

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 57325/00

D. H. and Others

Applicant

v.

The Czech Republic

Respondent

WRITTEN COMMENTS

BY

**Minority Rights Group International
The European Network Against Racism
and
European Roma Information Office**

**PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS AND RULE 44 § 2 OF THE
RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS**

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I - INTERESTS OF AMICI

1. These written comments are submitted by Minority Rights Group International (MRG), the European Network Against Racism (ENAR), and the European Roma Information Office pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.¹
2. MRG was established over 40 years ago and undertakes litigation on behalf of minorities and indigenous peoples before the European Court of Human Rights, its Inter-American and African counterparts, as well as before UN Treaty Bodies. ENAR is a network of over 500 European NGOs, which works to combat racism in all EU member states since 1998. ERIO, founded in 2003, contributes to the political and public debates surrounding Roma issues in EU member states and EU institutions. Key areas of specialisation include desegregation and anti-discrimination policies in schools, citizenship and housing.
3. This intervention, based on the research and knowledge of the three organisations, sets out the widespread nature of discrimination against Roma in education.² The level of discrimination is such that various bodies, both at the European and the international level, have considered it necessary to adopt specific recommendations on the issue. For example, at the European level, the Council of Europe's Committee of Ministers has issued a Recommendation to member states on the education of Roma/Gypsy children in Europe,³ while at the international level, the UN Committee on the Elimination of Racial Discrimination ("CERD") has issued a General Recommendation on Discrimination against Roma.⁴

II – CASE CONTEXT AND CONTOURS OF INDIRECT DISCRIMINATION

4. This case concerns discrimination on the basis of race in school placement of Roma children. More specifically, the case alleges the discriminatory assignment of Roma children to 'special schools' designed to address the needs of children with mental disabilities. This alleged practice is problematic in several regards, beginning with the fact that the majority of Roma children assigned to these schools have been found to be of normal or above normal intelligence. The long term consequences of their assignment to a significantly lower level of education than the mainstream, in turn, heavily compromises access to further schooling and employment.
5. The present case raises critical questions regarding the interpretation of Article 14 of the European Convention. To date, the ECHR has widely held that differences of

¹ Pursuant to a letter dated 26 September 2006 issued by Deputy Registrar, Michael O'Boyle.

² The Council of Europe began to address the need for the integration of Roma children in mainstream education as far back as the 1960s with the Parliamentary Assembly issuing Recommendation 563 *On the Situation of Gypsies and other Travellers in Europe* (1969). Two recent reports examining the continuing discrimination faced by Roma, particularly in education, are the final report of Mr Alvaro Gil-Robles, the Council of Europe's Commissioner on Human Rights, *The human rights situation of Roma, Sinti and Travellers in Europe* (CommDH(2006)1, Feb 2006) and the report of the EU's European Monitoring Centre on Racism and Xenophobia *Roma and Travellers in Public Education: An Overview of the Situation in the EU Member States* (May 2006); and the 2004 report published by the European Commission's Directorate General for Employment and Social Affairs, *The Situation of Roma in an Enlarged European Union*.

³ Recommendation No R (2000) 4, adopted 3 February 2000. This advocates the development of pre-school education schemes in order to secure access of Roma children to school and the establishment of appropriate support structures to enable Roma children to benefit, particularly through positive action, from equal opportunities in school (Articles 4 & 6). See too, General Policy Recommendation no 3 of the Council of Europe's European Commission against Racism and Intolerance *Combating racism and intolerance against Roma/Gypsies* CRI(98)29 rev (1998).

⁴ General Recommendation no 27, adopted 16 August 2000. Paragraphs 17-26 deal specifically with measures in the field of education.

treatment in the exercise of the rights guaranteed in the ECHR must be based on an objective and reasonable justification to avoid being discriminatory. More specifically, the Court has stated that:

The existence of such justification must be assessed in relation to the *aim and effects* of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only *pursue a legitimate aim*: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of *proportionality* between the means employed and the aim sought to be realised.⁵

6. The Court later expanded the facets of discrimination prohibited under Article 14 by holding that “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.⁶
7. Traditionally, jurisprudence in relation to Article 14 has been developed in the context of *direct* discrimination. The Court has recently recognised that discrimination can nonetheless also occur when a general policy or measure has a disproportionate, prejudicial effect on a particular group, even if an effect was not intended.⁷ This recognition echoes a number of international instruments, from the International Covenant on the Elimination of Racial Discrimination (ICERD), to the European Union’s Race Directive.⁸ The common principle among these instruments is that discrimination takes place in circumstances where a provision which appears neutral on the surface disproportionately disadvantages a specific group.
8. Of particular significant to the present case, however, is the European Court’s finding of racial discrimination ‘as a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction’.⁹ The Court has consequently underscored the need for authorities to ‘use all available means to combat racism’.¹⁰

III – THE RIGHT TO EDUCATION

9. Addressing any form of discrimination in education is extremely important as education is considered indispensable to the realisation of other human rights.¹¹ Given the limited jurisprudence on ECHR Article 2 of Protocol 1,¹² international standards on the right to education provide an important framework for identifying what is required of states in relation to the full realisation of this right. The main framework elaborated and applied by the Committee on Economic, Social and Cultural Rights (CESCR) and the Special Rapporteur on the Right to Education requires that

⁵ Case ‘*Relating to certain aspects of the laws on the use of languages in education in Belgium*’ (‘Belgian Linguistics’ case), Judgment of 23 July 1968, Series A, No. 6. para. 10.

⁶ *Thlimmenos v. Greece* (GC), Judgment of 6 April 2000, para. 44.

⁷ *Hugh Jordan v. The United Kingdom*, no. 24746/94, 4 May 2001, para 154.

⁸ ICERD Article 1 refers to racial discrimination taking place in relation to ‘any distinction (...) which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing (...)’. [Emphasis added]. See also Article 2(2)(b) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, defines indirect discrimination as “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”

⁹ *Timishev v Russia* no 55762/00 and 55974/00, para 56.

¹⁰ *Ibid.* para 56.

¹¹ Committee on Economic, Social and Cultural Rights, General Comment 13, E/C.12/1999/10 (hereafter CESCR General Comment 13), para 1.

¹² The European Court has ruled on fewer than 25 Article 2 Protocol cases in total. Amongst these, the majority have focused on the second limb of Article 2, which relates to the right of parents vis-à-vis their children’s education.

education be available, accessible, acceptable and adaptable.¹³ As such, international standards require that education in all its forms and at all levels shall exhibit the following interrelated and essential features:

10. In the first instance, there will be a failure in the duty to *respect and protect* the right to education – and thus the finding of a violation – if functioning educational institutions and programmes are not **available** in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings, sanitation facilities for both sexes, safe drinking water, trained teachers, teaching materials, and so on.¹⁴
11. In the second instance, lack of **accessibility without discrimination** will amount to a violation. Accessibility has three overlapping dimensions: (1) Non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds including that of race; (2) Physical accessibility: education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme); (3) Economic accessibility - education has to be affordable to all.¹⁵
12. In the third instance, a Government will fall short of its obligations to respect and protect the right to education if the form and substance of education, including curricula and teaching methods, are not **acceptable** (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents.¹⁶
13. In the fourth instance, a violation will be found if education is not sufficiently flexible in so far as to **adapt** to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.¹⁷
14. Finally, while the obligation to respect the right to education requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) for its part requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education.¹⁸

IV – FORMS OF DISCRIMINATION AGAINST ROMA IN EDUCATION

15. Through the lens of the above framework, the remainder of this intervention will examine the three main ways in which Roma in Europe are discriminated against in exercising their right to education.
 - (a) Assignment to special schools for people with mental disabilities;
 - (b) Attendance at segregated “ghetto” schools; and
 - (c) Lack of access to school;

¹³ CESCR General Comment 13, para 6.

¹⁴ CESCR General Comment 13, para 6a.

¹⁵ CESCR General Comment 13, para 6b.

¹⁶ CESCR General Comment 13, para 6c.

¹⁷ CESCR General Comment 13, para 6d.

¹⁸ CESCR General Comment 13, para 47. On special measures, see also CERD Art1(4) (in combination with Art 5(e)(v)) and FCNM Art 12(3).

(a) *Assignment to special schools*¹⁹

16. The most obvious form of discrimination against Roma children is their continuing wrongful assignment to “special schools” for the mentally disabled. This practice has been condemned as “the most odious form of indirect segregation, because it attaches a particular stigma with far reaching negative consequences for such pupils’ life chances.”²⁰ It is segregation by deliberate decision of the state authorities. Children in such special schools are not provided with an equal standard of education to that provided in normal schools. Instead, they follow a simplified curriculum considered appropriate for their lower level of development. Thus, for example, in the Czech Republic, children in special schools are not expected to know the Czech alphabet or numbers up to 10 until the third and fourth grade, while their counterparts in regular schools acquire this knowledge in the first grade.²¹ Therefore sending any Roma child to such a school is a difference in treatment which requires an objective and reasonable justification, and meets the requirement of proportionality.
17. This practice is widespread across Roma communities, and has been described as “semi-automatic channelling”²². It has received considerable attention, both at the European level and within the human rights bodies of the UN. The concerns of such bodies on the wrongful assignment of Roma children to special schools on the basis of language differences and real or perceived cultural differences is amply illustrated by the FCNM Advisory Committee’s comments on the case of the Czech Republic.²³ In its first report to the Advisory Committee, the Czech Republic expressly acknowledged that: “Romany children with average or above-average intellect are often placed in [special] schools on the basis of results of psychological tests (this happens always with the consent of the parents). These tests are conceived for the majority population and do not take Romany specifics into consideration.”²⁴
18. In its opinion on this first report, the Advisory Committee stated: “it appears that many Roma children who are not mentally handicapped are placed in these schools due to real or perceived language and cultural differences between Roma and the majority.”²⁵ In its second opinion, the Advisory Committee acknowledged the special attention being given by the Czech Republic to address the unjustified placement of Roma children in special schools,²⁶ before going on to express its concern that:

¹⁹ As well as assignment to special schools for the mentally disabled, there is a parallel practice of assigning Roma children to “special classes” within mainstream schools. Such segregated classes vary in purpose. Some, like the special schools, are directed at children with learning disabilities; others are simply for children from underprivileged backgrounds (see the final report of the Commissioner on Human Rights *op cit* n2, para 47); or to address absenteeism (see the opinion of the FCNM Advisory Committee on Denmark (ACFC/INF/OP/II(2004)005, para 104)). In some cases, the placement of Roma children in segregated classes is a means of ensuring that non-Roma parents do not remove their children from the school (the avoidance of the phenomena of “white flight”); see *Roma and Travellers in Public Education: An overview of the situation in the EU Member States*, European Monitoring Centre on Racism and Xenophobia (hereafter ‘EUMC report’), May 2006, referring to the situation in Greece, p50, and Hungary, pp54-5. In all cases, children in such special classes follow a simplified curriculum.

²⁰ EUMC report, n 19, p47. See also OSCE High Commissioner on National Minorities *Report on the situation of Roma and Sinti in the OSCE area* (2000) at pp77-8.

²¹ ERRC *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia* (2004) p34.

²² ECRI reports on the Czech Republic (CRI(2000)4, para 33) and Hungary (CRI(2000)5, para 30).

²³ The Advisory Committee has considered it necessary to express its concerns in no fewer than 10 of its opinions. If account is also taken of placement in special classes, the figure rises to at least 18 opinions. Countries criticised include, the Czech Republic, Bulgaria, Hungary, Romania, Serbia, the Slovak Republic and Slovenia.

²⁴ ACFC/SR(1999)006.

²⁵ ACFC/INF/OP/I(2002)002, para 61.

²⁶ ACFC/INF/OP/II(2005)002, para 141.

“a considerable number of Roma children are still being placed, at a very early age, in ‘special’ schools, and that revision of the psychological tests used in this context has not had a marked impact. According to non official estimates, Roma account for up to 70% of pupils in these schools, and this – having regard to the percentage of Roma in the population – raises doubts concerning the tests’ validity and the relevant methodology followed in practice.”²⁷

19. Similar concerns as to the over-representation of Roma children in special schools and the failure of the testing system to take account of language and cultural differences have been expressed at a European level by, amongst others, the Council of Europe’s Commissioner on Human Rights;²⁸ the Council of Europe’s European Commission against Racism and Intolerance (ECRI);²⁹ the OSCE’s High Commissioner on Human Rights;³⁰ and the European Union’s European Monitoring Centre on Racism and Xenophobia (EUMC).³¹ The issue of the discriminatory placement of Roma children in special schools has been specifically mentioned by each of the relevant UN human rights treaty bodies in their concluding observations on a number of state parties’ reports.³² The issue has also been a subject of concern for the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance.³³
20. As well as the adequacy of the tests employed, a further issue arises as to the quality of the parental consent which is said to be given to the placing of Roma children in such special schools. Such consent would appear to be neither free nor fully informed, as demonstrated by the comments of ECRI in its third report on the Czech Republic:

As far as the other element required in order to send a child to a special school – the consent of a parent or legal guardian of the child – parents making such decisions continue to lack information concerning the long-term negative consequences of sending

²⁷ Ibid, para 146. See also, in particular, the Advisory Committee’s reports on Hungary (ACFC/INF/OP/I(2001)004, para 41 and ACFC/INF/OP/II(2004)003, para 90); Serbia (ACFC/INF/OP/I(2004)002, para 89); the Slovak Republic (ACFC/INF/OP/I(2001)001, para 39 and ACFC/INF/OP/II(2005)004, para 96); and Slovenia (ACFC/INF/OP/I(2005)002, para 63).

²⁸ *Final report on the human rights situation of the Roma, Sinti and Travellers in Europe*, *op cit* n2, para 46 where the Commissioner refers to the fact that “Roma children are frequently placed in classes for children with special needs without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin.” See also ERRC *Stigmata*, *op cit* n21, which identifies a correlation between the presence of special schools and the size of the Roma population in the administrative unit, p37; while CRC’s Concluding Observations on Hungary identify a relationship between limited access to pre-school classes and high incidence of poverty and a predominant Roma population in the area (CRC/C/HUN/CO/2 (2006), para 49).

²⁹ See, for example, its second and third reports on the Czech Republic (CRI(2000)4, para 33 and CRI(2004)22, para 107 respectively); its third report on Hungary (CRI(2004)25, para 98); and its third report on Slovakia (CRI(2004)23, para 103).

³⁰ Report of the Situation of Roma and Sinti in the OSCE area, Organization for Security and Co-operation in Europe, High Commissioner on National Minorities, 2000, pp76-83.

³¹ *Roma and Travellers in Public Education*, *op cit* n 2, pp 46-7. The EUMC’s overall recommendations include “assessment procedures and psycho-pedagogical testing taking into account language issues and different sociocultural norms and models of behaviour should be developed involving Roma and Traveller representatives in order to replace any current discriminatory practices that result in the placement of disproportionately high numbers of Roma and Traveller pupils in special education.”

³² CESCR has expressed concern over the issue on at least two occasions; CERD on at least 9 occasions; and CRC on at least 5 occasions. Each of these bodies has specifically raised the issue in relation to the Czech Republic: in the case of CERD, on three separate occasions, most recently in its 2003 Concluding Observations CERC/C/63/CO/4, para 14.

³³ See the report of Mr Glele-Ahanhanzo on his mission to Hungary, the Czech Republic and Romania: E/CN.4/2000/16/Add.1, particularly paras 13, 15 and 111. See also the report of Mr Doudou Diene E/CN.4/2004/18, at para 10.

their children to such schools... Special schools are often presented to parents as an opportunity for their children to receive specialized attention and be with other Roma children.³⁴

21. In any event the right to education vests in the child. It is difficult to see how a parent's consent to a violation of that right would relieve the state of its obligations to ensure that all its children benefit from the right, without discrimination.
22. Whatever the merits of separate education for children with genuine mental disabilities, the decision to place Roma children in special schools is, it appears, in the majority of cases, not based on any actual mental disability but rather on language and cultural differences which are not taken into account in the testing process.³⁵
23. Accordingly, such testing, rather than constituting "an objective assessment of essentially different factual circumstances"³⁶ which might justify such a difference in treatment, is instead biased against Roma students. Rather than being neutral as between children of different cultural backgrounds, such tests have a disproportionately negative effect on Roma children, depriving them of their right to enjoy the same quality of education as those non-Roma students who have the same intellectual abilities as them, and thereby severely limiting their future opportunities.
24. In order to fulfil their obligations not to discriminate against Roma in the exercise of their right to education, the first requirement of states is to amend the testing process for assignment to special schools so that it takes due account of language and cultural differences: such language and cultural differences should not be the basis for relegating mentally able students to a substandard education.³⁷
25. At the same time, however, such language and cultural differences do need to be appropriately addressed if Roma children of normal intelligence are not to be disadvantaged within mainstream schooling.³⁸ Accordingly, for states to meet their obligation of non-discrimination and their obligation to fulfil in relation to the right to education, international bodies have recommended that states must take positive measures in the area of language training and social skills training to ensure the *de facto* equality of Roma students in the enjoyment of the right to education. Such measures might take the form of pre-school classes, extra language tuition and the use of Roma teaching assistants.³⁹ Additionally, it is important that such measures are "functionally linked to normal school activities facilitating the full integration of pupils in the normal education process",⁴⁰ rather than being used to justify the continued segregation of Roma students, albeit this time through attendance at separate classes within mainstream schools.⁴¹

³⁴ CRI(2004)22, para 108.

³⁵ See the comments of the Czech Republic in its first report to the FCNM Advisory Committee, *op cit* n 24, and also the report of the OSCE High Commissioner on Human Rights, *op cit* n2, where he refers to many Czech educational authorities conceding that "the overwhelming majority of Roma students who are sent to special schools are not mentally disabled", (p78).

³⁶ *Belgian Linguistics case* no.1474/62, p 40.

³⁷ E.g. *ERRC Stigmata*, *op cit* n 21, p38.

³⁸ These differences would need to be taken into account in accordance with the precedent set in the case of *Thlimmenos v Greece*, as outlined in paragraph 6 of the present amicus brief.

³⁹ As advocated for example by ECRI in its reports on Finland (CRI(2002)20, para 29); Bulgaria (CRI(2000)3, para40); Croatia (CRI(2005)24, para 142); and the Czech Republic (CRI(2000)4, para 34).

⁴⁰ EUMC, *op cit* n 19, p47.

⁴¹ See, for example, the second report of ECRI on Lithuania which states "attendance at preparatory classes for longer than is strictly necessary must be avoided at all costs. Care should be taken to ensure that only those children who need preparatory classes are put into these classes and that all other children are integrated immediately into mainstream schools" (CRI(2003)5, para 58); and the Commissioner on Human Rights, *op cit* n 2, para 49.

(b) Attendance at segregated ghetto schools

26. Distinct from the assignment of Roma children to special schools for people with mental disabilities is the issue of their attendance at Roma only schools, commonly referred to as “ghetto schools”, often as a result of the segregated living patterns of Roma communities and the lack of any meaningful opportunity to attend mixed schools.⁴² Such racial segregation is of itself a direct violation of international law.⁴³
27. Unlike special schools there is no legal distinction between such ghetto schools and other mainstream schools, with the same curriculum being followed at both. In reality though, there are consistent reports of a marked difference in the quality of the material conditions of and the education provided at the two types of schools.⁴⁴ As one report says:
- “Romani ghetto schools, usually known locally as “Gypsy schools,” are generally inferior in material conditions and quality of education— school buildings are run-down and ill-equipped to provide for quality education, teachers lack basic qualifications, textbooks are out-of-date, and teaching aids are lacking. The low quality of education in the ghetto schools is also caused by a prevalence of unqualified teachers in these schools. Research data in Romania demonstrated that in 1998, unqualified teachers were present in every rural school with a student body that was more than 50 percent Roma.”⁴⁵
28. The relegation of Roma children to ghetto schools with such an inferior quality of education is a stark example of the collective failure of educational authorities and ministries to provide an appropriate service to Roma students. Such discrimination on the basis of ethnicity, would appear to be partly a result of, while at the same time reinforcing, the negative stereotypes of Roma held by the non-Roma population, including that of their limited educational ability.⁴⁶
29. Equally, such inferiority in the material conditions of the schools and the quality of the education provided at them has implications as to the right to education in terms of both the availability and acceptability of education. For a state to fulfil its obligations in relation to the right to education, it is not sufficient that it makes education physically available. Rather, availability requires that the school is

⁴² Another cause is the phenomena of “white flight”: non-Roma parents withdrawing their children from schools as the number of Roma children increases. (See, for example, the FCNM Advisory Committee’s opinion on Hungary ACFC/INF/OP/II(2004)003, para 91).

⁴³ See Article 3 of the International Covenant on the Elimination of All Forms of Racial Discrimination, together with CERD’s General Recommendation no 19. The illegality of racial segregation in the field of education was recognised in the US courts back in 1954 in the landmark case of *Brown v Board of Education of Topeka* 347 US 483. More recently, it was recognised by the Bulgarian domestic courts in a case which challenged the fact that a local ghetto school in Sofia was attended entirely by Roma students: decision of the Sofia District Court, Case 11630/2004, decided 25 October 2005.

⁴⁴ See, for example, ERRC *Stigmata*, *op cit* n 21, pp75-79; ECRI second report on Bulgaria (CRI(2000)3, para 40); Commissioner on Human Rights, *op cit* n 2, para 47; and the UNDP’s regional human development report on Central and Eastern Europe for 2002 *Avoiding the Dependency Trap: The Roma in Central and Eastern Europe*.

⁴⁵ S. Danoval “Patterns of Segregation of Roma in Education in Central and Eastern Europe” in Public Interest Law Initiative *Separate and Unequal: Combating Discrimination Against Roma in Education* (2005) pp 8-9.

⁴⁶ See, for example, on such negative stereotypes and prejudices ECRI’s reports on Albania (CRI(2005)23, paras 57-8); Croatia (CRI(2005)24, para 146); and FYRM (CRI(2005)4, para 117). See also the Macpherson Report from the United Kingdom which defines institutional racism as “the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount discrimination, through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people”, The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William McPherson February 1999, <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

adequately functioning, with sound buildings, sanitation and heating. Acceptability in turn necessitates that the form and substance of the education provided is of a sufficiently high standard.⁴⁷

30. In order to comply with their obligation of non-discrimination and their duty to fulfil in relation to the right to education, states are required to take positive measures to ensure that schools within Roma areas receive sufficient budgets to enable them, *inter alia*, to maintain the school buildings to an adequate standard and to recruit teachers with the necessary qualifications and experience to enable them to provide good quality education. In the absence of such measures, Roma students will continue, without objective or reasonable justification, to receive an inferior education to that of their non-Roma counterparts.

(c) Lack of access to school

31. Even more broadly, across Europe, Roma enrolment and attendance at school are marked by their disproportionately low rates.⁴⁸ Concern at such low enrolment and attendance rates has been repeatedly expressed by such bodies as ECRI,⁴⁹ the Council of Europe's Advisory Committee on the Framework Convention for National Minorities ("the FCNM Advisory Committee")⁵⁰, the EUMC,⁵¹ CESCR, CERD and the UN Committee on the Rights of the Child (CRC).⁵² The reasons for such low rates of enrolment and school attendance are various.⁵³ However, there are two particular factors which demonstrate clearly that Roma are being indirectly discriminated against in access to education.
32. The first particular factor, which adversely and disproportionately impacts upon the economic access of Roma to education, is poverty. The Roma populations within member countries of the Council of Europe are marked out by their severe socio-economic disadvantage, as compared with the majority population: they suffer from disproportionately high levels of unemployment; often live in settlements which lack basic amenities, such as running water, heating and sanitation; and suffer from various poverty related health problems, e.g. tuberculosis.⁵⁴ Such poverty makes the

⁴⁷ CESCR General Comment no 13, para 6c.

⁴⁸ For example, in Bosnia and Herzegovina between 80-85% of Roma children do not attend schools: CESCR Concluding Observations on Bosnia and Herzegovina E/C.12/BIH/CO/1 (2006), para 29 and ECRI's third report on Bosnia and Herzegovina, CRI(2005)2, para 66. Even in those cases where the figures for Roma enrolment are not a particular cause for concern, there is an issue as to poor attendance rates and high drop-out rates: see further the World Bank report by Ringold, D., Orenstein, M., and Wilkens, E. *Roma in an Expanding Europe: Breaking the Poverty Cycle* (2005), pps 43-44.

⁴⁹ ECRI has raised such concern in relation to countries varying from Albania (CRI(2005)23, para 58) to Spain (CRI(2003)40, para 44); and from the Former Yugoslav Republic of Macedonia (CRI(2005)4, para 116) to France (CRI(2005)3, para 95).

⁵⁰ See, for example, its opinions on Bosnia and Herzegovina (ACFC/INF/OP/I(2005)003, para 146) and on Bulgaria (ACFC/OP/I(2006)001, para 90).

⁵¹ See *Roma and Travellers in Public Education*, *op cit* n2, pp21-45.

⁵² See, for example, its Concluding Observations on Finland (CRC/C/15/Add.272 (2005), para 42), Bosnia and Herzegovina (CRC/C/15/Add.260 (2005), para 56), Romania (CRC/C/15/Add.199 (2003), para 52) and Spain (CRC/C/15/Add.18 (2002), para 42).

⁵³ One reason often cited is the lack of desire of Roma parents to send their children to school: see, for example, ECRI's second report on Albania (CRI(2001)2, para 21). Even then though, other underlying factors are at play, for example, fear on the part of Roma parents that their children will suffer prejudice and racism at school, be it from teachers or from fellow students and their parents: see the findings in the EUMC report, *op cit* n 19, on Greece (p26) and Italy (p31). See also the OSCE High Commissioner on National Minorities *Report on the situation of Roma and Sinti in the OSCE area* (2000) at p70.

⁵⁴ See, for example, ECRI's reports on the situation of Roma populations in countries ranging from Latvia (CRI(2002)21, para 54) to Finland (CRI(2002)20, para 27); from Moldova (CRI(2003)6, para 30) to Germany (CRI(2004)23, para 68); from the Czech Republic (CRI(2004)22, para 88) to France (CRI(2005)3,

cost of enrolment and attendance at school prohibitive, in terms of both the opportunity costs, since children are needed to generate income, and the associated costs of schooling, such as workbooks, school materials, uniforms and food.⁵⁵ As a result, Roma find themselves trapped in a vicious circle: low education levels impact negatively on their employment opportunities, while high levels of unemployment prevent Roma families from being able to afford to send their children to school.⁵⁶

33. The second, though related, factor which additionally raises issues of the physical accessibility of education to Roma children is the geographical distance of Roma families from schools. Roma communities are often ghettoized, living in poor conditions on the outskirts of cities where they are often far from educational opportunities;⁵⁷ this includes their living on camps (whether authorised or unauthorised) where educational provision is often limited to mobile or truck schools run by NGOs.⁵⁸ The situation is well described by the Council of Europe's Commissioner for Human Rights in his final report on the human rights situation of the Roma, Sinti and Travellers in Europe:

In extreme cases, whole communities might lack access to education due to their segregation from the rest of society and the resulting physical distance from schools. By way of example, in 2004 it was reported that children living in the Spata Roma community in Greece were unable to attend school for three years because the distance from the municipality made it impossible for the Roma children to reach school due to lack of transportation. Following a public protest, a bus was finally provided enabling the Roma children to attend a preparatory class in view of their integration into ordinary school classes.⁵⁹

34. The reality therefore is that while education may in theory be accessible to all, the disproportionately low economic status of Roma compared to the rest of the population, and their often physical isolation, means that the costs of schooling (including textbooks, uniform and transport), which apply to all parents and therefore appear neutral on their face, have a disproportionately prejudicial effect on Roma children, preventing them from exercising their right to education on an equal basis. The contrast of the apparent neutrality with the disproportionately prejudicial effects of school costs in this instance embodies the very essence of indirect discrimination.

para 95); and from Italy (CRI(2002)4, paras 60-5) to Bosnia and Herzegovina (CRI(2005)2, paras 58, 62 & 64).

⁵⁵ See, amongst others, ECRI's third report on Albania (CRI(2005)23, para 58); the FCNM Advisory Committee's opinion on Bulgaria (ACFC/INF/OP/I(2006)001, para 90); CESCR's Concluding Observations on Italy (E/C,12/1/Add.43 (2000), para 10); and CERD's Concluding Observations on Bosnia and Herzegovina (CERD/C/BIH/CO/6 (2006), para 22). Additionally, see the UNDP's regional human development report on Central and Eastern Europe for 2002 *Avoiding the Dependency Trap: The Roma in Central and Eastern Europe*, chapter 5.

⁵⁶ More generally, on the right to education as a key to unlocking other human rights, see the report of the UN Special Rapporteur on the Right to Education E/CN.4/2001/52, para 12; and *Timishev v Russia* no 55762/00 and 55974/00, para 64 where the right to education is described as "indispensable to the furtherance of human rights".

⁵⁷ See, for example, ECRI's second report on the Czech Republic (CRI(2000)4, para 40). Such assignment to undesirable housing areas is itself often the result of discrimination in access to housing, (ibid para 39). The other result of such 'ghettoisation' is the existence of Roma only schools in the ghettos: a situation addressed separately below.

⁵⁸ See, for example, European Roma Rights Centre ("ERRC") *Always Somewhere Else: Anit-Gypsium in France* (2005), pp249-251. This report describes the truck schools as "a bandaid solution created by non-governmental organisations in order to partially remedy the profound inability and unwillingness of mainstream schools to respond to the needs of children who travel". (p251).

⁵⁹ *The human rights situation of Roma, Sinti and Travellers in Europe*, op cit n2, para 45. See also the report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance E/CN.4/2002/24, para 51 which describes how 300 Roma children in Bulgaria were "bussed" by several NGOs to enable them to be enrolled in non-segregated schools in the city.

35. In order to bring an end to such indirect discrimination and to ensure that they are meeting their obligation to fulfil in relation to the right to education, states are required to take measures to ensure that Roma children have equal economic and physical access to schools, not just in theory but in practice. This requires the taking of special measures, such as the provision of free school meals and textbooks and ensuring that free transport to school is made available.⁶⁰ Conversely, the failure to take such special measures to address the current *de facto* disadvantage and inequality suffered by Roma children amounts to a violation of the right to education in conjunction with the right to non-discrimination.⁶¹

V - CONCLUSION

36. The present brief confirms that discrimination against Roma in education occurs in three major ways, all of which are widespread across many European countries. Of these, the systematic assignment of Roma children to special schools for people with mental disabilities is the form of discrimination which is largely caused by the action of state authorities (the others are due to inaction by authorities).

37. The extent of this discrimination, both in its direct and indirect forms, has been recognised by a wealth of Council of Europe and UN human rights monitoring bodies. Together, these bodies have found that no objective or reasonable justification can legitimise the systematic disadvantage faced by Roma children in the field of education. Moreover, their findings confirm a common acceptance that such disadvantage is the result of existing laws and practices that have disproportional effects on the Roma, despite their deceptively neutral appearance. The result is a resounding rejection of this disadvantage being merely accidental or coincidental.

38. Whilst the degree of consistency amongst the aforementioned institutions and quasi-judicial bodies is persuasive in confirming the existence of widespread discrimination against Roma children in access to education, such findings cannot serve as a substitute for substantive judicial protection available through the European Court of Human Rights. The case of *D.H. and Others v. the Czech Republic* thus presents the Court with a crucial opportunity to build on initial steps taken in its jurisprudence, and now establish a firm basis of legal protection against the pernicious effects of indirect discrimination.

39. As a fundamental right which has been acknowledged as a precondition for the realisation of other human rights, failure to secure the right to education to all Roma children within the Council of Europe will undermine the ability of Roma communities to break cycles of poverty and marginalisation. The second class citizenship that emanates from lack of effective protection against indirect discrimination in education runs contrary to the principles of equality and human dignity that underpin the European Convention.

⁶⁰ The critical role of such special measures has already been widely recognised in many of the reports and concluding observations previously cited. See for example, the recommendations in ECRI's reports on Albania (CRI(2005)23, para 60), Bosnia and Herzegovina (CRI(2005)2, para 66) and the Former Yugoslav Republic of Macedonia (CRI(2005)4, para 115); and the conclusions of the EUMC, *op cit* n 19, at pps 115-6.

⁶¹ See further CESCR General Comment no 13 on the role of temporary special measures (para 32) and violations of the right to education (para 59). Also, in its General Policy Recommendation No. 7, the European Commission on Racism and Intolerance (ECRI), emphasised the need to take positive action measures in addressing structural discrimination, including in the area of education. The recommendation provides that the law should "place public authorities under the duty to promote equality and to prevent discrimination in carrying out their functions." See: ECRI General Policy Recommendation No. 7 (2002).