Survey of the Public Defender of Rights into the Ethnic Composition of Pupils of Former Special Schools

Final Report

Synopsis:

Supplement

Description of the method and results of the survey of ethnic composition of pupils in former special schools in the Czech Republic (2011-2012)

1) INTRODUCTION

This report summarises the results of research aimed at ascertaining the ethnic composition of pupils of former special schools.

Czech law stipulates that the state must assure all children equal access to education corresponding to their educational needs. However, in 2007 the European Court of Human Rights held that the Czech education system committed the unlawful segregation of Romany children and pupils in what were the special schools for the disabled. With regard to the conclusions of this ruling, this research focused primarily on ascertaining the proportion of Romany pupils in this type of school.

The Czech Republic has long been criticised by non-governmental and international organisations for its excessive exclusion of Romany pupils out of the educational mainstream. This practice has an adverse impact on the further education of these pupils and subsequently on their employment prospects and on other aspects of their lives. Their exclusion from their mainstream peers also hampers mutual acceptance between the Romany community and the majority population and, in the broader context, reduces social cohesion within society.

For these reasons special attention needs to be paid to the education of Romany pupils in the Czech Republic. As part of follow-up steps taken after the issue of the European Court of Human Rights decision the Ministry of Education, Youth and Sports (MŠMT) (2009) and the Institute for Information on Education (also in 2009) carried out investigations aimed at, amongst other things, ascertaining the proportion of Romany pupils educated outside of the mainstream education system. The Czech School Inspectorate also visited selected former special schools. In 2010 it contacted the former Public Defender of Rights, JUDr. Otakar Motejl, with its conclusions, on the basis of which he stated that discriminatory practices persisted in the Czech education system. These surveys were based on the claims of school heads, or were restricted locally.

One of my tasks is also to advocate the right to equal treatment. My duties include carrying out surveys on related questions, amongst other matters. With regard to these facts and being aware of the systematic criticism of educational bodies in the Czech Republic I decided to ascertain up-to-date figures concerning the proportion of Romany pupils, as well as other ethnic minorities, in former special schools throughout the whole of the Czech Republic.

The aim of the research was to determine whether or not equality of treatment in access to education matches up to the requirements stipulated by the education and anti-discrimination legislation. I began my investigations last December and completed them in May 2012. The conclusions of the research, as well as detailed definitions of the methodology used, are presented below. I will pass on these findings to the Ministry of Education, Youth and Sports of the Czech Republic as well as to the Czech School Inspectorate, and they will serve as the basis for further professional discussion as well as for the formulation of remedial measures.

2) THE DEFENDER'S COMPETENCES AS REGARDS RESEARCH IN THE FIELD OF EQUALITY

Beginning in 2009 the Czech Public Defender of Rights in accord with the European Union Directives became to operate as so called equality body.[1] His powers and tasks in relation to protection against discrimination are specified by the provisions of Section 21b of the Public Defender of Rights Act.

It is therefore within my competence to provide methodical assistance to victims of discrimination, to draw up and publish recommendations and statements on matters relating to equality of treatment, to share these findings with the relevant European bodies and, last but not least, to carry out research into related questions. With regard to this I decided to enter into this research, as the right to equal access to education is strictly stipulated by international conventions and also the Czech legislation.[2] Unequal treatment in access to education on the grounds of ethnicity, nationality or race, amongst others, is also prohibited by the Anti-discrimination Act.[3]

As high-quality education is essential to social integration and as the Czech Republic is obliged to respond to the condemning verdict of the European Court of Human Rights (hereafter referred to as "the Strasbourg Court"), I now present the conclusions and results I came to on the basis of this research.

I am entitled to perform this research on the basis of the Public Defender of Rights Act, which grants me authority to act against state administration bodies and other subjects in matters associated with equal treatment and protection against discrimination through the provisions of Section 1 Paragraphs 1, 2 and 5 of this Act. Bodies and institutions which are obliged to provide aid for me also include heads of schools and school facilities. Heads exercise state administration in matters relating to the enrolment of pupils (the provisions of Section 165 Paragraph 2 e) together with the provisions of Section 46 Paragraph 1 of the Education Act). I also have the power to request cooperation from state bodies in matters relating to equal treatment. I am thus authorised to call upon heads of schools or other school employees to provide explanations, present records and carry out other tasks I am entitled to request on the basis of the provisions of Section 15 or. Section 16 of the Public Defender of Rights Act.[4] To take the steps required to carry out the research I did not need the approval of the parents (legal representatives) of the pupils or that of the pupils themselves, nor did I require their consent needed, for example for inspections and checks carried out by the Czech School Inspectorate.

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[1] The adoption of Law No. 198/2009 Coll., on equal treatment and legal remedies to protect against discrimination (the Anti-Discrimination Act), which amended, amongst others, Law No. 349/1999 Coll., on the Public Defender of Rights, as subsequently amended (hereafter referred to as "the Public Defender of Rights Act") with the addition, amongst others, of Section 1 Paragraph 5. According to this, "the Defender exercises authority in matters relating to the right to right to equality of treatment and protection against discrimination." This amendment entered into force on 1 December 2009.

[2] This is particularly stipulated by the provisions of Section 2 Paragraph 1 a) of Law No. 561/2004 Coll., on Pre-school, Basic, Secondary, Tertiary Professional and Other Education, as subsequently amended (hereafter referred to as "the Education Act").

[3] The provisions of Section 1 Paragraph 1 i) together with the provisions of Section 2 Paragraph 3 of the Anti-Discrimination Act.

[4] While the provisions of Section 15 of the Public Defender of Rights Act grant me a number of powers towards administrative bodies, the following provisions of Section 16 of the law state that other bodies, i.e. state bodies and persons exercising public administration are obliged, within their spheres of authority, to provide me with the assistance I need during the course of my investigations.

3) EQUAL ACCESS TO EDUCATION IN THE CZECH SCHOOLS SYSTEM

a) Equality of treatment in access to education and the best interests of the child

According to Article 3 Paragraph 1 of the Convention on the Rights of the Child,[5] one must always act towards children with their best interests in mind. This principle is also stipulated by the UN Committee on the Rights of the Child, when it states that when providing education it is necessary assure that the child itself is always at the centre of the education process.[6] The aim of education systems is therefore to try to develop the child's individual skills, taking account of the fact that every child has his or her own educational needs. At the same time *everyone* is assured the right to education, as granted primarily by the Charter of Fundamental Rights and Basic Freedoms.[7] An important social right is the right guaranteed by the Universal Declaration of Human Rights (Article 26 Paragraph 1) and also assured by the Charter of the Fundamental Rights of the European Union (Article 14), the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2 I. of the additional protocol) and the International Covenant on Economic, Social and Cultural Rights (Article 14 Paragraph 1).

The best interests of the child undoubtedly include a complete and high-quality education, which is essential for a successful start in life. It should be the primary and common interest of state administration as a whole that all children, regardless of the nature of their disadvantage, receive an education using educational methods which do as much as possible to develop their talents and which also mitigate their initial disadvantage as effectively as possible. This approach is stipulated by Article 23 Paragraph 3 together with Article 29 Paragraph 1 a) of the Convention on the Rights of the Child, according to which efforts must be taken to provide both healthy children and children with disabilities with the chance to develop their personalities and skills as broadly as possible.

Part of the pedagogical community claims that this goal can be achieved by so-called inclusive education, i.e. by attempting to ensure that wherever possible all pupils are educated together in mainstream schools.[8] Others, however, believe that certain pupils require special educational techniques in separate schools.[9] It is not within my field of expertise to judge these matters (in this report I only explore the

[5] Memo No. 104/1991 Coll., of the Federal Ministry of Foreign Affairs on the adoption of the Convention on the Rights of the Child, according to which the interests of the child must be the primary factor in any matters relating to children.

[6] The Committee speaks of so-called "child-centred education". In: Hodgkin, R. and Co.: Implementation Handbook for the Convention on the Rights of the Child. UNICEF 2007, p. 4.

[7] Resolution of the Czech National Council Presidium No. 2/1993 Coll., on the declaration of the Charter of Fundamental Rights and Basic Freedoms as part of the constitutional order of the Czech Republic (hereafter referred to as "Charter"). In accordance with Article 33 Paragraph 1 "*everyone* has the right to education"; in accordance with Article 3 Paragraph 1 together with Article No. 1 of the Charter the fundamental rights are guaranteed for all, with no differences in treatment.

[8] This term is used in the text as a synonym for the standard elementary school.

[9] On this matter cf. e.g. Bazalová, B.: Vzdělávání žáků se speciálními vzdělávacími potřebami v zemích Evropské unie a v dalších vybraných zemích (Educating Pupils with Special Educational Needs in Countries of the European Union and Other Selected Countries). 1st edition. Brno: Masaryk University, 2006, 188 pp., Matějů, P., Straková, J., Veselý, A. (eds.). Nerovnosti ve education. Od měření k řešení (Inequality in Education. From Gauging to Resolving). SLON, Prague 2010.

legal aspects of the problem), although the results of my research may constitute a platform for professional discussion on which children do primarily require targeted education in special schools. Regardless of the above, all children must be educated in a way that allows them to develop as much as possible. Also, according to the Education Act, it is necessary to **assure the all-round development of the pupil's personality, taking account of his or her educational needs, without any form of discrimination**.[10] An assessment of whether the results of the research lead to a conclusion confirming discrimination will follow later in this report.

b) Education system after the amended Education Act taking effect

The current Education Act, i.e. Law No. 561/2004 Coll., on Pre-school, Basic, Secondary, Tertiary Professional and Other Education, as subsequently amended (abbreviated in this text to the "Education Act") introduced several fundamental changes. Amongst other things, it de iure **abolished the so-called special schools**, i.e. schools for children "with intellectual deficiencies"; or for pupils with mild disabilities. Besides these, auxiliary schools were also set up.[11] According to the first sentence of the provisions of Section 185 Paragraph 3 of the Education Act, special schools are now known as elementary schools. Most of these schools have obviously been renamed to practical elementary schools, while heads claim that the name of the school is at the discretion of the founding body.

However, the regulations class "practical elementary school" not as the former special schools, nowadays elementary schools, but various special schools set up for disabled pupils. According to the provisions of Section 3 Paragraph 1 c) of Decree No. 73/2005 Coll., on the education of children, pupils and students with special educational needs and children, pupils and students who are exceptionally gifted, as subsequently amended (hereafter referred to as the "Decree on the Education of Pupils with Special Educational Needs"), disabled pupils may be taught in schools set up separately for that purpose, for which the Decree uses the term "special school". According to the provisions of Section 5 f) of the Decree on the Education of Pupils with Special Educational Needs, special schools may bear the attribute "practical elementary school". The Decree allows this name to be used for special schools, but not for elementary schools which are now also former special schools. This nomenclature is therefore in contravention of the above Decree, even though it is in common use.

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[10] The provisions of Section 2 Paragraph 2 a) together with the provisions of Section 2 Paragraph 1 b) a a) of the Education Act.

[11] According to the provisions of Section 28 Paragraph 4 together with the provisions of Section 31 Paragraph 1 of Law No. 29/1984 Coll., on the System of Primary and Secondary Schools and Higher Vocational Colleges, special schools were supposed to teach pupils "with intellectual deficiencies preventing them from successfully studying at elementary school or special elementary school." Besides special elementary schools, there were also auxiliary schools (according to the provisions of Section 33 Paragraph 1 of this law these always taught children with intellectual deficiencies preventing them from successfully studying at elementary school or at a special school). The second sentence of the provisions of Section 185 Paragraph 3 of the current Education Act state that the former auxiliary school is now a special elementary school, while according to the provisions of the second sentence of Section 16 Paragraph 8 special elementary schools teach pupils with medium-severity and severe mental disability, as well as pupils with multiple disabilities and autistic children. The terminology of the previous and current Education Act is therefore unsystematic.

Owing to this inconsistency in this report I will be using the collective term "special school", which is the expression used for schools set up separately for disabled pupils (cf. the following paragraph).

The research focused on the ethnic composition of pupils of former special schools, or pupils educated under the appendix to the Framework Education Program for the Elementary Education of Children with Light Mental Disability (hereafter referred to as "LMD"). The criticism expressed by the European Court of Human Rights is aimed at these former special schools. For the purposes of the survey the name of the school could not be considered conclusive: what counted was whether or not the school taught disabled pupils. The Strasbourg Court concluded that the proportion of Romany pupils educated under the program for disabled pupils in special schools is unacceptable. Therefore, the sample of schools visited was drawn from a list of former special schools. The numbers of pupils being educated as part of various programs were obtained from school web sites and from information provided by school heads, as well as the numbers of pupils for which the school draws increased per capita disability payments.[12] Data about the education programs and findings about per capita payments for pupils are decisive for determining which schools teach disabled pupils.

The law as it stands also allows pupils without disabilities to be taught in special schools. According to the provisions of Section 10 Paragraph 2 of the Decree on the Education of Pupils with Special Educational Needs, a class or group of students with disabilities may also be attended by pupils with a different type of disability or health impairment. The Decree now also allows socially disadvantaged pupils to be taught there on a temporary basis (the provisions of Section 3 Paragraph 5 b/).[13] I express my opinion on the adequacy of this law in my final recommendations in this report. In carrying out the research was necessary to deal with this fact; I present further information in the section devoted to methodology.

c) <u>Placing pupils in special education</u>

I will now briefly summarise the current Education Act and implementing decrees which were essentially applicable under the previous Education Act effective at the time the suit was filed with the Strasbourg Court (in 1999).

Pupils who do not have special educational needs are generally taught in mainstream schools, i.e. at standard elementary schools. If a child or pupil has a certain special need requiring the use of special teaching methods or rendering it more effective to teach that pupil outside of the mainstream education system, the following procedure must be observed.

The Education Act specifies the conditions governing the education of pupils with special educational needs who are disabled, health impaired or socially

[12] On the basis of the provisions of Section 3 Paragraph 6 a) of Directive No. 492/2005 Coll., on regional norms, as subsequently amended (hereafter referred to as "Directive on Regional Norms), is it evident that a school set up separately for disabled pupils receives not just the basic sum for each disabled pupil, but also an additional payment (cf. the provisions of Section 3 Paragraph 1 of this Directive). For this reason the numbers of disabled pupils were surveyed.

[13] The latter provisions of Section 3 Paragraph 5 a) and b) are effective as of 1 September 2011.

disadvantaged as defined by the provisions of Section 16 Paragraph 1. School counselling facilities are obliged to ascertain whether pupils have special needs (Paragraph five of the same provision), as well as to formulate measures to be applied with those pupils.[14] A disabled pupil may be taught in a standard elementary school in the form of individual or group integration, or in a school specifically set up for such pupils. It is essential to consider getting the pupil involved in the educational mainstream, as stipulated by the provisions of Section 16 Paragraph 8 of the Education Act, which states that schools or classes should be set up for disabled pupils *if the nature if their disability so requires*. We may therefore infer that the pupil should generally be taught in a "classic" elementary school. Preferential integration in a standard school is also favoured by the specialised literature[15] and can moreover be inferred from the systematics of the implementing Decree on the Education of Pupils with Special Educational Needs, where individual integration is ranked first amongst forms of special education.[16] A disabled pupil should therefore be taught in a special school only if that pupil's educational needs so dictate and given the following:

- the school counselling facility, i.e. pedagogical – psychological consultancy centre or special pedagogical centre,[17] on the basis of a diagnosis, concludes that a pupil needs to be taught in a special school, i.e. **if it issues a written recommendation that the pupil be taught in a special school**;

- the possibility of educating their son/daughter in a special school is discussed with the pupil's parents (legal representatives) and they **grant their informed consent**;

- the head of the school **decides to enrol the pupil in the special school, or to have the pupil taught following a modified education program.**[18]

This research is not focused on checking the legality of the process used by school heads when deciding whether to enrol pupils.[19] These aspects have been the subject of inspections by the Czech School Inspectorate (hereafter referred to as "CSI"). According to its thematic report from March 2010, pupils are enrolled into special schools on the basis of formalistic conclusions drawn by counselling facilities or without the informed consent of parents.[20] The two latter aspects were also

[14] The provisions of Section 5 Paragraph 3 a) of Directive No. 72/2005 Coll., on the provision of counselling services in schools and school counselling facilities, as subsequently amended (hereafter referred to as "Directive on Consultancy Services").

[15] According to the commentary on the Education Act, now, unlike previously, there is no longer a separate special education system and efforts are now made to integrate pupils with disabilities into mainstream schools. In: Školské zákony 2011 (Education Laws 2011), Eurounion Prague, s. r. o., 2011, p. 44.

[16] Cf. the provisions of Section 3 Paragraph 1 of the Directive on the Education of Pupils with Special Educational Needs.

[17] The provisions of Section 3 Paragraph 1 a) and b) of the Directive on Consultancy Services.

[18] The provisions of Section 49 Paragraphs 1 and 2 of the Education Act, as well as the provisions of Section 9 Paragraph 1 a) – c) of the Directive on the Education of Pupils with Special Educational Needs. In the schools in question pupils are mainly taught in accordance with the appendix to the Framework Education Program for Pupils with Light Mental Disability. From interviews with school heads it is clear that the practice nowadays is for practical elementary schools to teach primarily pupils with LMD and for special elementary schools to take pupils with more severe forms of disability.

[19] When visiting the schools the staff of my office did not peruse the records.

[20] The conclusion to this summary report on the thematic inspection work of the CSI in former special schools from March 2010 states that the intended changes planned by the current Education Act have still not

criticised by the Strasbourg Court in its judgment discussed below, when it stated that it questioned the neutrality of the testing work carried out by school counselling facilities as well as the failure to obtain informed consent from parents.

4) LAWS GOVERNING THE DETERMINATION OF ETHNIC DATA

With regard to the methodology used I would like to describe the laws governing the ascertainment and collection of ethnic data, i.e. data concerning the ethnicity of pupils. This problem cannot be resolved without determining the proportion of Romany children currently attending special schools. The Czech bodies are obliged to issue information about the steps taken in this respect. I assume that it is difficult to measure the effectiveness of these steps without gauging the ethnicity of pupils in the schools that exist today. The ascertainment of ethnic data is generally accompanied by the question of protection of personal or sensitive data as defined by the Personal Data Protection Act.[21] For the purposes of this research it is necessary to thoroughly distinguish between the **addressed** and **unaddressed collection of ethnic data**. In the first case ethnicity is associated with a specific individual, while in the second case the data is acquired anonymously, consisting merely of general numerical data about the ethnic composition of a particular group; the identity of individuals is not ascertained.

Addressed data about the ethnicity of a specific person really do constitute sensitive data which are subject to the stringent protection of the Personal Data Protection Act.[22] Sensitive data relating to a particular person may only be monitored in cases specified by the Personal Data Protection Act[23] (e.g. the protection of public health) and in the manner permitted by this law. The addressed collection of data would involve ascertaining and recording ethnicity-related information stating the names of specific pupils.

In contrast, if data are obtained providing information about the ethnic composition of a certain group as a whole (schools, locality, workplace, etc.) without it being possible to identify which individuals in the group the ethnicity data pertain to, this cannot be classed as the addressed collection of data. The result is merely a number, a percentage proportion. **The Personal Data Protection Act does not govern the unaddressed ascertainment of data**.[24] This research is based on the mapping the ethnic composition of schools in this manner, i.e. it aims to obtain solely numerical data, not information about which pupils in a specific school are Romany.[25] I have therefore used the method of collecting anonymous, unaddressed data. The CSI has also determined the ethnic composition of pupils in certain schools in a similar manner: in its conclusions it states, amongst other figures, percentual data

been implemented, when there persists the system of “hidden special schools”. These are profiled as schools teaching pupils with LMD.

[21] Law No. 101/2000 Coll., on the protection of personal data and on the amendment to certain laws, as subsequently amended (hereafter referred to as “Personal Data Protection Act”).

[22] The provisions of Section 4 b) of the Personal Data Protection Act.

[23] The provisions of Section 9 of the Personal Data Protection Act.

[24] Cf. the provisions of Section 4 d) of the Personal Data Protection Act.

[25] The collection of personal data is supported, for example, by the UN Committee on the Elimination of Racial Discrimination (CERD), the European Commission against Racism and Intolerance (ECRI), and also the European Roma Information Office (ERIO).

about Romany pupils.[26] Likewise, the unaddressed collection of ethnic data has been used in the past by the Ministry of Education, Youth and Sports, when it carried out an anonymous census of Romany pupils in secondary schools. This procedure is therefore in common use.

It is also necessary to ask how unaddressed data are to be determined. For the purposes of this research I chose the method of identification by another person, while the identifying attribute of ethnicity was a **combination of observation and ascertainment of indirect attributes** (surname, language, tradition, social context, family environment). The data were collected by appointed members of staff of my Office and teachers (class teachers), who were able to assist as they know their pupils very well. As identification by a third party was used, i.e. the pupils themselves or their legal representatives were not asked whether they considered themselves to be Romany (or another minority), the question of the freedom to choose membership of a minority nationality arises. This, however, is not affected when data is collected anonymously.[27] For the purposes of determining the existence of inequality of treatment, the detached judgement of a third party seems to be the most suitable method: discrimination is, after all, treatment based on how an individual is perceived by his or her peers (or by the person who makes decisions about that individual), not on whether that individual feels himself or herself to be part of a minority, or whether a particular minority considers an individual to be a member.

I discuss the individual methods further in the methodological section. On the basis of the above it is necessary to conclude that anonymous censuses of school pupils do not infringe upon the Personal Data Protection Act, nor do they violate the law on the rights of members of national minorities. This conclusion has also been backed up by the Office for Personal Data Protection. However, it may considerably help to reassess and revise the image of the quality of education which ethnic and national minorities tend to have in this country.

5) LEGAL INTERPRETATION OF THE RESULTS OF THE RESEARCH

a) Judgment of the Strasbourg Court and statement of the Defender from 2010

On 13 November 2007 the Grand Chamber of the European Court of Human Rights issued a ***decision in the case of D. H. and others versus the Czech Republic***, complaint no. 57325/00,[28] **according to which the Czech Republic committed discrimination and the unlawful segregation of Romany pupils**, when excessive numbers of such pupils are educated in special schools.

The court concluded that it had no option but to rule that the bodies deciding about the enrolment of Romany children in special schools were at fault, when it had been found that excessive numbers of Romany pupils were being taught in these

[26] Cf. The aforementioned CSI report from March 2010, e.g. p. 11.

[27] The provisions of Section 4 of Law No. 273/2001 Coll., on the rights of members of national minorities and on the amendment to certain laws, as subsequently amended, stipulate limits on records of addressed data. The gathering of anonymous ethnic data, however, cannot be classed as keeping records as defined by this provision.

[28] Text of the ruling available here: http://portal.justice.cz/justice2/ms/ms.aspx?o=23&j=33&k=390&d=20108

schools. As the proportion of Romany children at special schools in the Ostrava region was at that time more than fifty percent, while the proportion of such pupils at elementary schools was merely 2%, the court issued a verdict declaring discrimination. In its decision it emphasised that inadequate care in assuring high-quality education was also rife in other countries in Europe. The court followed up on this ruling in the cases *Sampanis and others versus Greece*[29] and *Oršuš versus Croatia,*[30] while in both cases it condemned the segregation of Romany pupils.

After the issue of the verdict against the Czech Republic, the Ministry of Education, Youth and Sports (2009) and Institute for Information on Education (also in 2009; the Institute has since been abolished) carried out research (more details in the methodological section). In 2010 the CSI contacted my predecessor, JUDr. Otakar Motejl, requesting a statement[31] on whether the results of the thematic report from March 2010, mentioned a number of times in this report, may constitute evidence of persistent discriminatory practice. It specifically asked whether the fact that a third of pupils diagnosed as mentally disabled are Romany, as well as the fact that roughly a quarter of pupils not diagnosed with LMD yet placed in special schools are Romany, can be understood to constitute discrimination. **In his reply the Defender stated that both questions were proof of unequal treatment as far as Romany pupils were concerned, confirming the persistent segregational practices of the Czech education system.**

As an equality body I decided to carry out research with regard to the need to find out whether the criticisms expressed by international bodies concerning the numbers of Romany children in Czech special schools outside of the mainstream education system were justified.[32] I now present an interpretation of the results of my research.

b) Data acquired and assessment of possible discrimination

The ban on discrimination in access to education, besides being anchored in the constitutional framework and in international treaties,[33] is also stipulated by the Education Act and the Anti-discrimination Act,[34] which prohibits direct or indirect discrimination on the grounds of race, ethnicity or nationality. This case does not

[29] Ruling from June 2008, No. 32526/05. This segregation consisted of the fact that Romany pupils were taught in separate school buildings, and were placed there on the basis of ethnicity. A similar verdict was issued in December 2011 by the District Court of Prešov (25C 133/10-229), when it condemned the repeated placement of Romany children in parts of the school building which were separated from classes containing non-Romany pupils.

[30] Ruling from March 2010, No. 15766/03. In the "Croatian" ruling the court stated that the creation of language classes for Romany pupils did as a consequence constitute discrimination.

[31] Complaint dated 15 April 2010, File Ref. 94/2010/DIS/LO.

[32] The topicality of this issue is also highlighted by the Commissioner for Human Rights of the Council of Europe, T. Hammarberg, in his report dated 2010:
http://www.coe.int/t/commissioner/News/2010/101122CzechRepublic_en.asp.

[33] Including the UNESCO Convention against Discrimination in Education, adopted in 1960 in Paris. In accordance with Article 12 Paragraph 3 of the Framework Convention for the Protection of National Minorities (Ministry of Foreign Affairs Memo No. 96/1998 Coll.), states are obliged to support equal opportunities in members of national minorities' access to education at all levels.

[34] The provisions of Section 2 Paragraph 1 a) of the Education Act and the provisions of Section 1 Paragraph 1 i) together with the provisions of Section 2 Paragraph 3 and the provisions of Section 3 Paragraph 1 of the Anti-Discrimination Act.

involve direct discrimination.[35] Direct discrimination would be, for example, setting different conditions for the placement of Romany pupils, the use of more stringent methods of assessing their readiness for school or their mental capacity, etc., and this was not found to be the case.

All that remains is to assess whether the results of the research may lead to a conclusion of indirect discrimination. When assessing these results an appraisal is made of the impact of the practices used when placing pupils in special schools. Unlike "traditional" direct discrimination,[36] this is **action or lack of action which, on the basis of apparently neutral provisions, criteria or practices, places a person at a disadvantage compared to others**, including on the basis of ethnicity.[37] As with the conclusion drawn by the European Court of Human Rights in 2007, it was also necessary to assess whether the numbers of Romany or other ethnic minorities which were ascertained may constitute indirect discrimination in access to education. However, it does not constitute discrimination (according to the provisions of the second sentence of Section 3 Paragraph 1 of the law), if the provisions, criteria or practices used are objectively justified by a legitimate aim and the means used to achieve it are reasonable and essential. In this case this corrective cannot be taken into account: the separated, segregated education of a certain ethnic minority cannot be a legitimate (justified) aim and no other aim is evident.[38] From the methodological part of the report it is evident that at 67 of the schools selected the staff of my Office and school employees ascertained the following data:

Total number of pupils in the schools visited: **3954**[39]

Number of Romany pupils (on the basis of observation by staff of the Office of the Public Defender of Rights): **905**

Number of Romany pupils (on the basis of questionnaires completed by class teachers):**915**

Proportion of Romany pupils (on the basis of observation by staff of the Office of the Public Defender of Rights): approx. **32 %**

Proportion of Romany pupils (on the basis of questionnaires completed by class teachers): approx. **35 %**

Official estimates of Romany people permanently residing in the Czech Republic: **150 000 - 300 000**[40]

Official statistic of the total number of inhabitants of the Czech Republic: **10 562 214**.[41]

[35] According to the provisions of Section 2 Paragraph 3, indirect discrimination is understood to mean action, including inaction, by which a person is treated less favourably than a person in a comparable situation is treated or would be treated, on the grounds of *race, ethnic origin, nationality*, sex, sexual orientation, age, disability, religion, faith, or world opinion.

[36] This, as defined by the provisions of Section 2 Paragraph 3 of the Anti-Discrimination Act, is understood to mean action, including inaction, by which a person is treated less favourably than a person in a comparable situation is treated or would be treated, on the grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, faith, or world opinion.

[37] The provisions of Section 3 Paragraph 1 together with the provisions of Section 2 Paragraph 3 of the Anti-Discrimination Act.

[38] Other permissible forms of different treatment are specified by the provisions of Section 6 and following of the Anti-Discrimination Act. None of these situations may be applied in this case.

[39] This number does not include pupils attending the school who are taught as part of an education program for able-bodied children according to an education program for special elementary schools.

[40] The document entitled A Decade of Romany Inclusion puts the number of Romany people at 188 000. This figure is on the outer limits of the estimates. This would correspond to a representation of 1.88 % of Romany people in the Czech Republic. In: No data - no progress. Country findings. Data collection in countries participating in the decade of Roma inclusion 2005–2015. New York: Open Society Institute.

If there are approx. 150 – 300 thousand Romany people living in the Czech Republic and the total number of inhabitants according to the latest census totals 10 562 214 people, the **proportion of Romany people in the Czech Republic is approx. 1.4 – 2.8%. We should find a similar ratio in the schools we visited.**[42] **The percentage proportion of total Romany people is evidently 32%, or. 35%.** This conclusion may be inferred in two ways: firstly, from the fact that mental disability was found to be much more frequent in Romany pupils in comparison with the majority, and secondly from the unlawful approach taken by some bodies which has resulted in a far higher proportion of Romany children in special schools.

This conclusion, which implies that a disability naturally occurs considerably more frequently in one ethnic group that in others, is obviously unacceptable and has no scientific basis in fact. There is therefore only one remaining explanation for the notably high proportion of Romany pupils, and that it **indirect discriminatory practice on the part of bodies involved in deciding on the placement of pupils into special education**. Most of all we can call into question the relevance of assessing Romany pupils in pedagogical – psychological counselling centres or school counselling facilities. We must ask how it is possible that such high numbers of Romany pupils are recommended for special schools on the basis of appraisals. There may be two explanations for this practice: firstly, it is possible that a psychologist recommends special education for a child without diagnosing that child as being disabled (although in such a case the head of the school should not decide whether or not to enrol the child, as special schools are exclusively for disabled children), or the second explanation is that the wrong methods are used when assessing the mental capacity of Romany pupils.[43] Both these aspects, i.e. poor-quality and inconsistent assessment, as well as deciding to enrol a child without a diagnosis, were also criticised in 2010 by the Czech School Inspectorate.[44]

The Strasbourg Court and other judicial authorities state that with indirect discrimination the discriminating party (in this case the subject which decides on the placement of a child or is in collusion with such a placement) does not necessarily intend to discriminate. What is actually monitored is the impact of what at first glance seems to be a neutral practice: “unequal treatment may be the excessively

[41] Cf. Population and Housing Census 2011. Source: www.czso.cz.

[42] A slight corrective to this calculation could be the fact that roughly ten years ago the literature stated a higher percentage of school-age children in the Romany population in comparison with children of the same age in the majority population. This fact can obviously not be included in the calculation, as there is no up-to-date information available from recent years. Moreover, even if we did have access to these figures, they would not clearly justify the significantly higher proportion of Romany children in former special schools (for more on this, cf. the methodological part of this report).

[43] Research has repeatedly shown that Romany pupils are less well prepared when starting to attend school in comparison with non-Romany pupils: this is often caused by a lack of incentive provided at home, where Romany children do not learn the skills that are commonly taught in the families of non-Romany children, and also often by the considerably lower attendance rate for Romany children at nursery school. In the ruling in question the Strasbourg Court also passed comment on the inadequacy of methods used to test pupils. Criticism also focused on the confusion concerning the frequent social disadvantaging of Romany pupils with LMD.

[44] According to the Inspectorate 110 pupils were monitored with problematic appraisals or with the school head deciding on enrolment for special education without having been recommended to do so by a counselling facility. Of these, 26.4 % were appraisals of Romany pupils, which again is an extremely flagrant proportion. According to aforementioned thematic report, these appraisals often used inconsistent terminology, gave vague diagnoses, and failed to take account of the cultural and language differences of individual pupils. Cf. CSI thematic report, p. 9. Another condition is the consent of the pupil’s legal representatives. This in itself is no reason for the high number of Romany pupils in special schools: it is merely a necessary condition when placing a child in education, but the subject responsible for providing adequate education to suit the educational needs of the child is the school head and the specialists in counselling facilities.

disadvantageous impact of a policy or measure which, although expressed in neutral terms, does have a discriminatory impact on a certain group".[45] Incidentally, the purpose of this research was not to assess any intention to discriminate on the part of those subjects that make the relevant decisions: I did not ascertain which specific subjects are responsible for this situation. Indirect discrimination is implied by the fact that the methods used in counselling facilities are the same for Romany and non-Romany pupils. Despite this, in its ruling the Strasbourg Court stated that the testing method is evidently not sensitive enough towards the cultural differences of the Romany minority and may result in the aforementioned consequences, i.e. the fact that Romany pupils are too often recommended for special education.

The court also stated that indirect discrimination may be proven by various statistics, i.e. including unaddressed numbers of pupils at the schools visited, as presented by this research, as it is otherwise very difficult to prove. These are the conclusions drawn by the Strasbourg Court in the aforementioned judgement,[46] and are also classed as attributes of indirect discrimination is the professional literature.[47]

It is also necessary to state that the numbers of pupils from other ethnic minorities living in the Czech Republic as obtained from information supplied by the teachers at the schools visited and the staff of my Office are negligible as regards the assessment of equal treatment.[48]

6) CONCLUSION

On the basis of the above, all I can do is to conclude that the **ratio of Romany pupils to pupils of non-Romany origin in the schools monitored is wholly incommensurate in relation to the proportion of Romany people in Czech society.**

The proportion of Romany pupils at the ratio of 32%, or 35% in the schools we monitored is proof of the persistent indirect discrimination against them in terms of access to education, despite the fact that the whole of the core sample was not surveyed, i.e. all former special schools.

In this respect the only possible course of action is to follow up on the 2007 verdict of the European Court of Human Rights. My conclusion is even more worrying in that unlike the court, which evidently took account only of the numbers of Romany pupils in schools in the Ostrava region (the claimants' complaint in this case related

[45] Paragraph 184 of the ruling in the case of D. H. and others versus the Czech Republic, as well as the ruling *Hoogendijk versus The Netherlands* dated 6 January 2005, Complaint No. 58461/00. Likewise, the Court of Justice of the European Union also emphasised that when ruling indirect discrimination it does not need to determine intent or any other form of culpability (ruling dated 8 November 1990 in the case of *E. J. P. Dekker versus Stichting Vormingscentrum voor Jong Volwassenen, C-177/88.* The concept of indirect discrimination has also long been recognised by courts outside Europe, with one of the first being the USA Supreme Court.

[46] Including Paragraph 187 of the ruling in the case of D. H. and others versus the Czech Republic. The possibility of proving indirect discrimination by various statistics is also given by Council Directive 2000/43/EC, which introduces the principle of equal treatment for all, regardless of their race or ethnic origin.

[47] Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M.: Antidiskriminační zákon. Komentář (The Anti-discrimination Act. Commentary). C. H. Beck, Prague 2010, p. 149 and following. Bobek, M., Boučková, P., Kühn, Z. (eds.): Rovnost a diskriminace (Equality and Discrimination). C. H. Beck, Prague 2007, p. 52 and following.

[48] At the schools visited the teachers taught 5 Vietnamese pupils, 5 Hungarian pupils and 1 Slovak pupil.

to schools in Ostrava),[49] **my research focused on the Czech Republic as a whole, i.e. it encompassed all schools in all regions, and, what is more, the schools used for the purposes of the research were chosen at random**. We should therefore be able to assume that the proportion of Romany pupils in the research would be lower than in the case of the Strasbourg decision: The research sample set of schools visited also included schools from regions in which Romany people traditionally do not live.

In conclusion I would like to state that improving education for the largest minority group living in the Czech Republic is an essential condition for the integration of that group. The consequence of inadequate education for Romany children, who often live in excluded localities, is later long-term unemployment and the increased risk of socio-pathological behaviour. The Czech education system is therefore obliged to provide the highest possible standard of education, instead of the systematic mistakes that have been made up to now and which have resulted in the fact that not only do non-Romany pupils in elementary schools not learn how to live in harmony with Romany people, but the gap between their educational paths is becoming even wider. Especially at a time when the education system, dependent upon the socio–economic status of pupils' families, amongst other factors, produces ever more evident educational elites and the primary interest focuses on graduates' appeal on the labour market, serious consideration needs to be given to the gravity of this situation.

Contemporary society is responsible for the harmonious coexistence of minorities in the future. Unfortunately, the segregation of some Romany pupils, which still persists in the Czech education system, is shaping the conditions for even greater social and economic poverty in which future generations of Romany people will have to live. This will mean an even greater burden on the welfare system of the Czech Republic. It is therefore the responsibility of the government and all the relevant departments to strive to get the Romany minority involved as much as possible in the education process.

[49] The fact that this only involved Ostrava schools has also been confirmed by staff working on the case from the European Roma Rights Centre. Moreover, in its verdict the court mentions schools a number of times, always in the Ostrava region, while figures on the numbers of Romany pupils are obtained from questionnaires filled in by school heads, so they may be distorted for a number of reasons (cf. particularly Section 18 of the verdict).

7) RECOMMENDATIONS

On the basis of this research, as well as the findings from investigations into individual cases and the systematic visits made to certain facilities, I have decided to formulate three recommendations. First is directed to Czech Governement, the other two recommendations are intended particularly for the Ministry of Education, Youth and Sports of the Czech Republic.

a) Absence of explicit prioritisation of integration

According to the Education Act and the Decree on the Education of Pupils with Special Educational Needs, the education of pupils with special educational needs should be assured in the form of individual integration, group integration, or in a special school – these forms may also be combined.[50] Although individual integration often seems to be the most unsuitable form, either from the pedagogical or socialisation viewpoint, the education regulations currently in place do not explicitly stipulate that individual integration in an elementary school be prioritised. The provisions of Section 16 Paragraph 8 of the Education Act as discussed above only mentions a certain corrective in allowing segregated education in cases where it is required by the nature of a pupil's disability. This often gives rise to doubts about the intention of the legislator, as these provisions may be interpreted in a very broad sense. A certain argument for prioritising individual integration may be the aforementioned systematics of the relevant provisions of the Decree,[51] although this prioritisation is not explicitly mentioned.[52]

I consider this legislation to be vague; moreover, I assume that the legislator's interest in ensuring that integration at standard elementary schools is implemented as broadly as possible is a substantial interest which should be explicitly incorporated not only into the secondary legislation, but actually directly into the Education Act. The need to stipulate this prioritisation also arises from the Czech Republic's international commitments; the Czech legislator must also be guided by the principles specified in Article 24 of the UN Convention on the Rights of Persons with Disabilities dated 13 November 2006, by which the Czech Republic is bound.[53] According to the first paragraph of this article, contracting states are obliged to ensure that persons with disabilities "have equal access to inclusive, high-quality and free education".

It is therefore unquestionable that, according to the wording of the above Convention, the option of education in a standard elementary school should always

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[50] Cf. the provisions of Section 3 Paragraph 1 together with Paragraph 2 of the Decree on the Education of Pupils with Special Educational Needs.

[51] Individual integration comes first (the provisions of Section 3 Paragraph 1 of the Decree): "the special education of pupils with disabilities is assured: a) through the form of individual integration, b) through the form of group integration, c) in a school set up separately for pupils with disabilities (hereafter referred to as "special school"), or d) a combination of the forms listed under a) to c)."

[52] This was the case with the previous provisions of Section 3 Paragraph 4 of the Decree. The current wording lacks any form of prioritisation. Before Amendment No. 147/2011 Coll. came into effect, a pupil with a disability was preferentially educated through the form of individual integration in a standard school, *if such integration corresponded to the needs and capacity of the pupil and to the needs and capacity of the school*. Owing to the problematic postscript of this wording the entire sentence was omitted and replaced with the somewhat illogical sentence: "a pupil with no disability shall not be taught according to an education program for pupils with disabilities".

[53] Ministry of Foreign Affairs Memo No. 10/2010 Coll. m. s., on the conclusion of the UN Convention on the Rights of Persons with Disabilities.

be prioritised. In this context I would like to draw attention to the fact that pupils with primarily light forms of disability are educated as standard in developed democracies. There therefore arises the need for a three-track elementary education system in this country: besides elementary schools teaching able-bodied pupils, nowadays there are also schools most often referred to as practical elementary schools for children with LMD, as well as special elementary schools for children with more severe forms of disability.

I therefore recommend that the government, in accordance with the provisions of Section 22 Paragraph 1 of the Public Defender of Rights Act, clearly and consistently incorporate the individual integration of pupils with special educational needs into the provisions of Section 16 of the Education Act. This provision could read as follows: "*Pupils with special educational needs, including physical disability, should, wherever possible, be educated through the form of individual integration at elementary school*."

b) Inconsistency between Decree No. 73/2005 Coll. and the Education Act

The Education Act contains the basic arrangements governing the education of pupils with special educational needs. According to the provisions of Section 16 Paragraph 1, pupils with these needs include disabled, health impaired or socially disadvantaged pupils. According to the provisions of Section 2 Paragraph 1 b) of the law, it is always necessary to choose teaching methods which are in the best interests of the pupil with regard to his or her individual needs. The law explicitly does not asses which procedures and what type of education are suitable for a pupil in a specific case, or when a disadvantage merits placing a child in targeted education in a separate institution. It merely states (the provisions of Section 16 Paragraph 8) that if *the nature of a disability so requires, special classes or schools may be set up*. This option is granted by the law **only in the case of pupils with disabilities**, not for other cases.[54]

The Decree on the Education of Pupils with Special Educational Needs contains the provisions of Section 10 Paragraph 2, which allow a pupil or pupils with a different type of disability or health impairment to be placed in a class (group) of disabled pupils. This, according to the provisions of Section 16 Paragraph 3 of the Education Act, is understood to mean less severe forms of medical disorders, long-term illness or other debilitation.[55] Although a recommendation from a counselling facility is required and in terms of capacity the proportion of pupils without disability is limited to 25%, the objection can be made that **in this respect the directive goes beyond the law, which does not allow for this option**. As the decrees (secondary legislation) may only "implement" or specify provisions that are lawful, this legislation must be considered unlawful. The question also arises as to how it can be in the best interests of a pupil with no disability who, for example, has suffered nothing more than a long period of illness, to be taught in a group of disabled pupils, despite the

[54] Cf. the provisions of Section 16 Paragraph 8 of the Education Act and the provisions of Section 16 Paragraph 1 of the same law.

[55] A class or study group set up for pupils with handicaps may, at the request of an adult pupil or the legal representative of a pupil and with a recommendation from a school counselling facility, also take pupils with a different type of disability or health impairment. The proportion of such pupils may not exceed 25 % of the highest number of pupils in the class or study group in accordance with Paragraph 1. The provisions of Section 3 Paragraphs 4 and 5 and Section 9 Paragraph 1 are not affected.

explicit stipulation that that pupil must be taught as part of an education program for able-bodied pupils (cf. the provisions of Section 3 Paragraph 4 of the Decree).

Paragraph Five of Amendment No. 147/2011 Coll. (effective as of 1 September 2011) incorporated into the Decree on the Education of Pupils with Special Educational Needs the provisions of Section 3, according to which a school, class or group for disabled pupils may teach a pupil with a health impairment if that pupil experiences a "total failure" at elementary school (letter a/), or a socially disadvantaged pupil for a period of up to five months (letter b/). Even in this case it should be questioned whether five months spent in a special school is appropriate treatment for the "total failure" of a pupil whose only handicap might be, for example, a family environment that does not provide any incentive. Besides the fact that they contravene the Education Act, an objection may be made against both provisions in that there is justified suspicion that they breach the constitutionally guaranteed right to education and the principles stipulated by the Education Act. At a time when ever greater emphasis is placed on the opposite trend, i.e. the placement of disadvantaged pupils in standard schools, the effective legislation must be challenged.

I hereby recommend that the Ministry of Education, Youth and Sports, in accordance with the provisions of Section 22 Paragraph 1 of the Public Defender of Rights Act, omit the option to place an able-bodied pupil into a special class or school as granted by the provisions of Section 10 Paragraph 2 and the provisions of Section 3 Paragraph 5 a) and b) from the Decree; owing to their inconsistency with the Education Act, these provisions are unlawful.

c) Inconsistency in school nomenclature

If the purpose of the Education Act was to transform elementary education by abolishing special schools (the first sentence of the provisions of Section 185 Paragraph 3), it is necessary to note that in practical terms their profile has remained unchanged. This conclusion was also confirmed by the thematic report compiled by the CSI, which states that in this respect the intentions of the new Education Act were not fulfilled. Schools were merely renamed, wholly inconsistently, with some now bearing the name elementary school and some as practical elementary schools. Elsewhere in this report I stated that the legislator had made his intention clear in the provision which reads "special school under the existing regulations is an elementary school under this Act".

The consequence of this inconsistent approach by local governments and others which decided on the current name for former special schools is a situation whereby the designation "elementary school" does not make it clear which education program the pupils at the school are taught under. The name "elementary school" may be used either by a standard elementary school or by a school that was formerly known as a special school. As the Ministry of Education has shown insufficient interest in this matter in the past, not only have these inconsistencies not been rectified, but most of all the Ministry does not have an overview of the development of special education in the Czech Republic, when it does not even have a complete list of these schools. Similar conclusions have also been confirmed by the staff of the Czech School Inspectorate. However, the keeping of such records is a fundamental

prerequisite for the monitoring and assessment of the transformation of special schools.

I hereby recommend that by 31. 12. 2012 the Ministry of Education, Youth and Sports create precise records of former special schools and the number of pupils educated in accordance with the appendix to the Framework Education Program for Children with Light Mental Disability;[56] these records should be regularly updated and sent to my Office and to the CSI. I also suggest that the Ministry consider changing the law governing school nomenclature.

Pavel Varvařovský
Public Defender of Rights

[56] As well as the numbers of pupils eductaed under a special elementary school education program.