Record Card

File number	5202/2014/VOP
Area of law	Discrimination – education
Subject	Access to education
Type of finding	Inquiry report – Section 18
Result of inquiry	Errors found Discrimination found
Relevant Czech legislation	99/1963 Coll., Section 125 99/1963 Coll., Section 133a (b) 349/1999 Coll., Section 1 (2) 500/2004 Coll., Section 2 (4), Section 71 561/2004 Coll., Section 36 (4), Section 36 (7), Section 46 (1), Section 165 (2)(e), Section 178 (1), Section 178 (2) 198/2009 Coll., Section 1 (1)(i), Section (2)(3), Section 3 (1), Section 4 (1), Section 4 (4) 89/2012 Coll., Section 88
Relevant EU legislation	
Date of issue	16 April 2015
Date of filing	18 August 2014

Headnote

(I) The headteacher's declaration of the aim to regulate the number of admitted Roma pupils in itself constitutes direct discrimination in the access to education on the ground of ethnicity. The implementation of this aim, even by means of seemingly neutral measures, also constitutes direct, not indirect, discrimination.

(II) Under the principle of predictability of administrative proceedings (Section 2 (4) of the Code of Administrative Procedure), prior to the enrolment of first graders, a school's headteacher should publish the number of 1st year classes that will be opened in the next school year, the maximum number of pupils who can be enrolled (in accordance with the capacity registered in the schools register pursuant to Section 36 (7) and Section 144 (1)(e) of the Schools Act), and the criteria for decision-making in the administrative proceedings on admission to compulsory school education.

(III) The only lawful criteria for admission to compulsory school education are the age and permanent residence of the child in the relevant catchment school's school district (Section 36 (3) of the Schools Act). Any other supplementary criteria must be selected very carefully by the headteacher so as to avoid coming into conflict with the principle of equal access to education and non-discrimination (Section 2 (1)(a) of the Schools Act).

(IV) An elementary school headteacher acts unlawfully if he or she uses the results of the "school readiness test" as a criterion for admission of children to the first year of elementary school.

(V) The Schools Act does not provide any basis for the claim that a child whose compulsory school attendance was deferred for a year by the headteacher (Section 37 of the Schools Act) has a priority right to be enrolled in the given school in the next school year, or that such a child may be enrolled with the effect deferred until the next school year.

(VI) The choice of the elementary school constitutes an important matter for the child (Section 877 (2) of the Civil Code). The choice of the elementary school thus belongs solely to the parents or a court (Section 887 (1) of the Civil Code). Foster parents may not substitute for the parents in making the choice.

Note: The headnote is not necessarily included in the Defender's opinion.

Document:

Brno, 16 April 2015
File No.: 5202/2014/VOP/BN

Report on inquiry
concerning non-admission of Roma children to elementary school on the grounds of the school's insufficient capacity

Ms K. V., residing at XXX, and Ms K. G., residing at YYY (hereinafter the "Complainants") approached me, represented by Ms J. Š., residing at ZZZ (hereinafter the "Complainants' representative"). The Complainants complained about an inappropriate conduct on the part of the headteacher of the Elementary School A (hereinafter "School A"), Mr A.B. (hereinafter the "headteacher") in relation to the admission of the son of Ms G. [1] and the grandson of Ms V.[2] to school education in the school year 2014/2015. The Complainants believed that the headteacher's decision-making was affected by the fact the children were Roma. The Complainants also pointed out the fact that the admission to the school was conditional on successful passing of the "school readiness test". In the Complainants' opinion, the test results did not reflect the real abilities and skills of the children and the teachers were arbitrarily awarding lower scores in order to regulate the number of Roma children at the school. The Complainants also referred to inappropriate comments made by the headteacher about the need to regulate the number of Roma at the school.

A – Subject of inquiry

On 1 September 2014, reacting to the complaint, I initiated my inquiry into the case within the meaning of Sections 14 and 21b (a) of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.

I found two major issues in the case, which I pursued during inquiry into the case as well as in drawing up this report. Firstly, I inquired into the headteacher's decision-making on admission of children to elementary education, since the headteacher was making decisions pursuant to Section 165 (2)(e) of Act No. 561/2004 Coll., on preschool, elementary, secondary, higher vocational and other education (the Schools Act), as amended, where the headteacher acted in the role of an administrative body. Secondly, I assessed the matter of whether or not discrimination on the grounds of ethnicity occurred during admission to the elementary school.

Having regard of the Complainants' statements and the preliminary evaluation of their complaint, I focused my inquiry on a number of areas:

(1) decision-making of the headteacher acting in the role of an administrative body
- the school's capacity
- the course of enrolment in the elementary school education
- criteria for admission to the school
- irregularities concerning the place of permanent residence and the foster care of J. V.
- admission of last school year's children with deferred school attendance
- delays in proceedings

(2) discrimination
- hallmarks of direct and indirect discrimination, instruction to discriminate and harassment.

I base my report on the documents and audio recordings provided by the Complainants' representative, the authenticated minutes of the meeting of the head of the equal treatment department of the Office of the Public Defender of Rights (hereinafter the "Office") with the representatives of the Complainants,[3] and of the meeting of the authorised employees of the Office with the representatives of the founding authority [4] and the representatives of School A.[5]I further base the report on written statements of School A teachers present at the enrolment,[6] written statement of the then member of the Slezská Ostrava Municipal District Council Mr Radomír Mandok and the headteacher of School B,[7] and a copy of the appellate administrative authority's file.[8]

B – Findings of fact

B.1 Representation of the children and school selection

The Complainants stated[9] that they and the children were participating in the information campaign implemented as part of a pilot project titled *"Pilot project for the implementation of the judgement 'D.H. and Others v. the Czech Republic' in Ostrava"* (hereinafter the "Project").[10] This was confirmed during the meeting of the head of the equal treatment department of the Office with the Complainants' representative. She added that the campaign was implemented also in the Slezská Ostrava municipal district and that approx. 70 children were participating. The purpose of the campaign was to provide information to Roma parents to help them choose non-segregated elementary schools for their children and to improve their children's preparedness for elementary education. The campaign included meetings between the parents and the implementers of the Project,[11] creation and distribution of information materials for parents and monitors[12] and information meetings between the Complainants' representative and then councillor with headteachers of elementary schools in the relevant school districts. The meeting at School A took place approx. two weeks before the enrolment. The representative of the Complainants introduced the campaign objectives to the headteacher. She also informed the headteacher that eleven Roma children participating in the Project, under long term supervision of external pedagogue Ms J. H., would come to the enrolment for the 2014/2015 school year. The then councillor did not confirm[13] the

information that the Complainants' representative told the headteacher about the expected number of Roma children who would come to the enrolment.

The Complainants both stated that they selected the school for their boys because of its good reputation. Ms V. believed that the school was good also because her other grandchildren attended it with good results. Ms G. also stressed that the school was close to their home and the boy's friends from the neighbourhood also attended it.

For the sake of clarity, I note that both Complainants stated that they speak with their children in Czech at home.

B.2 Definition of the school district and co-ordination of school policy within the school district

The Slezská Ostrava school district covers the whole area of the municipal district of the same name, in accordance with the generally binding ordinance No. 13/2014, on school districts of the catchment schools founded by the municipal district of the statutory city of Ostrava. Specifically, there are four elementary schools.[14]

According to the representative of the founding authority, the Slezská Ostrava municipal district (hereinafter the "founder"), the founder did not have accurate statistics on the number of children in respect of whom it had the statutory duty to provide access to compulsory school education. For this reason, each year it only made a qualified estimate based on the number of children attending kindergartens and the preparatory class[15] situated in the municipal district. However, the founder's representative noted that it is common for a number of children from the municipal district to attend schools outside the school district. For the school year 2014/2015, the founder estimated a sufficient available capacity in the first-year classes. This was confirmed after the enrolment. Only School A reported an excess of children; the capacity of the other schools was used up to about 70%. The founder thus considered its statutory duty to have been performed. The founder did not coordinate the number of pupils admitted to the individual schools and was not planning on doing so in the future.

The headteacher and the representative of the founder both stated that the department of education and culture of the Municipal Authority of Slezská Ostrava holds meetings of headteachers from its school district regularly, usually once every two months.[16] The headteacher said that they were dealing with the influx of children into one of these schools. At the meeting, the representative of the founder made assurances that the overall number of places in newly opened classes was sufficient in the school district. The representatives of the founder recommended to the headteacher of School A to refer pupils to the other schools, especially the ones nearby, in the event of insufficient capacity due to influx of children.

Given the fact that I always try to obtain information from all available sources, I tasked the head of the equal treatment department of the Office to also contact the headteacher of School B.

His written statement[17] revealed that he had never discussed coordination concerning the number of children enrolled in the first-year classes with the other

headteachers in the school district. He noted that that all the headteachers in the school district rely on the decision of the founder that the catchment area of each school includes the whole area of the municipal district of Slezská Ostrava.

B.3 Capacity of School A

The Complainants' representative did not agree that the headteacher rejected the children due to the school's insufficient capacity. This is also confirmed by the reasoning given in the issued decisions on non-admission.[18] She also stated that the headteacher could have used the room of the after-school group to open another first-year class.

At a meeting with authorised employees of the Office, the headteacher noted that he was unable to open more than one first-year class due to capacity reasons, i.e. the capacity of the school building. The school was not informing the public of its intention to only open one class in any way. The school is, in the words of the headteacher, known in the area as a "one-form school". The current second and third years were an exception from this rule.[19] The headteacher explained the school's plan to the Complainants' representative at their meeting held approximately two weeks before the enrolment day; the meeting was also attended by the then councillor. This information was confirmed by both participants.

The school building has eleven standard classrooms, three specialised classrooms (language-teaching, computer and IT-chemistry classrooms)[20] as well as one room for the after-school group.[21] The headteacher saw the proposed use of the after-school room as a standard classroom as a bad solution since the room was situated in the attached school canteen building. Using it as a standard classroom would entail complicated accessibility and teaching would be hampered by the operation of the school canteen.[22] The headteacher admitted, however, that the insufficient capacity already meant that some divided classes were already being taught in the after-school group room. The headteacher also noted the fact that the school planned to participate in the project titled "EU – funding for the schools II" organised under the Education for Competitiveness programme, which is, based on the headteacher's information, to be initiated by the Ministry of Education, Youth and Sports (hereinafter the "Ministry").[23] As the school has already participated in a similar project in the past, his experience was that this often resulted in an increased number of divided lessons *(lessons where children from a single class are divided into two groups, each being taught a different subject - trans.)*. These classes had to be taught in the after-school group's room. The headteacher stressed that the school building cannot be altered or expanded, not even potentially.[24] He also stated that given the numbers of children in the individual classes, he had not counted on being able to merge classes in the two-class years.

I established during my inquiry that the headteacher would open two first-year classes in the school year 2015/2016. The headteacher confirmed this fact to the employees of the Office. He added that he gained the opportunity due to the transfer of multiple second-year pupils to another school, which enabled him to unite the classes in the future third year into one class, thus making room for two first-year classes.

The representative of the founder noted that she was aware that the schools were not publishing the anticipated number of first-year classes. After the experience from the last-year's enrolment, she was planning to issue new methodological guidelines in this regard. However, I am yet to receive a confirmation that the founder has actually done so. In September 2014, the founder sent the headteachers the Recommendation on organisation of the enrolment in compulsory school education,[25] prepared by the Ministry of Education.

B.4 Course of the enrolment and assessment of the children's school readiness

The testimonies of the Complainants agree in most aspects with the statement of the school's headteacher. The enrolment in the school was taking place within the span of two days, from 15 to 16 January 2014 from 12 noon to approx. 5 p.m. Most applicants arrived on the first day. On the same day, the Complainants' representative also came to the school alongside several Roma families and a TV crew. The headteacher said that before he was able to respond, the TV crew already made video recordings in the school which subsequently appeared on air. However, no representative of the media had contacted the school and, for this reason, the headteacher asked the journalists to leave the school building. The whole situation caused a stir as there were suddenly many people present at the enrolment.

The Complainants' representative was present during the enrolment of most of the Roma children participating in the Project, acted as the monitor and made audio recording of the enrolment.[26]

The enrolment was taking place in two classrooms. In one classroom, the legal representatives of the children filled in the necessary documents (the Application for Admission and the Parents' Questionnaire). In the other classroom, a teacher was informing the parents of the school's operations and the after-school activities as well as about catering possibilities in the school canteen. Another teacher took the child through several stations where they were tested in social development[27], language skills[28], reasoning skills[29] and auditory perception[30] and undertook the "Jirásek-Kern Test".[31] The teacher recorded the child's score attained at the individual stations to a sheet and assigned points based on a pre-determined scale. The sheets were not released to the parents, but served as an internal document. The headteacher stated that the tasks assigned at each station were being used each year; the school prepared the record sheets and assigned points in the enrolment for the 2014/2015 school year for the very first time. The individual stations included tasks based on the test carried out in school counselling facilities to assess school readiness ("maturity"). The school's administration did not believe the test included any culturally insensitive elements.

Neither of the Complainants was aware at that time that the school had set any criteria for admission. They only learnt of the need to achieve good scores in the school readiness after the enrolment had begun. They added that the boys were well-prepared for the basic tasks (knew their name, home address, age, colours, shapes etc.) since they had already attended the preparatory courses as part of the Project; their knowledge and skills had been confirmed prior to the enrolment by an external psychologist.

The then councillor said that he had learnt of the course of the enrolment from the media after the fact and was surprised by the situation. He considered the Complainants' representative's bringing in the media as unfair.

The representative of the founder noted that the founder only checks the school's economic management. It had never interfered with the course of the enrolment, nor did it plan to do so in the future. The organisation of the enrolment, i.e. including the potential use of the school readiness test, is in the competence of the headteachers.

B.4.1 Repeated testing of school readiness

The Complainants were not satisfied with the course of the enrolment, especially their children's scores. They stated that the teachers administering the tests were not treating their children fairly, patronised them and did not let the children finish when they were answering questions. They stressed that one of the teachers inappropriately rebuked Z. Ž. after he gave his friend the correct answer. As a result, he withdrew and was very anxious about the enrolment.

The teachers organising the enrolment noted that during enrolment, Z. Ž. showed no interest in performing tasks, not even when encouraged by the mother and the teachers; allegedly, he shouted at his friends and the mother was helping the child (led his hand when drawing). J. V. seemed tired and unsure to the teachers, he could not recognize colours, numbers and shapes, could not describe a picture and did not communicate with the teacher.

The Complainants as well as the teachers agreed that the Complainants' representative was also unsatisfied with the enrolment. She requested the children be tested again,[32] which the teachers did. Z. Ž. was tested by the same teacher who conducted the first test, J. V. was tested by another teacher. The teachers said the "original record sheets were annulled". The Complainants said the sheets were torn to pieces and thrown into the dustbin. The teachers also stressed that the Complainants' representative interfered with the testing (e.g. giving clues to the boys about the colours). The teachers indicated in the record sheets that this was the second round of testing carried out on request of the legal representatives and the Complainants' representative. The administrative file only contains the second record sheets.

B.5 The headteacher's decision-making

B.5.1 Admission criteria

The headteacher confirmed that admission in the first-year classes in the school year 2014/2015 was published on the school's website simultaneously with the enrolment results. Therefore, the fact that the assessment of school readiness would be critical for (non)admission had not been publicly known before.

"The main criteria:

- child residing in the school district, 3 points.

- child with a permanent residence address in a municipality without a catchment school, 2 points.

Supplementary criterion
- assessment of school readiness (prerequisites for attending the first-year class of an elementary school), maximum of 29 points.

Any potential deadlock shall be resolved by a draw."

The headteacher specified during the proceedings that within the school readiness testing, a child could have obtained 15 points in the Jirásek-Kern Test, while the remaining 14 points were assigned by the other stations (as described above).

Following the enrolment, the headteacher also published on the school's website a document titled "Enrolment in the first-year classes and the statutory rules". Paragraphs three and four of this document state, *inter alia*, that the "Legal representative of the child may choose for the child a school different from the catchment school. Reasons for non-admission into the selected school may lie primarily in an insufficient capacity."

B.5.2 Deferred school attendance from 2013/2014

The headteacher said that in deciding on the (non)admission, he was counting with nine pupils whose school attendance had been deferred in the previous year. In reality, six such pupils commenced school attendance and the headteacher was only inferring the necessity of their admission. This is also documented by a list of admitted children included in the review file. The children with deferred school attendance from the previous year took the 24th to 30th place, i.e. the last available places, and received no scores or points.

B.5.3 Decision on non-admission

In the matter of the non-admission of the children to the elementary school, on 27 January 2014 the headteacher issued a decision[33] with the following reasoning:

"The proceedings on admission to elementary school were initiated on the basis of the application of Z. (sic!) Ž. (J. V.),[34] submitted on 15 January 2014 through his legal representative. In the school year 2014/2015, children were admitted to the Elementary School A (contributory organisation) on the basis of a proof of residence in the school's catchment area and, further, a set of criteria determined by the headteacher to establish the order in which applicants would be admitted. (...) The headteacher decided to reject the admission on the basis of the fact that according to the criteria, the applicant scored 11 (20) points in total and was placed 37th (32nd) in the final list. As the school's capacity only allows to admit 30 children in the first-year class in the school year 2014/2015, your child did not meet the necessary prerequisites for admission to our school."

Appeal against the decision on non-admission

The file of the appellate administrative authority shows that both the boys, represented by the Complainants, appealed against the decision on non-admission of 14 February 2014. The appeal was addressed by the Complainants to the headteacher and the founder of the school.

The headteacher then summoned the Complainants for individual meetings. Both meetings took place on 28 February 2014 and the headteacher made records of both,[35] which, however, the Complainants refused to sign. The Complainants' representative was present during both meetings. The meeting concerned the reasoning for the non-admission of the boys to the school due to capacity reasons. The headteacher informed both Complainants of the possibility to enrol the boys in other schools in the school district, specifically the Elementary School B and Elementary School C. The headteacher also asked K. V. to submit a proof of permanent residence of her grandson.

The then mayor of the municipal district of Slezská Ostrava, Mr Antonín Maštalíř, reacted to the Complainants' appeals of 10 March 2014 by a letter in which he informed them that their objections were discussed at the meeting of the municipal council held on 6 March 2014. The mayor noted that the school's capacity only allowed one class to be opened in the first year, but he stressed the free capacity of the other elementary schools in the school district, which he considered compliant with his duties under Section 178 (1) of the Schools Act. He stressed that the size of the school district "ensures that school education is available to all children with permanent residence in the municipal district, even if on another school but the one selected for the child by the legal representative." The mayor also noted that it was "absolutely common for a headteacher to set up a system for assessment of the so-called school readiness, i.e. the physical and mental readiness of the child for school education. (...) The points awarded on the basis of tests performed on the enrolment day are used to create a waiting list of children to be admitted, which serves as the basis for issuing decisions on (non)admission with regard to the number of free places."

On 11 March 2014, the headteacher referred the appeal to the Regional Authority of the Moravian-Silesian Region, which on 8 April 2014 annulled the original decision and referred the case back to the headteacher for review. The Regional Authority argued that the headteacher as the administrative authority failed to demonstrably invite the legal representatives of the children (parties to the proceedings) to respond to the underlying documents, failed to demonstrably prove that the children's legal representatives were advised of their right to inspect the file pursuant to Section 38 (1) of the Code of Administrative Procedure, insufficiently identified the parties to the proceedings,[38] and provided insufficient reasoning of his decisions. According to the appellate authority, the unreviewability of the decisions consisted especially in the fact that the documents did not demonstrably prove that the applicants were advised of the rules of the admission procedure, i.e. with the set of admission criteria, prior to its beginning, despite the fact that the headteacher used this as a basis for his reasoning in the decision on non-admission. It also stressed that the "administrative authority did not indicate why the party to the proceedings received 11 (20) points and whether all the other applicants (...) placed above the 36th (31st) place received more points and had permanent residence in the school district, which was not clear from the attached file." The appellate body also stressed that the school did not

document the intention to only open one class for 30 children in the first year, nor did it give any reasoning for it in the decision on non-admission. According to the appellate authority, this omission cannot be cured by the reasoning provided in the response to the appeal against the decision on non-admission. The appellate body further noted that the headteacher did not address the objections raised by the children's legal representatives (the parties to the proceedings).

B.5.4 Decision on admission

The file further shows that that the Regional Authority returned the file to the headteacher on 10 April 2014. Subsequently, on 16 April 2016, the headteacher sent letters to the Complainants informing them of their right to inspect the file and invited them to respond to the documents collected for the purposes of decision-making.

After new proceedings, the headteacher decided to enrol J. V. (on 30 May 2014)[40] and Z. Ž. (on 5 June 2014)[41] in the school. Both new decisions were justified by the headteacher by the fact that "during the re-opened administrative proceedings, new circumstances have arisen making the admission possible."

The headteacher noted that during the period for issuing new decisions in the matter, he was informally informed that two of the previously admitted children would not commence education in the first year because they would transfer to another school. For this reason, he was expecting the legal representatives of these children to deliver to him their applications for a transfer, enabling him to admit the boys in their place. The provided list showed these two children had permanent residence in the school district.[42]

Neither of the boys eventually commenced education at School A due to the bad experience with the enrolment. In the meantime, both boys were admitted to Elementary School B, i.e. a school within the school district, where they commenced their education.

B.5.5 Specific position of J. V.

(1) Place of permanent residence

The headteacher stated he was aware of his duty to primarily enrol in the first year the children with permanent residence in the school district. This is documented also by the list of children who were not admitted, which is included in the review file.[43]

The file shows that the Complainant indicated two permanent addresses during the enrolment. She indicated an address outside the school district in the "Application for admission of a child to primary education", whereas she indicated an address inside the school district in the "Parent's Questionnaire". Upon inspection of the population register, the appellate administrative authority subsequently found that the boy's permanent residence was at a third address, outside the school district.

The headteacher was basing his decision on non-admission on the assumption the boy's permanent address was within the school district; therefore, the boy "overtook" the children from the catchment area.[44] The headteacher admitted during meeting

with the employees of the Office that he was aware of his error. He stressed that he acted based on a wrong information and asked the Complainant for a proof of permanent residence of her grandson only upon issuing the negative decision. The Complainant confirmed at a private meeting with him that both she and her grandson had their permanent residence outside the school district. However, she also brought a handwritten confirmation that she and the boy were living in leased premises within the school district. The headteacher did not consider this document reliable and disregarded it in favour of the known place of permanent residence. He did not change the original order to place the boy under all the other children from within the catchment area.

(2) Foster care

The Parents' questionnaire filled in by the Complainant on the enrolment date and included in the file shows that the Complainant is not the mother of the minor child. This is also documented by the judgement of the District Court in Ostrava[45], which is also included in the file. The audio recordings from the enrolment itself support the Complainant's claim that she informed the teacher present at the enrolment of this fact and asked her whether it was necessary for her to present the judgement by virtue of which the boy was entrusted in her foster care. However, the teacher did not request to see the court's decision. It was only requested by the headteacher at the time when he was collecting all the necessary documents for the purposes of referral to the appellate body, i.e. after he had issued the decision on non-admission. The headteacher delivered the decision on non-admission to the Complainant.

B.6 Claimed discrimination

The Complainants' representative emphasised that she saw significant differences between the individual schools of the Slezská Ostrava school district in terms of their integration of Roma children. She believed School A was a good school attended primarily by majority children, while School B could be described as a "segregated" school attended primarily by Roma children.

The statements of all the parties involved showed that the municipal district of Kunčičky, where School B is situated, is an excluded area of Slezská Ostrava where most flats are owned by RPG Byty, s.r.o. According to those asked, this company leases flats predominantly to Roma people, which is also why Roma children are a majority in School B. The headteacher of School B estimated that 210 out of 233 children attending the school were Roma, even though only ten had the status of socially-disadvantaged pupils.[46] Forty-one children participated in the enrolment in the first year at School B and all were admitted by its headteacher. The headteacher of School B added that he was not present at any meeting dealing with the matter of transferring children to other schools in the school district in order to make the ratio of Roma children to non-Roma children more balanced. He had never considered such a solution. This was also confirmed by the representative of the founder.

The headteacher of School A noted that in his school, the usual ration was four to five Roma children per class. His estimate was that there were eight to nine Roma children in the first-year classes in the school year 2014/2015.

The Complainants' representative also provided a list of the children participating in the Project who came to the enrolment for the school year 2014/2015. I supplemented this data with the numbers of children based on the list of admitted and rejected children included in the review file, which yielded the following results:

- the total of 41 children came to the enrolment
    - of these, 11 were participating in the Project[47]

- 30 children were admitted as of 28 January 2015
    - of these, 7 children were admitted after a deferral
    - of these, 4 were participating in the Project
    - of these, 1 or 2 were participating in the Project[48]

- 11 children not admitted as of 28 January 2015
    - of these, 5 to 6 were participating in the Project[49]

The list also shows that three children participating in the Project were enrolled in School B. The headteacher admitted all children as well as three children who applied following their unsuccessful application to be enrolled in School A, including the Complainants' children. The remaining children participating in the Project (22 in total) were enrolled in six elementary schools outside the school district of Slezská Ostrava.

B.6.1 The headteacher's comments featured in the media

The authorised employees of the Office confronted the headteacher with some of his comments published in the press[50] and asked him about their source. The headteacher said that in this case his comments were taken out of context. The interview with the reporter was conducted over the phone and the headteacher was responding to the comments made by the Complainants' representative as quoted by the reporter. He confirmed that he supported integration of Roma children. He believed the best way to achieve integration is to have four to five minority children per class. He feared a situation where more Roma children would be enrolled in the first year. He also indicated misgivings concerning the potential withdrawal of majority children, which had occurred in Elementary School C, where the large numbers of minority children had allegedly led to the withdrawal of majority children, leading to further segregation – instead of integration – of the Roma children.

The audio recording of the conversation between the Complainants' representative and the headteacher include the following comments made by the headteacher.

He stated the following in response to the declaration of the Complainants' representative that she brought six Roma children to the enrolment:

"But I also have here eight deferrals from the last year... or nine. And of those nine deferrals, eight are Roma. So, count with me (...) It's not about us not wanting to accept Roma children. We have eight of them here who are deferred from the last year... But, you see, eight plus six, that give an entirely different number than four or five."

To the Complainants' representative's declaration that the children were looking forward to the enrolment, only the parents were nervous, and now they were going to be rejected only because the headteacher was afraid of losing majority children, the headteacher reacted as follows:

"I was just afraid that these kids would simply not meet the demands, that was my point. I want to accept children with whom we can work well in the next year, not to take in children who will not do well here, especially if they could be somewhere else where they would do better."

The Complainants' representative noted that it was sad that the headteacher assumed (without even seeing the children) that they would not do well in their first year. The headteacher responded as follows:

"We have some of these children here, even some children from you, and I know it is often difficult with them. Our experience with them is, or has been, not very good."

The Complainants' representative reacted to the headteacher's claim that he was afraid of the majority children's leaving, as had been the case of School C. She noted that School C was 90% Roma, by which she wanted to emphasise that the situation there was different. The headteacher reacted:

"But we're speaking about the society as it is today, this is how it works. If [the parents] see that Roma are a majority in the class, it will happen this year or the next. I cannot change the society – I may try, but I think there will be some leaving of the normal children..."

When asked by the Complainants' representative why in the school year with two classes opened the headteacher placed all Roma children in a single class, the headteacher said:

"A half of the first class is Roma. But we have taken into consideration their readiness level, yes. To make it possible to work with them in the class differently than in the other class."

C – The Defender's assessment of the case

C.1 Admission of children to elementary education

The Schools Act stipulates[51] the duty of the child's legal representative to "sign the child up for enrolment in compulsory school education in the period from 15 January to 15 February of the calendar year in which the child is to commence compulsory school education." It also specifically stipulates the age at which children must start going to school,[52] as well as the place where they may commence school attendance.

"The pupil shall perform compulsory school education at the elementary school founded by the municipality or an association of municipalities that is seated within the school district (Section 178 (2)) in which the pupil has his or her permanent

address (hereinafter the “catchment school”), unless the pupil’s legal representative selects a school different from the catchment school.”

The Act[53] also stipulates the catchment school headteacher’s duty to preferentially admit children with permanent residence in the respective school district or placed in a facility for the performance of institutional or protective education or a school facility for preventative educational care[54] situated within the school district. This duty is only suspended in case of full capacity, i.e. the above-mentioned number of pupils indicated in the schools register.[55]

The definition of the school district as well as creating suitable conditions for the performance of compulsory school education to all children in the school district are competences assigned by the Schools Act[56] primarily to municipalities or, in case of their inactivity, to the relevant Regional Authority. The city of Ostrava complied with its duty by defining school districts in its territory by means of a municipal ordinance; in case of Slezská Ostrava, the school district is identical to the municipal district.

C.1.1 School capacity

An extract from the schools register shows that the total capacity of School A is 350 pupils. The annual report on activities in the school year 2013/2014 indicated 243 pupils as of 31 August 2014. This means that even with fluctuations counting in the newly admitted first year pupils minus the leaving ninth year pupils, the school’s capacity could not have been used fully.

I am aware the headteacher was put in an impossible situation where on the one hand his school did not exceed the number of pupils recorded in the schools register but he simultaneously lacked capacity in the specific year. The number of pupils in the year is based on the number of classes, where pursuant to the Schools Act’s implementing regulations, there can be no more than 30 pupils in a class, or 34 if an exemption is granted.[57]

I must agree with the headteacher’s claim that in the relevant school year, the school lacked actual capacity to open more first-year classes.

- The school building lacked any free room that could be converted to a standard classroom.
- Alterations or expansions of the building were not and are not possible due to the building’s surroundings.
- Already in the school year 2013/2014, the school lacked the usual staffroom.
- The school was unable to convert the specialised rooms due to the requirements of past projects and the obligations following from them.
- The school could not merge classes in two-class years.
- Even though I consider most of the headteacher’s arguments concerning the impossibility of using the after-school group’s room irrelevant,[58] the fact that the school was forced to use these premises for teaching of several divided classes in the school year 2013/2014 demonstrates the lack of available room. Therefore, I believe that such a step would impose unrealistic organisational demands on the school.

Given the specific nature of the defined school district, especially the free capacity in the other schools, the specific location of the school and its capacity limitations, I do not believe the headteacher should request expansion of the class capacity by means of an exemption. I am equally sceptical about the notion that the headteacher should co-operate with the founder to expand the school, e.g. by means of a lease of premises in the adjacent buildings or by formation of a detached workplace.

I consider it sufficiently proven that the school did not advertise its intention to only open one first-year class and the number of pupils to be admitted, nor did it disclose this information to the legal representatives of the children (parties to the administrative proceedings) during the enrolment. Taking into consideration the principle of predictability, i.e. protection of legitimate expectations stipulated by Section 2 (4) of Act No. 500/2004, the Code of Administrative Procedure, as amended (hereinafter the "Code of Administrative Procedure"), the headteacher should have done so. The headteacher did not substantiate his argument, not even in the reasoning given in the decision on non-admission. The headteacher's claim that the school is regarded as a "one-form school" in the area is, in my opinion, completely irrelevant, especially with regard to the fact that the school did previously open multiple classes in the first year.

The reasoning of the decision on the non-admission of the boys only cite insufficient school capacity; I consider such explanation lacking because it is essentially unreviewable. This was similarly stated in the previous decision made by the appellate body and I share its opinion in this matter.

I do not say that the reasoning should contain an exhaustive legal argument that would necessitate legal training on the part of the headteacher. However, I consider it necessary for the reasoning to include all the necessary facts on the basis of which the headteacher decided not to admit the child, i.e. the decision criteria and why other children were preferred. If this were not the case, such decision would be unreviewable and the appellate body would be forced to annul it.

The argument of insufficient capacity may only be tolerated in case of children who are not from the school's catchment area and it must be backed by additional reasoning.[59]

My conclusions are supported by literature,[60] which indicates that the "headteacher is obliged to accept the aforementioned 'catchment' pupils preferentially, regardless of his decision to only open a certain number of classes in the year or limit the number of pupils per class."

C.1.2 Admissibility of audio recordings as evidence in court

Since the Complainants' representative also provided audio recordings made during the enrolment, without consent of the headteacher or the teachers present at the enrolment, and given that I, too, rely on these recordings in my own line of inquiry, I would like to briefly comment on their permissibility as evidence in potential court proceedings. The provided recordings capture the course of the enrolment and a

conversation with the headteacher about the enrolment and its implications for administrative decision-making.

Firstly, it needs to be mentioned that Section 125 of Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (hereinafter the "Code of Civil Procedure") does not exclude evidence in the form of audio recordings taken in secret. Act No. 89/2012 Coll., the Civil Code (hereinafter the "Civil Code") primarily requires consent of the person being recorded, as the recording represents an infringement of the individual's freedom. Nevertheless, it also provides for exceptions from the rule[61] in cases where the recordings are used to protect the rights of others or other persons' protected interests, or in cases where a person acts publicly in matters of public interest. Similarly, the currently available case law indicates that audio recordings of utterances made in performance of one's occupation, commercial or public activities cannot usually be considered private,[62] i.e. the above-mentioned provisions concerning the protection of personal rights cannot be invoked. Case law also infers a lack of justification for preferring the protection of personal rights of the recorded person over the right of the weaker party (e.g. an employee) to fair trial.[63]

C.1.3 The course of the enrolment

Neither the audio recordings nor other evidence confirms the claim of the Complainants that the teachers treated the children inappropriately. The atmosphere during the enrolment was clearly tense on occasions, but I must say both parties are to blame. The alleged incident with inappropriate rebuke of Z. Ž. for giving clues to a friend, which supposedly led to his non-cooperation with the teacher, cannot be demonstrated. The audio recordings allow me to confirm the teachers' claim that the Complainants' representative and the Complainants themselves occasionally interfered with the testing. Both the Complainants and their representative agreed with the results of the second test.

Thanks to the audio recordings[64] of the enrolment, I regard as demonstrated that the teachers who were assessing the skills and competences of the children changed their assessment after the intervention of the Complainants' representative.[65] Since the headteacher was deciding on (non)admission of the children based on their results, this procedure was very non-standard. The recordings do not allow to infer whether or not this attitude was motivated by an attempt to discriminate against the Roma children.

C.1.4 Criteria for admission to elementary education

The only lawful criteria for admission to compulsory school education are the age, pursuant to Section 36 (3) of the Schools Act, and permanent residence of the child in the school district, which guarantees preferential admission. This means that all "catchment" children of pre-school age should be admitted preferentially in comparison to the "non-catchment" children. In this regard, I must conclude that any additional criteria must be set up very carefully by the headteacher so as to avoid potential discrimination.

- Making the criteria public

I consider it demonstrated that the headteacher failed to advertise the criteria prior to the enrolment and did not disclose them to the legal representatives during the enrolment. For this reason, I believe the headteacher breached one of the basic principles of administrative proceedings, i.e. the principle of predictability stipulated by Section 2 (4) of the Code of Administrative Procedure. Pursuant to Section 46 (1) of the Schools Act, he should have announced them simultaneously with the place and time of the enrolment in a manner usual for the given area.

- Main criteria

I would firstly like to emphasise that the main criteria were formulated by the headteacher in a very problematic manner. In the first sentence, he speaks of a "child residing in the school district" and in the second sentence of a "child with a permanent residence address in a municipality without a catchment school"; the legal representative of the child may thus get the impression that a difference will be made between permanent residence address and the place where the child actually lives. However, by doing this the headteacher would expand the set of "catchment children" and preferentially admit, i.e. favour, a broader range of children than required by Section 36 (7) of the Schools Act. I do not believe this was the headteacher's intention, nevertheless, I recommend to use the same term in both sentences in the future, i.e. "the permanent residence address".

I wish to further draw attention to the interpretation of the Schools Act,[66] which emphasises that "the headteacher of a catchment school is obliged to first decide on applications filed by the legal representatives of the "catchment" children, while simultaneously he is not authorised to reject any such "catchment" child for any reason whatsoever if the maximum allowed number of pupils indicated in the register of schools and school facilities pursuant to Section 144 (1)(e) and (f) of the Schools Act makes their admission possible. The duty to preferentially accept these children takes precedence even over the competences of the headteacher pursuant to Section 164 (1)(a) of the Schools Act."

The criteria used at School A, however, do not unequivocally ensure that "catchment" children would always take precedence over "non-catchment" children, and thus over any other criteria. To the contrary, it is possible to infer that the results will be determined based on a simple sum of points, which merely give the "catchment" children an advantage. This system could not ensure that all "catchment" children would be admitted, i.e. that no "non-catchment" child would take their place if this child scored more points based on the additional criteria. However, I note that the headteacher was aware of his duty to preferentially accept the "catchment" children. This is documented by the list of rejected children included in the review file, which clearly shows that a child who received good scores in the school readiness test ended up at the 39th place[67] because the child did not meet the criterion of living in the catchment area.[68]

After the authorised employees of the Office pointed out the unsuitable formulation of paragraphs three and four of the document titled "Enrolment in the first-year classes and the statutory rules", which was published on the school's website after the enrolment, the headteacher removed the word "primarily" from the above-quoted paragraphs. I regard this modification as sufficient.

- Additional criteria

I regard as demonstrated that one of the criteria influencing the (non)admission of child to compulsory school education at School A included evaluation of the child's "school readiness". School readiness was evaluated by the teachers present at the enrolment based on a pre-determined scale with respect to the individual tasks. The school thus took advantage of its position as a sought-after school and was selecting pupils with the best prospects for successful school attendance. This procedure is common in secondary and tertiary education. However, I believe it is unacceptable in primary education, which serves a different purpose. Here, the pupil's right to education merges with the compulsory school education duty. Unlike in other types of schools, elementary schools have defined school districts. For these reasons, pupils in compulsory school education and children applying for it enjoy a greater degree of protection than students in higher levels of education. Similarly, all "catchment children" have the same level of legal certainty concerning preferential admission.

I'd like to add that I consider it suitable for a school to provide feedback to the parents based on expertly handled enrolment to inform them of the abilities, skills and knowledge of the child[69], with recommendations as to how to prepare the child for school attendance[70] commenced by the child approximately 6 months after the enrolment date. The use of a school readiness test as a criterion for (non)admission of a child to a school is, however, unlawful.

I am aware the headteacher was put in a difficult situation in which he had to make a decision. I do believe, however, that he should have first contacted the founder to discuss the school's capacity difficulties. In this regard, taking into account the children born in the strong population years who are currently reaching school age, I would like to recommend to the founder to monitor the capacities of the individual schools and provide the headteachers with assistance and guidelines for dealing with situations where there is insufficient capacity to accept all the "catchment" children. I cannot accept the claim of the founder that it complied with its statutory duty to ensure availability of compulsory school attendance for all "catchment" children pursuant to Section 178 (1) of the Schools Act by supporting unlawful decisions of the headteacher, who was rejecting "catchment" children citing insufficient capacity in the given year group instead the capacity indicated in the schools register. Similarly, it is not acceptable for the founder to recommend to the headteacher to refer the children "over capacity" to the remaining schools in the school district.

My inquiry also revealed that there are major differences between schools in the school district as regards the integration of Roma pupils and the related perception of the school by the general public. I would thus like to recommend to the founder of the schools to try and support the schools with bad reputation among the parents and try to gradually remove the differences between the individual schools in the school district. I also recommend to the founder of the schools to consider a better definition of the school districts and the related education policy with a view to preventing similar situations and reacting to the issue of segregated schools.

Since the regulations do not offer any particular procedure for solving this situation, I believe the best solution is to use the draw to make a selection from among

"catchment" children; the draw should be held in a transparent way in the presence of the children's legal representatives.[71] I am aware this solution is far from ideal, but I consider it to be the most objective one. However, the school should inform the legal representatives of this possibility prior to the enrolment as part of the published criteria and also in the decisions on non-admission of the children who "lost" the draw.

C.1.5 Priority admission of children after deferred school attendance

I infer from the list of admitted pupils that the children enrolled after a deferral of school attendance in the previous year were not assigned any points under the above-described criteria[72] and the headteacher admitted them without further considerations. This was confirmed by the headteacher.[73]

The Schools Act does not provide any basis for the claim that a child whose compulsory school attendance was deferred for a year by the headteacher has a priority right to be enrolled in the given school in the next school year, or that such a child may be enrolled with the effect deferred until the next school year. Based on the literature[74] as well as the legal interpretation by the Ministry of Education[75], I must conclude that the legal representatives of child with deferred school attendance must come to the next year's enrolment pursuant to Section 36 (4) of the Schools Act, to any elementary school of their choice. This applies to cases where the headteacher issued a decision to defer school attendance as well as cases where the legal representatives first applied for admission and, after the application was granted, successfully applied for a deferral of school attendance.

Therefore, the headteacher's procedure consisting in the non-application of the same criteria both to children with deferred school attendance and the other children was incorrect. In so doing, the headteacher violated the principle of predictability of administrative proceedings (Section 2 (4) of the Code of Administrative Procedure[76]) and the principle of procedural equality (Section 7 (1) of the Code of Administrative Procedure). The website of the school showing the results of enrolment in school year 2015/2016[77] demonstrates that this was not an isolated incident but a usual practice on the part of the headteacher.

C.1.6 Delays in proceedings

The headteacher's statements show that after receiving the file from the Regional Authority, he was deliberately waiting for a notification from the legal representatives of the previously admitted pupils that their children would not commence attendance or transfer to another school; only after these steps were made did he issue new decisions on admissions, which he justified by the capacity freed due to the leaving of the formerly admitted pupils.[78] However, the principle of expediency of administrative proceedings pursuant to Section 71 of the Code of Administrative Procedure demands that an administrative authority issue a decision without undue delay, within thirty or sixty days, respectively. This also applies in the event an appellate body refers the case back to the administrative authority. I cannot condone this approach even in this specific case where the delay was only measured in days. The legal interest of the parties to the administrative proceedings and the uncertainty

associated with waiting for a decision in a matter of such importance as the right of education must be taken into consideration.

I therefore note that the procedure of the headteacher, i.e. waiting for the application for transfer of the previously admitted children to a different school, is not in accordance with legal regulations.

C.2 Specific status of J. V.

In the case of J. V., I found further errors on the part of the headteacher concerning two instances. The first one is related to the uncertainty[79] concerning the boy's permanent residence address while the second one is related to the boy's legal representative.

C.2.1 Permanent residence

It is true that the headteacher was provided with two different addresses of the boy's place of permanent residence, of which one was outside the school district. The headteacher made an error when he did not ask the legal representative of the boy to clarify the permanent address pursuant to Section 50 of the Code of Administrative Procedure prior to issuing his decision. I agree with the conclusion reached by the Regional Authority that the headteacher breached Section 27 (1) of the Code of Administrative Procedure, since as a result of the failure to obtain all the necessary information to issue a decision, he incorrectly identified the boy (a party to the proceedings) in his decision.

I cannot object to the headteacher's decision not to change the order of the rejected children even after he learnt the boy did not have a permanent residence in the school district. At that time, the appellate proceedings were already pending and were to take these circumstances into account. The aforementioned procedure could have been favourable for the boy if the headteacher of the school subsequently offered the freed spaces based on the number of points the children had.

I consider it necessary to add that if the headteacher had verified the boy's permanent address and classified him as a "non-catchment" child, the decision on non-admission based on an insufficient capacity of the school would have been acceptable.

C.2.2 Foster care

Pursuant to Section 958 *et seq.* of the Civil Code, if a child is entrusted to foster care, the foster parent assumes, unless the court determines otherwise, only the so-called personal care of the child. The parents retain their parental rights and duties *vis-à-vis* the child[80], i.e. also the duty to provide for their child's education.[81] Moreover, pursuant to Section 877 (2) of the Civil Code, the selection of education is a significant matter belonging solely to the parents or the court (in case of parental disputes),[82] whereas the foster parent is "authorised and obliged to decide only in ordinary matters concerning the child."

I thus consider it demonstrated that the headteacher must have known the Complainant was a foster parent of the child and, *ipso facto*, could not have represented the boy in the admission proceedings. Based on these facts, I must conclude that the headteacher made an error when, in the course of administrative proceedings, he failed to request that the Complainant provide a proof of foster care and the parental consent to the selection of an elementary school, or a court decision clearly indicating the conferring of parental rights to the Complainant, or a court substitution of such parental consent.

C.3 Equal access to education and prohibition of discrimination

Given the fact that the Complainants allege discrimination, I should also say a few words about the issue. Direct discrimination under Section 2 (3) of Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws (the Anti-Discrimination Act), as amended by Act No. 89/2012 Coll., the Civil Code, means an act or failure to take action, where one person is treated less favourably than another would be in a comparable situation. Such less favourable treatment must be motivated by one or more of the so-called grounds of discrimination explicitly listed by the Anti-Discrimination Act. These also include ethnicity.

For hallmarks of discrimination to be present within the meaning of the Anti-Discrimination Act, such unfavourable treatment must involve an area substantively covered by the Anti-Discrimination Act. In the present case, this means the access to education and its provision.[83]

In addition to direct discrimination, the Act also defines indirect discrimination. Indirect discrimination pursuant to Section 3 (1) of the Anti-Discrimination Act means an action or conduct that relies on certain provisions, criteria or practices that may appear neutral on the surface, but ultimately put the person identified by the relevant grounds of discrimination at a disadvantage compared to other persons. A seemingly neutral provision, criterion or practice is not considered indirectly discriminatory if it can be justified by a legitimate aim and the means of achieving it are reasonable and necessary.

With regard to the issue at hand, it is also necessary to emphasise that the Anti-Discrimination Act also includes a form of discrimination called “instruction to discriminate”[84], defined as follows:

“conduct of a person who abuses the subordinate position of another person to discriminate against a third party.”

Harassment is also considered discriminatory under the Anti-Discrimination Act[85] and is defined as follows:

“an unwelcome behaviour related to grounds listed in Section 2 (3) that is aimed at or results in degrading the dignity of a person and creating a threatening, hostile, humiliating, degrading or offensive environment, or that could be justifiably perceived as a precondition of a decision affecting the exercise of rights and performance of duties following from legal relationships.”

The prohibition of discrimination is also stipulated in the Schools Act in Section 2 (1)(a) as one of the main principles of education:

"Education is based on the principles (...) of equal access of every national of the Czech Republic or another Member State of the European Union to education without any discrimination on the grounds of race, skin colour, sex, language, faith and religion, nationality, ethnic or social origin, property, gender, health, or another position or condition of the citizen."

The objectives of education pursuant to Section 2 (2) of the Schools Act include, *inter alia*, the understanding and implementation of the principles of democracy and the rule of law, fundamental human rights and freedoms as well as responsibility, the sense of social cohesion, formation of awareness of national identity and citizenship, and respect for ethnic, national, cultural, language or religious identity of individuals.

C.3.1 Assessment of the alleged discrimination

It is clear to me from the headteacher's comments that he wanted to regulate the number of Roma children going to his school so that their number did not exceed what he considered the "ideal number" for integration, i.e. four to five Roma pupils per class. The headteacher repeated this also at the meeting with the authorised employees of the Office and in the recorded conversation with the Complainants' representative. I thus cannot agree with his explanation that these comments were taken out of the context of a longer phone conversation. Regardless of the motivation behind this conduct, I am convinced the headteacher's intention to regulate the number of children of one group (Roma) without doing the same in case of another group (non-Roma) constitutes less favourable treatment in the sense of Section 2 (3) of the Anti-Discrimination Act.

To conclude that direct discrimination did occur, it is necessary to find a so-called comparator, i.e. "a person to whom a less-favourably treated individual can compare to".[86] The definition of the comparator is very significant, because it enables "to determine whether or not the protected characteristic was indeed the factor influencing the decisions of the discriminating party."[87] If the comparator are the non-Roma children, whose number was not to be regulated in any way by the headteacher, I can clearly conclude that the ethnicity (i.e. prohibited grounds of discrimination pursuant to Section 2 (3) of the Anti-Discrimination Act) was the factor on the basis of which the headteacher[88] treated the Complainants' children differently in comparison to other children. The comparator should also set a certain standard of treatment – in the case at hand, this is the equal access to education without any disadvantage in the form of quotas. The conception of direct discrimination thus stands even from this point of view.

I am not aware of a similar problem being addressed by the court in the past. However, by analogy I can mention the decision of the Court of Justice of the European Union in case Feryn.[89] The Belgian equality body sued a director of Firma Feryn NV ("Feryn") who was looking to recruit fitters, but did not want to employ "immigrants". The Court of Justice, to which this matter was referred to for preliminary ruling, held that the fact that an employer declares publicly that it will not

recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43/EC.[90] The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.

The case law provides a reference even due to the fact that the cited Directive also applies to the area of education.[91] Taking into account the aforementioned conclusions of the Court of Justice of the European Union, if the headteacher explicitly and repeatedly said that he was planning to regulate the number of Roma children going to his school, the very comment itself constitutes direct discrimination and it is not necessary to prove that the headteacher's intention had an actual impact on specific children.

As the inquiry demonstrated, specific children could have been affected by the declared objective (i.e. the regulation of the number of Roma children) as a result of the seemingly neutral measures adopted. Such measures could in themselves meet the definition of indirect discrimination. However, the declared objective and the measures to attain it must be considered as a whole. Given the fact that the case law of CJ EU shows that the very declaration of the intent to regulate the Roma pupils constitutes direct discrimination, the practical implementation of this intent, even though seemingly neutral measures, constitutes both direct and indirect discrimination.

Pursuant to Section 133a (b) of the Code of Civil Procedure, if a discrimination claim was made, the defendant (i.e. the school) would have to prove that the principle of equal treatment was not violated. The so-called shared burden of proof means the school would have to defend itself both against the discrimination in principle and against its individual manifestations:

- the use of the school readiness test in admission of children to compulsory school education and its potential implications for minority children;
- preferential admission of last school year's children with deferred school attendance;
- the headteacher's comments concerning the need to regulate the number of Roma children in class.

Even if the headteacher could bear the onus of proof and refute the direct discrimination claim, he would still have to address the measures which, in themselves (i.e. without the comments) can meet the definition of indirect discrimination.

The school readiness test is one of these seemingly neutral measures that could be indirectly discriminatory. My inquiry did not confirm that the school readiness test included culturally insensitive elements that could present an unfair disadvantage for the Roma children. I am aware of only two[92] Roma children who successfully passed the school readiness test[93]; the remaining Roma children were admitted preferentially after a deferral of school attendance, i.e. without points. These circumstances indicate that Roma children were coping with the test worse than the

other children. However, I do not have information on the ethnicity of the remaining rejected children and I have no competence to ascertain it; for this reason, I cannot conclude that the tests were discriminatory for the Roma children. Nevertheless, I anticipate that if the Complainants lodged an anti-discrimination claim, the case would require the ethnicity of the remaining non-admitted children to be established (by means of witness testimonies of the legal representatives of the rejected children and their self-identification at court).

I have already addressed the issue of preferential admission of last school year's children with deferred school attendance. I would like to add that it is very important for the assessment of the potential discriminatory conduct that the headteacher knew the ethnicity of the deferred children.[94] The fact that eight out of nine children with deferred school attendance were Roma could have led the headteacher to be more hesitant to admit additional Roma children, or in other words, it could have led him to a more stringent regulation of the number of Roma children.

At this point, I wish to add that my inquiry did not prove that the headteacher incited the teachers present at the enrolment to discriminate, i.e. that he gave them an instruction to discriminate (pursuant to Section 4 (4) of the Anti-Discrimination Act) in the sense to evaluate Roma children less favourably during the enrolment.

Even if the court concluded, despite my findings, that direct discrimination did not occur, it would have to address the headteacher's comments also from the viewpoint of their potential meeting the statutory definition of harassment (pursuant to Section 4 (1) of the Anti-Discrimination Act). The children and their legal representatives could have justifiably felt that the headteacher's comments were humiliating, threatening and constituted an attack against their dignity.

D – Conclusions

Finally, I emphasise that I am fully aware of the difficult situation faced by the headteacher of School A in decision-making concerning admission of children to compulsory school education. I understand that the whole situation resulted from a great demand on the part of the parents to enrol their children in this school, which indicates that the school has been doing a good job.

I invite the headteacher to make use of measures supporting inclusive education that proved successful in other schools. The most effective of them consist in the establishment of a preparatory class, hiring Roma assistants and learning support assistants, ensuring the availability of tutoring and initiating co-operation with NGOs.

Based on the above findings and considerations, I have reached the conclusion pursuant to Section 18 (1) of the Public Defender of Rights Act that the headteacher of Elementary School A made errors consisting in issuing unlawful decisions concerning the Complainants' children. His decision-making on admissions was based on criteria that have no legal basis in the Schools Act or elsewhere. My inquiry also revealed other individual errors made by the headteacher. These include the failure to publish the admission criteria, preferential treatment of last school year's pupils with deferred school attendance, the failure to verify the consent of the legal

representatives of J. V. and the failure to ascertain the place of his permanent residence.

Based on a detailed assessment of the case, I conclude that the headteacher's conduct, consisting especially in the application of the school readiness test, the preferential admission of last school year's pupils with deferred school attendance, and his comments concerning the need to regulate the number of Roma children, meets the definition of direct discrimination pursuant to Section 2 (3) of the Anti-Discrimination Act.

I am sending this inquiry report to the headteacher of Elementary School A, Mr A. B., and request that he respond to the found errors within 30 days of its delivery and inform me of the remedial measures he adopted. The report summarises my current findings, which may be reflected in my final statement.

I am also sending this inquiry report to the Complainants' representative, the founder of Elementary School A, i.e. the mayor of the municipal district of Slezská Ostrava, Ms Barbora Jelonková, and for the attention of the head of the Regional Authority of the Moravian-Silesian Region, Mr Tomáš Kotyz.

Mgr. Anna Šabatová, Ph.D., signed
Public Defender of Rights

[1] Z. Ž

[2] J. V., entrusted to foster care of his grandmother, Ms K. V.

[3] J. Š. was accompanied to the meeting by E. S. and M. K.

[4] Head of the department of education and culture of the Municipal Authority of Slezská Ostrava, Ms Petra Nitková, and Mr Vojtěch Müller, the authority's lawyer.

[5] Headteacher of the school Mr A. B. and the deputy headteacher Ms C. D.

[6] E. F. and G. H.

[7] Ch. I.

[8] Regional Authority of the Moravian-Silesian Region

[9] Audio recordings documenting a conversation between the Complainants and M. Z. and M. S. of the European Roma Rights Centre (ERRC), provided by the Complainants' representative.

[10] Project donors: Foundation Open Society Institute (FOSI), a Swiss foundation and Roma Initiative Office (RIO) under the Open Society Fundations (OSF). For more information, see: DH PROJEKT [on-line]. Ostrava: Vzájemné soužití, o. p. s., 2015 [retrieved on: 19 March 2015]. Available at: http://www.vzajemnesouziti.estranky.cz/clanky/aktuality/dh-projekt.html.

[11] Meetings took place primarily before the enrolment date. During the meetings, the organisers advised parents of their rights and worked with the children to improve their skills in order to successfully pass the enrolment.

[12] External observers of the enrolment from the ranks of the organisation's employees. Their goal was to monitor the enrolment and evaluate it, make audio recordings and react to potential conflict situation if needed. Their responsibilities are described in more detail in the Monitors' Manual. The Project organisers acquainted the parents of them through the Parents' Manual.

[13] On 11 November 2014, the head of the equal treatment department of the Office asked for the councillor's co-operation. He received the answer on 18 November 2014.

[14] Elementary School A, Elementary School B, Elementary School C and Elementary School D. The first three schools are situated within 1.5 km radius. Elementary School B is situated roughly five kilometres from Elementary School A.

[15] At Elementary School B.

[16] The meetings are attended by the head of the department of education and culture, the deputy mayor responsible for the area of education, and four headteachers of schools lying within the Slezská Ostrava district.

[17] Of 13 November 2014.

[18] For more, see subchapter B.5.3.

[19] Two classes are opened in each year group.

[20] They have been equipped as part of previously implemented projects and cannot be removed. Also, they are not suitable for teaching full classes of children.

[21] Newly equipped with hexagonal tables suitable for children's interest activities. This arrangement is not suitable for standard lessons and everyday moving or refurnishing would be required.

[22] According to the school educational programme (hereinafter the "SEP") valid as of 1 September 2013, first-year pupils have 21 teaching hours per week, i.e. once per week the lessons finish at 12:35 noon. The school canteen opens at 11:40 a.m. The scope of teaching hours according to the SEP is available in the Annual report on activities in the school year 2013/2014

[23] The project was not announced as of the date of the enrolment. On 13 November 2014, the headteacher emphasised in his supplementation that he had information the project would be announced. He did not indicate whether he had had the information also at the time of the enrolment.

[24] Already in the previous year, the school converted the janitor's workshop to a new classroom; in the preceding years, it converted the staffroom to a standard classroom.

[25] Ministry of Education, Youth and Sports. Doporučení k organizaci zápisů k povinné školní docházce (Recommendation on organisation of the enrolment to compulsory school education) [on-line]. Prague: MŠMT, 2014 [retrieved on: 10 November 2014]. Available at: http://www.msmt.cz/file/34308/.

[26] The quality of some of the recordings is bad and their information value is correspondingly low.

[27] The knowledge of the child's name, age, home address, friends and attendance of a pre-school facility.

[28] Correct pronunciation of speech sounds, the ability to tell a story based on a picture, sufficient vocabulary.

[29] Ordering of daily activities, recognition of colours, spatial orientation and recognition of right and left hand side, basic mathematical skills, recognition of geometric shapes and some letters.

[30] Ability to recognize first consonant or vowel in words, division of words into syllables with clapping.

[31] Jirásek-Kern test is traditionally composed of evaluation of drawing of a male body, imitation of a sentence and the ability to join a group of points by a line.

[32] She also requested repetition of testing with respect to a third boy (also participating in the Project).

[33] Ref. No.: SŘ/14/2014/ŘŠ and SŘ/16/2014/ŘŠ.

[34] The wording of the decision is the same for both children, except for the names, the number of points awarded and the final placement. For this reason, the quoted wording of the reasoning is identical for both boys, with J. V.'s version indicated in the brackets.

[35] Ref. No.: SŘ/80/2014/ŘŠ and SŘ/81/2014/ŘŠ.

[36] Ref. No.: SLE/06404/14/ŠaK/St and SLE/06405/14/ŠaK/St.

[37] File No.: ŠMS/7766/2014/Jos and ŠMS/7765/2014/Jos.

[38] Incorrect identification of Z. Ž. and the permanent address of J. V.

[39] Ref. No.: SŘ/14/2014/ŘŠ and SŘ/16/2014/ŘŠ.

[40] Ref. No.: SŘ/16/2014/ŘŠ.

[41] Ref. No.: SŘ/14/2014/ŘŠ.

[42] The list of the children admitted as of 1 February 2014 provided by the headteacher indicates these children under Nos. 24 and 28.

[43] The 39th place was occupied by a child with a better score than the last admitted child, nevertheless the notes indicated the child did not meet the main criterion, i.e. being from the catchment area.

[44] In the whole text, "catchment" children are children with permanent residence within the school district of the school for which they apply. Pursuant to Section 36 (7) of the Schools Act, these children have the right to preferential admission to compulsory school education at the given school. "Non-catchment" children are those who do not enjoy this right, i.e. children residing outside the relevant school district.

[45] Judgement of the District Court in Ostrava of 21 December 2011, File No. 43 P and Nc 206/2011.

[46] The school combats the pupils' social handicaps through a number of measures, including the activities of three learning support assistants, the long-term availability of a preparatory class, tutoring of children above the scope of standard lessons, co-operation with the Ostrava-Opava Diocese Charity group, opening of a school club for children under 17, a logopaedic group and the use of specialised textbooks.

[47] I.e. the Roma

[48] The Complainant and the headteacher disagree on this point. The Complainant claims that the headteacher admitted one child (number 19 in the list of admitted children included in the review file) later, on 31 January 2014, after deregistration of a previously accepted child. The headteacher, on the other hand, confirmed to an employee of the Office that the decision to admit this child alongside four other children with low point scores was issued simultaneously with the other decisions, i.e. on 28 January 2014. It was only received by the legal representatives of the child on 19 February 2014. During the phone call with the Defender's employee, the headteacher first confirmed late admission, but later denied it.

[49] See previous footnote.

[50] RADOVÁ, Markéta. Část škol v Ostravě chce přijímat jen omezené počty romských dětí (Some schools in Ostrava to admit only limited numbers of Roma children). In: Idnes.cz [online]. 21 January 2014. [retrieved on: 18 September 2014]. Available at: http: ... .

[51] Section 36 (4) of the Schools Act.

[52] Pursuant to Section 36 (3) of the Schools Act "Compulsory school education begins with the start of the school year following the date when the child reaches 6 years of age, unless the child was granted a deferral. A child that reaches 6 years of age in the period from September to the end of June of the relevant school year may be admitted to school already in that year, provided the child is sufficiently physically

and mentally prepared and the child's legal representative requests so. Admission to school under the second sentence of a child born in the period from September to the end of December is also conditional on a recommendation issued by a school counselling facility; admission of a child born in the period from January to the end of June is conditional on recommendations issued by a school counselling facility and a specialist physician; the legal representative of the child must attach said recommendations to the application".

[53] Section 36 (7) of the Schools Act.

[54] For the purposes of this report I will no longer mention children placed in school facilities for the performance of institutional or protective education or school facilities for preventive educational activities.

[55] Pursuant to the last sentence of Section 36 (7) of the Schools Act.

[56] Section 178 (2) and (3)

[57] Pursuant to Section 23 (5) of the Schools Act.

[58] The fact that the teaching of one lesson per week collides with the operation of the school canteen is not relevant, since at least two lessons per week (physical education) do not take place in the classroom. Similarly, the school could furnish the classroom with equipment necessary for teaching standard school lessons. The need for additional room for potential participation in a project which has not even been announced yet is, in my opinion, entirely irrelevant.

[59] I address the specific position of J. V. in part C.2.

[60] RIGEL, Filip et al. Školský zákon (Schools Act). Commentary. 1st edition. Prague: C. H. Beck, 2014, p. 208. ISBN 978-80-7400-550-3.

[61] Section 88 et seq. of the Civil Code.

[62] Judgement of the Supreme Court of 11 May 2005, File No. 30 Cdo 64/2004, available at: http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/A932C08B6CE4E2B2C1257A4E006A9DE5?openDocument&Highlight=0.

[63] Ruling of the Constitutional Court of 9 December 2014, File No. II. ÚS 1774/14, available at: https://nalus.usoud.cz.

[64] Especially recordings designated "recording866487908" and "recording1739953860".

[65] It is not clear what the point difference was as the teachers destroyed the original record sheets, which are therefore not included in the file.

[66] KATZOVÁ, Pavla. Školský zákon (Schools Act). Commentary. 1st ed.Prague: ASPI, a. s., 2008. p. 191. ISBN 978-80-7357-421-3.

[67] Or 9th in the list of rejected children, respectively.

[68] I will address the specific approach in J. V.'s case later.

[69] Especially those necessary to enter a school environment.

[70] Specifically, this may include a recommendation to co-operate with a logopaedic clinic or a school counselling facility, special workbooks, procedures for training certain abilities and skills or acquiring specific knowledge. Having regard of the fact that it is the school's duty to inform the legal representative of the possibility to defer school attendance, I also recommend to consider this instrument.

[71] I addressed this issue in more detail in my recent press release: The Public Defender of Rights. Enrolment of first-graders under pressure – headteachers must ensure children's equality [on-line]. Brno: Office of the Public Defender of Rights, 2015 [retrieved on: 3 March 2015]. Available at: http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2015/zapisy-prvnaku-pod-tlakem-reditele-musi-zajistit-rovnost-deti/.

[72] The list of admitted pupils indicates no point scores for these children.

[73] The deferred children did come to the enrolment and could undergo the school readiness test, but its results were not binding and did not influence the headteacher's decision-making.

[74] Cf. RIGEL, Filip et al. Školský zákon (Schools Act). Commentary. 1st edition. Prague: C. H. Beck, 2014, p. 210-212. ISBN 978-80-7400-550-3; KATZOVÁ, Pavla. Školský zákon (Schools Act). Commentary. 1st ed. Prague: ASPI, a. s., 2008. p. 193-197. ISBN 978-80-7357-421-3.

[75] Ministry of Education, Youth and Sports. K rozhodování ředitele základní školy o odkladu povinné školní docházky (On the decision-making of headteacher in deferring compulsory school education) [on-line]. Prague: MŠMT, 2005 [retrieved on: 1 March 2015]. Available at: http://www.msmt.cz/dokumenty/zakladni-vzdelavani.

[76] It is also referred to in literature as the principle of justified confidence in the procedure of public administration bodies. The principle consists in ensuring "that no unjustified differences occur in decision-making in cases based on the same or similar facts."

[77] Žáci přijatí do prvních tříd ve školním roce 2015/2016 (Children admitted to first-year classes in the school year 2015/2016) [on-line]. Ostrava: Elementary School A, 2015. [retrieved on: 10 March 2015].

[78] The Regional Authority referred the case back to the headteacher on 10 April 2014. In the case of Z. Ž., the headteacher decided on 30 May 2014; in the case of J.V. the headteacher decided on 5 June 2014.

[79] It is simultaneously not possible to blame the Complainant for notifying two different addresses to the school. In the "Application for admission of a child to primary education" (Ref. No. SŘ/16/2014ŘŠ), the box is titled "place of permanent residence", whereas the Parents' Questionnaire says "home address" (místo trvalého pobytu as opposed to bydliště - trans.). The legal terminology included in the laws is also not uniform, therefore the Complainant's interpretation is understandable.

[80] Section 960 (1) of the Civil Code.

[81] Section 858 of the Civil Code.

[82] Section 877 of the Civil Code.

[83] Section 1 (1)(i) of the Anti-Discrimination Act.

[84] Section 4 (4) of the Anti-Discrimination Act.

[85] Section 2 (2) in relation to Section 4 (1) of the Anti-Discrimination Act.

[86] BOUČKOVÁ, Pavla et al. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. 1st ed. Prague: C. H. Beck, 2010, p. 134. ISBN 978-80-7400-315-8.

[87] Ibid.

[88] The "discriminating party" according to the above citation.

[89] Judgement of the Court of Justice of the European Union of 10 July 2008 in Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=67586&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=4731622

[90] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[91] Article 3 (1)(g).

[92] Where in the case of one child the claims of the headteacher are contrary to the claims of the Complainants' representative.

[93] I.e. with higher point score and subsequent admission to school.

[94] Eight out of nine children were Roma.