

INTERNATIONAL BEST PRACTICES

INNOVATING EUROPEAN LAWYERS TO ADVANCE THE RIGHTS OF CHILDREN WITH DISABILITIES



Belgium



Bulgaria



Czech Republic and
Slovakia



Ireland



Lithuania



Poland



Romania



Coordinator



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European Union

Mental Disability Advocacy Centre

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Introduction

Of all children in the EU, children with intellectual or other types of mental disabilities (hereinafter: children with mental disabilities) are perhaps the most overlooked by policy-makers, lawyers, judges, the human rights fraternity and the media. In terms of their human rights, the result is that children with mental disabilities have enhanced vulnerability to specific forms of human rights violations compared to other children. Such children are also over-represented in the criminal justice sector as alleged offenders: poverty, susceptibility to persuasion and a lack of meaningful activities are all contributors. When they interface with justice systems, there is often no legal aid for them to benefit from skilled and caring lawyers who could help them, and represent their interests. Quantitative data on these problems are almost non-existent.

In 2015, the Mental Disability Advocacy Centre (MDAC) published a report on access to justice for children with mental disabilities.¹ The report, which assessed legislation and practices of 10 EU Member States,² came up with an important finding that the biggest barriers to children accessing justice was “the limited knowledge and exclusionary attitudes of those involved with the administration of justice, including judges, lawyers, police, social workers and psychologists”. The report suggested that it was essential to take steps to develop the awareness of these professionals about the rights of children, of persons with disabilities, the importance of a multidisciplinary approach to dismantling barriers and improving the quantity and quality of justice for children with mental disabilities.³

On the foundation of those findings, MDAC, in partnership with the Bulgarian Center for Not-for-Profit Law (BCNL, Bulgaria), DLA Piper (Belgium), Forum for Human Rights (FORUM, Czech Republic and Slovakia), Children’s Rights Alliance (CRA, Ireland), Psichikos sveikatos perspektyvos (Lithuania) and the Helsinki Foundation for Human Rights (Poland) supported by the European Commission, developed a specialised training module for lawyers and delivered the training in seven EU Member States (Bulgaria, Belgium, Czech Republic, Ireland, Lithuania, Poland and Slovakia), with the aim to build the capacity of legal professionals to ensure that children with mental disabilities have a real chance when seeking enforcement of their rights. The programme focused on five areas of human rights which represent those which are most commonly violated for children with mental disabilities in Europe:

¹ MDAC, *Access to Justice for Children with Mental Disabilities: Project Summary Report* (Budapest: 2015), available online at http://www.mdac.org/sites/mdac.info/files/access_to_justice_children_ws0_summary_eng.pdf (accessed 6.7.2017).

² Bulgaria, Czech Republic, Hungary, Ireland, Latvia, Lithuania, Romania, Slovenia, Spain, United Kingdom

³ The project also produced a set of online training materials which can be accessed at <http://mdac.org/A2J-training-site/> (available in all project languages).

- The right live and be included in the community
- Inclusive education
- Right to health
- Freedom from torture and ill-treatment, and
- Access to justice

Moreover, in cooperation with national partners, a “National Legal Innovation Strategy” was developed to be offered to legal professionals as a pathway for tackling systemic legal challenges in each project country. The strategies set out an approach to undertaking strategic litigation with a view to overcoming barriers which all too commonly result in children with mental disabilities being unable to enjoy their full range of rights.

This work was built on a pilot training conducted in Poland during June 2016 where the training methodology and tools were piloted in conjunction with the Helsinki Foundation for Human Rights. Following this, the methodology was further refined and training courses were rolled out for legal professionals in each project country. The present report describes a number of promising practices which emerged from the project and which can serve as inspiration for legal professionals to take concrete action.

This short report sets out a number of creative and innovative strategies that have developed as a result of the project, including the experiences of partners in promoting greater inclusion in education, better access to healthcare and enhancing protection against abuse. They provide a snapshot of the opportunities that can arise when providing lawyers and other stakeholders with focused capacity-building on the rights of children with mental disabilities who often experience multiple and concurrent forms of discrimination and barriers to accessing justice.

An emerging movement in Bulgaria

The mental disability rights movement gained momentum in Bulgaria following work of several NGOs to conduct research, advocacy and litigation. While MDAC became a household name after the European Court of Human Rights ordered Bulgaria to revise its guardianship system in 2012 in the Grand Chamber case of *Stanev*, programmes on the rights of persons with disabilities in the country were subsequently taken forward by the Bulgarian Center for Not-for-Profit Law (BCNL). The first in a series of trainings which took place in Sofia brought together a number of practicing lawyers, legal activists, professionals working with children and adults with disabilities, as well as law students, most of them with a track-record in human rights, children's rights and/or the rights of persons with mental disabilities and all of them with dedication to advance the rights of children with mental disabilities. The training was also supported by BAPID – the Bulgarian Association for Persons with Intellectual Disabilities – a nationwide association of children and adults with intellectual disabilities, their family members and professionals who support them.

Already during the training, it became obvious that participants were interested to take the initiative forward and become more involved in upcoming legal reform, advocacy and strategic litigation efforts.

Against this background, the participants of the course have established an informal network, led by BCNL, which serves for the exchange of experience and information in representing children with mental disabilities in the courts. This exchange was granted another platform during the legal strategy discussion, which took place in January 2017, where members of the group gathered and adopted their National Legal Innovation Strategy. Participants decided to focus on challenging the various forms of violence faced by children with mental disabilities in the country, particularly that which flows from their disabilities. While there have been positive developments in establishing a national child protection system, of significant concern is that children with intellectual disabilities in institutions are denied the protections offered to others and that there was a need to enhance law enforcement. Participants agreed that they would seek claims for children in such situations under national legislation including the Domestic Violence, Child Protection and Protection and Against Discrimination Acts.

Taking Flanders, Belgium, closer to inclusive education

In 2014 MDAC, supported by GRIP, the Flemish organisation for the rights of persons with disabilities, introduced a collective complaint to the European Committee of Social Rights against Belgium to demand remedy against systemic discrimination in education of children with intellectual disabilities. In response to the complaint, the Flemish Government introduced the so-called “M-Decree” which came into force on 1 September 2015, and which entitles children with disabilities to enrol in mainstream schools if the necessary accommodation to their needs can be considered “reasonable”. Instead of introducing inclusive education, the M-Decree encourages a form of integrated education, an approach which has continuously been criticised by the Committee on the Rights of Persons with Disabilities, significantly through their General Comment on the right to inclusive education.

However, as the Flemish National Legal Innovation Strategy identified, the M-Decree is a band-aid to a systemic problem which cannot be resolved without structural changes to the education system in the region and for as long as the State chooses to invest into segregated schools. The collective complaint has been designed to serve as a platform for future litigation by individual children and adults in order to claim the supports needed to be fully included in mainstream education.

Reportedly, the European Social Rights Committee is examining the collective complaint in the light of the M-Decree. It was decided therefore that this is an appropriate time in the Flanders to test the decree and demonstrate its inadequacy to address the inequalities imposed by the segregation in education in the region.

MDAC’s Belgian Partner, DLA Piper, a global law firm with activities in dozens of countries worldwide and a demonstrated culture of pro-bono support, is working together with the Flemish civil society and academia, to identify an individual case which will be litigated domestically to this effect and which will aim to serve to both advance the pending litigation at the European Committee of Social Rights, and set the scene for genuinely inclusive education policies in Belgium.

Ending illegal hospitalisation of children with mental disabilities in Ireland

Children with mental disabilities in Ireland, are routinely being placed into psychiatric hospitals for adults. Moreover, cases have been recorded where children in crisis, instead of being given proper health care and access to appropriate medical facilities, are transported to Scotland, with very little contact with their families, and whose families find the cost of travel to visit them prohibitive.

The basis for this situation is in the Irish Mental Health Act 2001, which fails to provide safeguards for children with mental disabilities, fails to ensure that children are not placed into adult hospitals and does not guarantee their right to access appropriate mental healthcare treatment in Ireland. It is widely understood to breach core provision of the UN Convention on the Rights of Persons with Disabilities (CRPD), which the country has committed to ratifying in the near future.

The Children's Rights Alliance (CRA), MDAC's Irish partner, worked in unison with the Irish Human Rights and Equality Commission to deliver trainings for legal professionals and engage in discussion with stakeholders in the development of the National Legal Innovation Strategy. The discussion in Ireland could not happen at a more opportune moment. Ireland remains the last EU Member State which is yet to ratify the CRPD and the eyes of the European disability rights advocates have been on the Irish government for a while, expecting to see moves forward towards the ratification of the instrument. The pressure is raising internally as well, with Irish disability and human rights organisations continuing to insist on ratification, while the Human Rights and Equality Commission has also been advocating for reform of the Mental Health Act. In a more promising sign, the Irish Department of Justice adopted a Roadmap to Ratification of the CRPD which outlined the need for amendments to the Mental Health Act.

The legal strategy discussion took place in Ireland in November 2016, while in December 2016 a draft Mental Health (Amendment) Bill was introduced for adoption by the Irish Parliament⁴, with the specific aim to put an end to the placement of children into adult inpatient units, as well as to ensure better psychiatric care for children with mental disabilities. While the proposal was not a part of the strategy, the CRA used the opportunity and intervened with the legislator,

⁴ <https://www.oireachtas.ie/viewdoc.asp?DocID=34202&&CatID=59>

advocating for better community-based services for children with mental health issues, drawing on an important link between the right to health and the right to live in the community⁵.

With the legislative proposal pending, CRA will work towards identifying a potential client to take up litigation and demonstrate the damages caused by a lack of access to the right to health to children with mental disabilities.

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https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Submission%20to%20the%20Seanad%20Public%20Consultation%20Committee.pdf

Promoting education reform in Lithuania

The legal strategy meeting in Lithuania took place with the support of the Lithuanian children's rights ombudsperson in January 2017. It attracted a number of representatives of the Government, notably from the Ministry of Education, as well as parents of children with mental disabilities and civil society organisations.

The participants quickly agreed that inclusive education was an issue that was insufficiently and inadequately dealt with by existing legislation and policies and a legal strategy was developed focusing on the right to inclusive education for all children regardless of impairment, and outlining potential litigation avenues to promote systemic change.

As the legal strategy was being drafted, Lithuania saw a change of government and consequently a new set of appointees at the Ministry of Education. Having taken up their functions, the new Ministry demonstrated enthusiasm to develop a national strategy for inclusive education in Lithuania and Perspektyvos, MDAC's Lithuanian partner, was asked to join the effort and ensure input to the strategy. In this way, a door was opened to directly draw on the strategy developed and integrate child- and disability-sensitive proposals into law.

A few months since the government was inaugurated, a draft national Concept of Inclusive Education has begun to take shape, and the Ministry has maintained enthusiasm to ensure that Perspektyvos, lawyers and other non-governmental actors are involved in the endeavour. As a result of this cooperation, an additional strategy meeting took place in July 2017, where representatives of the government, civil society and parents of children with mental disabilities met again to continue with input into the national reform plans.

Pro-bono culture in Poland

Human rights have become a delicate subject in Poland recently, and its judiciary seems to also have become a target under proposals which undermine the principle of judicial independence.⁶

In the midst of this turmoil, the Helsinki Foundation for Human Rights, MDAC's Polish partner, started off a discussion of the right of children with mental disabilities on access to justice. The discussion was started for a number of reasons. Firstly, it was estimated that the Polish justice system was not ready to address the needs of children with mental disabilities whose rights were not properly recognised or addressed in either criminal or civil proceedings. Secondly, children with mental disabilities are disproportionately represented as defendants in juvenile justice systems.⁷ Thirdly, in the course of its activity HFHR has identified numerous human rights violations in respect of juvenile justice. HFHR's research and monitoring activities helped to identify problems related not only to the right to a fair trial but also to the right to personal liberty, right to privacy and access to healthcare services for juveniles.⁸

A *conditio sine qua non* for proper access to justice is the availability of legal expertise. To overcome this shortcoming, however, it is necessary to have the legal professionals who are willing and able to develop that type of expertise, both through participating in trainings and other organised capacity-building efforts, as well as through actually taking a more active role in ensuring that children with disabilities have access to their fundamental rights.

Children from poor families are three times more likely to develop a mental disability.⁹ In addition, children with disabilities are generally more socially vulnerable, due to both their age and their disability and the resulting intersectional combination thereof. At the same time

⁶ In 2017, the Polish Parliament adopted three pieces of legislation towards judicial reform which were broadly seen as striking at the very centre of the independence of judiciary. One piece of legislation aimed at terminating the mandates of all current Supreme Court justices and replace them with a new set of justices directly appointed by the Government. The second piece of legislation proposed that Parliament would have been given authority to appoint members of the National Council of the Judiciary, while the third aimed at giving the justice minister the right to name the heads of Poland's lower courts. Polish President Andrzej Duda has announced he was vetoing the first and the second proposal, still signing off on the third.

⁷ 27 Commissioner for Human Rights (Rzecznik Praw Obywatelskich), Dostęp osób z niepełnosprawnościami do wymiaru sprawiedliwości. Analiza i zalecenia. available at: <https://www.rpo.gov.pl/sites/default/files/Dost%C4%99p%20os%C3%B3b%20z%20niepe%C5%82nosprawno%C5%9Bciam%20do%20wymiaru%20sprawiedliwo%C5%9Bci.pdf>

⁸ 30 M. Szwast, K. Wiśniewska, M. Wolny (2015), Dzieci po drugiej stronie muru, Helsinki Foundation for Human Rights, p. 130, available at: http://beta.hfhr.pl/wp-content/uploads/2015/10/HFPC_dzieci_po_drugiej_stronie_muru.pdf

⁹ 'Children from families living in poverty are 3 times more likely, on average, to suffer from psychiatric conditions, including both externalizing disorders such as ADHD, oppositional defiant disorder (ODD), and conduct disorder, and internalizing disorders such as depression, anxiety, and poor coping skills'. See Ivana Jakovljevic, MD, Ashley P. Miller, MDCM, FRCPC, Barbara Fitzgerald, MD, FRCPC, 'Children's mental health: Is poverty the diagnosis?' and the references contained therein, November 2016, available at: <http://www.bcmj.org/articles/children%E2%80%99s-mental-health-poverty-diagnosis>

the poor and socially vulnerable can only protect their rights if they can access the judicial mechanisms that serve them and reforming legal aid, by developing *pro bono* (or volunteer) legal practice around the world and by promoting other innovative approaches to meeting the legal needs of the public is one of the approaches to make justice systems more effective.

Pro bono culture is something that is seen as a characteristic of common law legal systems and is slowly penetrating continental law systems. However, it has been quite slow to take up in the Eastern European countries. However, Poland appears to be an exception to confirm the rule. Namely, strategic litigation has been HFHR's signature activity in Poland, and many strategically important cases were brought to courts by HFHR. What is interesting, however, is that majority of these cases were taken up by *pro bono* attorneys who worked alongside with and with the support and guidance of HFHR's staff. With lawyers' expertise in litigation and the willingness to dedicate time, knowledge and credentials to a case and HFHR's expertise in specific issues of human rights, the Polish legal environment has seen the opportunity of creative forms of litigation to advance the rights of particularly disadvantaged groups.

While a case on behalf of a child with mental disabilities is yet to be advanced before the competent institutions, the combination of NGO content knowledge and the expertise and resources of *pro bono* attorneys may be the first important step in enhancing access to justice for children with mental disabilities.