

D.H. and others v. Czech Republic

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I. Executive Summary

Six years ago, the European Court of Human Rights' Grand Chamber delivered its landmark judgment in *D.H. and Others v. Czech Republic*. The Court held that the disproportionate placement of Romani children in "special schools" – where they, along with children with disabilities, were segregated from their mainstream peers and taught to a limited curriculum -- constituted unlawful discrimination. Once assigned to these schools, Romani children had little chance to catch-up with their mainstream classmates' level of learning or to transfer back to mainstream schools. For many, this sub-standard education trapped them in a cycle of poverty and despair. The Czech government was ordered to end the violation and remedy, so far as possible, its effects.

Today, little has changed in the Czech Republic. Though the Czech government delivered a new Consolidated Action Plan (CAP) to this Committee in November 2012 – which included "tightly focused specific measures" that, according to the government, would "accelerate the execution of the judgment"¹ during the past 12 months – hopes of a speedy implementation have been dashed. Little has been done to realize this plan and Romani children continue to be segregated.

The Czech government may point to the political instability which rocked the country in 2013 (the government fell in June and elections were held in October) as reason for this lack of movement on implementing the *D.H.* judgment. This, however, is not a defense. Implementation of most measures under the Consolidated Action Plan did not require political action but rather a concerted effort by the Education Ministry to stick to the timetable and activities it proposed in 2012.

It is high time for the Czech government to stop making promises and start to act.

Our four organizations – the European Roma Rights Centre, Open Society Justice Initiative, Open Society Fund Prague and Česká Odborná Společnost pro Inkluzivní Vzdělávání (COSIV) – have worked extensively in the Czech Republic to ensure the effective implementation of the *D.H.* judgment over the past six years. This submission will provide an overview of the plan submitted by the Czech government in November 2012 and an update on developments to implement it since this Committee last debated the *D.H.* judgment in December 2012. We also encourage the Committee of Ministers to make the following five recommendations:

- Issue an interim resolution on non-implementation of the *D.H. and others v Czech Republic* judgment to recognize that six years without change on the ground, nor meaningful implementation of an effective Action Plan, is unacceptable.
- Request that the *D.H.* judgment be taken up by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights for additional review and follow-up;
- Request the Czech government to submit a report to this Committee in time for its June 2014 meeting, detailing the implementation of all action plan activities for which the government's own deadlines have already passed. The Czech government should be prepared to discuss its performance during a debate on the *D.H.* judgment at that time.

- Require the Czech government to submit a longer-term action plan by the Committee’s June 2014 meeting, which includes concrete measures, with transparent numerical targets for Roma and non-Roma children, to ensure the desegregation of Czech schools (both practical and mainstream) within five years, and which address all causes and forms of segregation.

II. Developments Since December 2012

In December 2012, the Czech government presented its most recent action plan to the Committee of Ministers. In response, the committee urged “the rapid implementation of the measures envisaged, while also ensuring their impact on the ground.” It invited the Czech government to keep the committee updated on the CAP’s implementation as well as the “authorities’ reflection on the development of the concrete situation on the ground.”ⁱⁱ

As background to our current analysis, we briefly recap the main CAP elements and deadlines, along with the concerns raised by civil society in advance of the December 2012 debate. The action plan is broken up into three parts, summarized here:

1. Three immediate/short term measures between 2012 and 2013:

- *Two key legislative amendments on school placements:* (1) to ensure that children with health disadvantages can no longer constitute 25 percent of classes ostensibly set up for children with disabilities; and (2) to ensure that children with health or social disadvantages (Romani children are often classified as being “socially disadvantaged”) can no longer be placed temporarily in a class for children with disabilities. The amendments were originally slated for September 2013.
- *Legislative amendment on diagnostic stays:* that is, children unable to cope with mainstream schools can no longer be placed for six months in a class intended for children with disabilities.
- *Revision of diagnostic tools:* During 2013, the tests used to assess children for mild mental disability will be revised to be culturally neutral and to foster “a link between diagnosed educational needs and corresponding services.”

2. Two medium-term measures in 2013/14

- *Greater supervision of the diagnostic and counseling services:* Three separate elements are envisioned within this measure: (1) the creation of an audit body, established by legislation, within the Czech School Inspectorate to monitor the diagnostic process. This amendment was to be drafted in 2013, and come into effect from January 1, 2014; (2) amended legislation to ensure registration/accreditation by all school advisory facilities with the Ministry of Education, with implementation planned to start January 1, 2014; and (3) diagnostic activities will be standardized “on a continuous basis”.
- *Collection of disaggregated data:* Annual surveys will be instituted to assess the number of Roma children educated under a practical curriculum, starting in 2013. A decree will be amended to ensure that schools record the number of children educated according to a practical curriculum.

3. Three longer term/wider measures

- Preparatory classes and nursery schools cannot be established at practical schools (with legislation amended for the 2013/2014 school year;
- Revision of the practical curricula;
- Creation of an NGO forum to discuss broader issue of equal opportunity in education.

In December 2012, the Open Society Justice Initiative offered its initial comments on the action plan.ⁱⁱⁱ The assessment included recognition of the plan's positive elements: the importance of annually collecting ethnically disaggregated statistics to assess the impact of efforts to comply with the *D.H.* judgment; the government's own acknowledgment of the flaws in the current tests used to diagnose mild mental disability and the need to revise them; the stated intention to take steps to address systemic problems and conflicts which can contribute to the overrepresentation of Roma children in practical education environments (such as the acknowledged need to abolish the existence of nursery schools or preparatory classes attached to practical schools – this structural connection can channel children straight into practical schools by default).

The Justice Initiative also raised seven key concerns about the action plan – specifically that the plan included:

- no long-term vision to fully implement the *D.H.* judgment;
- no clear commitment to closing practical schools;
- no plan to address segregated practical classes in mainstream schools;
- no plan to transfer children from practical to mainstream schools;
- no guarantee that flawed testing tools would not continue to be used while being revised;
- no articulation of a reliable and consistent survey methodology; and
- no institution of a public education and teacher training campaign to combat stereotypes and prejudices

These concerns still remain valid one year later, along with the concern that the Czech government has failed to implement most of the Consolidated Action Plan measures promised 12 months ago.

**(A) Legislative amendments on school placements: Czech government's stated deadline --
September 2013:**

The government has failed to meet the September 2013 deadline to amend its decrees which would cancel the placement of children with health or social disadvantages into classes ostensibly set up for children with disabilities. The Czech government's own October 2013 submission states that while the amendment was adopted by the Ministry of Education, it is undergoing an "interdepartmental procedure and it expected to come into effect as of 1 December 2013." The delay, according to the Czech submission, "was caused by the resignation of the government in June 2013."^{iv}

Yet more recent meetings between civil society and the Czech Education Ministry in early November 2013 revealed further delays. According to the Czech authorities, the amendments will not in fact come into force any earlier than September 2014. Indeed, one of the amendments (on the placement of children with health disadvantages into classes with children with disabilities) will not enter into force until September 2015, and even then, such segregated placements will still be possible at high schools.

This amendment did not require any political procedure, but was a purely administrative act which could have been completed and implemented by the Ministry on time and as projected. Instead, the proposals are now deviating in content and approach from the original plan and are likely to be contentious with other Czech authorities trying to support D.H. implementation and inclusive education efforts (such as the Ombudsman's office and the Agency for Social Inclusion).

(B) Legislative amendment on diagnostic stays: Czech government's stated deadline -- September 2013 (start of the school year 2013/14):

As with the amendments on school placements, the Czech government failed to meet the September 2013 deadline for the legislative amendment on diagnostic stays that would prevent children unable to cope with mainstream schools to be placed in a class intended for children with disabilities for six months. The Czech government gave the same reason and timeline as for the amendments on school placements (that is, the fall of the government in June).^v Since the Czech government's October 2013 submission to this committee, however, another problem has emerged. The latest version of the amendments, proposed in November 2013 and which have been shared with civil society, give further reason for concern. The current proposed amendment now states that the diagnostic stay will not be cancelled, but instead that the "diagnostic stay cannot be carried out at schools, classes, and groups for children with mild mental disability." The problem, however, is that there is no way to distinguish or monitor which "schools, classes and groups" are intended for "children with mild mental disability." Under current Czech law, schools are not required to label themselves as "practical" schools, and many schools, labeled "mainstream" actually provide both a regular curriculum, and a more limited one. *The revised version of the amendment, then, deviates in content from the original proposal in ways which civil society fear will be impossible to monitor and prevent abuses. Moreover, the original version of this amendment, which was less contentious and had civil society's backing, did not require any political procedure but was a purely administrative act which could have been completed and implemented by the Ministry on time and as projected.*

The government submission also indicated that it set up a diagnostic monitoring working group that will address "monitoring and support issues" related to diagnostic testing and counseling services. This group will develop amendments to the governing decrees which are expected to come into effect on September 1, 2014, in line with the government's original deadline ("at the latest from the 2014/2015 school year").^{vi} *Little is known about this working group, however, so civil society is unable to track the progress of this group nor input into its analysis.*

(C) Revision of diagnostic tools: Czech government's stated deadline - 2013:

According to the Czech government's November 2012 submission, expert discussions held during the drafting of the Consolidated Action Plan revealed "well founded doubts" about whether the diagnostic tools used in the Czech Republic – particularly the WISC III test -- were "sufficiently reliable in all areas of measuring."^{vii} The revision, originally projected by the Czech government to be completed in 2013, is now set to take *two more years* to complete, according to its latest submission.^{viii} Meanwhile, the Czech authorities indicate in their 2013 report that they are training psychologists in the testing centers in the administration of the Woodcock Johnson test – a test recognized as flawed, and which the Czech government indicates is undergoing re-standardization in a way that "include(s) Roma children". The Czech authorities purport to distribute two additional tests for use – the Intelligence and Development Scales (IDS) and the Cattell Culture Fair Intelligence Test (CFT-20R) -- "by the end of 2013." *The Czech government fails to report that the original tests (WISC III, WISC IV and Woodcock Johnson), about which "well founded doubts" exist – continue to be used in diagnostic centers and continue to be the means by which Romani children are being channeled into sub-standard education. No safeguards or guidance exist to ensure that these unreliable tests are no longer used.*

The government set up an expert working group on diagnostic tools in education which first met in December 2012. *Since then, the expert working group on diagnostic tools has been opaque in its workings, with civil society unable to monitor or contribute to its analysis.*

(D) Greater supervision of the diagnostic and counselling services: Czech Government's stated deadline – legislative amendment drafted in 2013, and implemented from January 2014:

This measure includes three separate elements -- the creation of an audit body, provisions for the registration and accreditation of school advisory centers, and standardized diagnostic activities – all of which require amendments to the *School Act (2005)*. ***Legislative amendments have not been completed, meaning it is highly unlikely that even if amendments are made by the end of 2013, the government will be able to meet its January 2014 deadline for implementation.*** Meanwhile, the structural problem persists: Special Education Centres (SECs) are charged with assessing children for the existence of mental disabilities. Yet these centres are attached to special (and also practical) schools, with the director of the school also holding the post of SEC director. The potential for a conflict of interest is clear: the best interests of the child sent for testing may not be in the best interests of the school to which the testing centre is attached, given that the school is dependent on ongoing diagnoses of “mild mental disability” to stay open and receive funding. Yet the government has provided no indication of its intention to address this structural problem that contains the potential to perpetuate the ongoing placement of children into practical and special schools.

(E) Collection of disaggregated data: Czech government's stated deadline – September 2013 for first annual survey; 2013 for the amended decree to record numbers of children educated to a limited curriculum:

Encouragingly, the Czech School Inspectorate collected ethnically disaggregated data from schools on time in September 2013, despite significant backlash from special pedagogues, some of whom refused to cooperate with the data collection process. The data is expected to be released in December 2013. The proposed decree was also amended. ***The Czech authorities are to be commended for completing this element of the Consolidated Action Plan. That said, methodological concerns remain. The data collection is reliant on the answers provided by school directors, who largely belong to the “special pedagogues” interest group, which objects to the data collection. Indeed, some special pedagogues reportedly refused to participate in the data collection, and civil society is concerned that others may underreport the numbers of Romani children studying according to a limited curriculum for fear they may be associated with discrimination against Romani children. The Czech government needs to reassess and standardize its methodology to ensure accurate results.***

(F) Preparatory classes and nursery schools cannot be established at practical schools: Czech government's stated deadline – September 2013 in time for 2013/4 school year

This measure has been dropped completely and no legislative amendments have been made. The Czech government indicates in its submission that the reason that “these measures have not been implemented for the time being” is that implementing such a “restrictive regulation” now would be “counterproductive” in relation to the Ministry of Education’s “more general objectives.”^{ix} ***In reality, this measure was dropped due to intense political pressure by the special pedagogues’ group which saw this move as undermining its interests.***

(G) Revision of the practical curricula: Czech government’s stated deadline – September 2013

The *School Act (2005)* amendment for this provision has not yet been passed. Even if it had been, the Czech government indicates that the revisions are still “being debated” at the Ministry of Education as to whether it should be an independent educational program.^x *According to the government, decisions about next steps require “further deliberations” but with no timeline indicated for when decisions will be made.*

(H) Creation of an NGO forum to discuss broader issue of equal opportunity in education: Czech government’s stated deadline – 2012

While the NGO forum was indeed created, it has only met twice and operates in practice as a one-way discussion with the Ministry of Education channeling limited information to civil society. *Civil society consultations facilitated through this forum have had no or limited impact.*

III. Conclusion

The Czech government gave reason for optimism in November 2012 with its submission of a new policy and Consolidated Action Plan. One year later, optimism has evaporated. The same issues of the lack of political will and foot-dragging which has bedeviled the implementation of the D.H. case for six years still remain. The real losers from this continued inertia are Romani children, who keep having hope and opportunity removed from their futures with every passing year in which they are relegated to second class education. The Committee of Ministers needs to act now to assert that ongoing inaction is unacceptable and must be challenged.

ENDNOTES

ⁱ See *Communication from the Czech Republic Concerning the case of D.H. and others against the Czech Republic* (Application No. 57325/00), Doc no. DH-DD(2012)1074, November 20, 2012, page 2.

ⁱⁱ See Committee of Ministers, *Decision: D.H. and Others v Czech Republic*, 1157th meeting, December 2012, available at http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=D.H.&StateCode=&SectionCode=

ⁱⁱⁱ See Open Society Justice Initiative, *D.H. and Others v Czech Republic: Comments on Consolidated Action Plan, December 2012*, available at <https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD%282012%291137&amp;amp;Language=lanFrench&amp;amp;Ver=original&amp;amp;Site=CM&amp;amp;BackColorInternet=DBDCF2&amp;amp;BackColorIntranet=FDC864&amp;amp;BackColorLogged=FDC864>.

^{iv} See *Communication from the Czech Republic Concerning the case of D.H. and others against the Czech Republic* (Application No. 57325/00), Doc. No DH-DD(2013)1133, October 21, 2013, page 2.

^v Ibid, see pages 2-3.

^{vi} See *Communication from the Czech Republic (2012)*, above note 1, page 5.

^{vii} See *Communication from the Czech Republic (2012)*, ibid, page 6

^{viii} See *Communication from the Czech Republic (2013)*, above note 5, pages 4-5.

^{ix} Ibid, page 9.

^x Ibid, page 10.