for digressing from the original intention. The information stated in the report on the fulfilment of measures of the Action plan of October 17th 2013 sounds very unconvincing in the national context.

I would like to point out that under the existing legal regulations (i.e. even without the need of the Education Act amendment), the state can influence at what schools preparatory classes will be established. It is because each school headmaster must request the consent of the relevant Regional Authority¹² which exercises state administration when granting the consent (it is not a self-government issue). The Ministry thus can, through its bodies, directly influence the education policy in individual regions. To obtain necessary data¹³ it can again use the CSI, an inspection body directed by the Ministry.

⁸ For more on this see

http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Survey_Ethnic-methodology.pdf.

⁹ It is to be noted that the CSI performed such inspections in the past.

¹⁰ The point is that practical elementary schools are de jure elementary schools and it is therefore hard to define in terms of existing school nomenclature at what schools preparatory classes will not be established. The key here might be the school districts which are missing in the case of practical elementary schools as they are not established by the municipalities but by the regional bodies.

¹¹ The amendment was ready in June of 2013 but it hasn't been presented to the government.

¹² provision § 47 of the Education Act

¹³ Especially on those schools, where there is a risk that a child from a preparatory class or nursery school will continue education at a practical elementary school according to the reduced education programme.

A suitable alternative to the preparatory classes are undoubtedly nursery schools. Here, I want to appreciate the promise of the new government to enact a law establishing an obligatory year of preschool education of children one year before starting their compulsory education.¹⁴ A speedy solution of this issue would surely also help solve the situation of socially disadvantaged pupils (including Roma children) and aided the execution of the judgement. However, until sufficient capacities of nursery schools are ensured and the Education Act is changed (2016), the Ministry must take specific executive steps (inspecting preparatory classes, limiting the granting of consents on the part of Regional Authorities in justifiable cases).

G. The position of FEP BE – MMD annex

The Education Act only recognizes two educational programmes (for the elementary school and special elementary school) which can be considered some sort of “internal regulations” i.e. regulations immediately effective only inside the system between whose units there are legal relations of superiority and subordination.¹⁵ However the existence of the FEP BE-MMD annex has no factual support in the law and de facto allows the existence of a third branch of elementary education.

Although the Ministry promised to revise the annex as early as in August of 2013, this has not happened yet. It is a purely technical issue independent of the political situation and the approval/denial of the Education Act amendment. The delay of the Ministry in fulfilling the mentioned point thus cannot be rationally justified.

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¹⁴ See the Government Policy Statement of February 14th 2014 available here: <http://www.vlada.cz/en/media-centrum/dulezite-dokumenty/policy-statement-of-the-government-of-the-czech-republic-116171/>.

¹⁵ Comp. the Decision of the Supreme Administrative Court of March 30th 2011, ref. no. 1 Ao 1/2011-49, available at: <http://www.nssoud.cz>.