

NATIONAL LEGAL INNOVATION STRATEGY Romania

INNOVATING EUROPEAN LAWYERS TO ADVANCE THE
RIGHTS OF CHILDREN WITH DISABILITIES



Belgium



Bulgaria



Czech Republic and
Slovakia



Ireland



Lithuania



Poland



Romania



Coordinator



Co-funded by the
European Union

**Centre for Legal Resources
Bucharest, 2017**

Developed within the project “Innovating European lawyers to advance rights of children with disabilities” (JUST/2014/RCHI/AG/PROF/7362). The project is coordinated by Mental Disability Advocacy Centre (MDAC) and co-financed by the European Union Rights, Equality and Citizenship (2014-2020) Programme.

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Introduction

In Romania, children with disabilities¹ face significant obstacles in the enjoyment of their rights, as provided by the United Nations Convention on the Rights of Persons with Disabilities, the United Nations Convention on the Rights of the Child,² the European Convention on Human Rights, and other internal and international legislation.

Such obstacles result from inadequate legislation, which is often not compliant with international standards, but also from the authorities' reluctance to properly apply the standards and practices that already exist.

As regards the rights considered throughout the project, these are among the rights of children with disabilities which are most frequently breached in Romania, as briefly detailed below:

- ❖ **Inclusive education** remains a theoretical right for children with disabilities in Romania, as the education system is still segregated between "mainstream" and "special schools". While inclusion of some children with disabilities in the mainstream education system is theoretically possible, in practice this is rarely done, due to opposition from authorities, prejudice from other parents and students as well as a lack of resources available to schools. In addition to their inherent segregationist nature, special schools face several other problems, such as a lack of specialised personnel, widespread abuse and negligence and prejudice against children with disabilities.
- ❖ **Community living** is another area where Romania is sorely lacking. Institutional care is still the preferred method for children (as well as adults) with disabilities, due to inadequate planning for the transition to community based care, lack of resources and personnel at the level of local authorities as well as prejudice against people with disabilities. Even in the cases of children with disabilities who are being taken care of in the community (such as children who are in foster or family care), community services provided by local authorities are often inadequate.
- ❖ The **right to health** is a problem, especially for institutionalised children with disabilities. Most institutions offer very little in term of therapeutic activities aimed at rehabilitation or preventing future disability. In addition, general health services are often provided at an inadequate level to children living in institutions.
- ❖ **Access to justice** is virtually nonexistent for institutionalised children with disabilities, as they lack any effective legal representation, as well as the means and assistance required to bring complaints in front of an independent authority or court.
- ❖ **Freedom from ill treatment** is another right which is seriously breached in Romania, as evidenced by the monitoring activity of the Center for Legal Resources, which uncovered several high-profile cases³ of widespread and serious ill-treatment of institutionalised children. This violation is aggravated by a lack of effective legal representation, improper

¹ According to official statistics, in Romania there are over 70,000 children with disabilities.

² The Convention was ratified through Law no. 221/2010 and it is directly applicable in Romania.

³ <http://www.crj.ro/pledoarie-pentru-demnitate/rapoarte-de-monitorizare/>.

monitoring and control mechanisms, lack of qualified personnel, as well as the emphasis authorities place on the institutional care system.

Methodology

Stakeholders in this area include three main groups: (i) parents' organisations, (ii) other interested NGOs and (iii) public authorities.

- ❖ Parents' organisations are obviously the most important stakeholder in this area, being a key player, and should be consulted on all efforts of strategic litigation undertaken in this respect. Key organisations such as the European Centre for Children with Disabilities and Autism Romania have collaborated with the CLR in the past and would be willing to take part in an effort to overhaul the Romanian education system. Both organisations have undertaken efforts in the past with a view to ensuring the right to inclusive education for children with disabilities in Romania, but this has not resulted in any fundamental improvements.
- ❖ Public authorities are another important player, but their level of interest in reforming the system is low, mainly due to their lack of involvement, outdated views regarding the rights of children with disabilities, as well as the perceived threats to their own position that such a reform might bring. Public authorities include both central institutions (such as Government and its subordinated agencies), as well as local authorities responsible for implementing disability policies and specifically for maintaining the support systems for children with disabilities.
- ❖ Other interested NGOs include various organisations active in the field of human rights or specifically children's rights or the rights of persons with disabilities. It is not likely that any such NGOs would have the capacity to be a key player in such an effort, but nonetheless such actors could provide valuable input throughout the process.

Regarding the tasks to be undertaken by each party, these can be summed up as follows:

- ❖ Parents' organisations should be involved throughout the whole process, starting from its inception; meetings should be organised with the representatives of these organisations before any litigation effort is undertaken, in order to collect their input, feedback, possible objections and to assess their visions of what a reformed education system would look like. These organisations should then be kept as an integral part of the process until its completion. Parents' organisations can contribute expertise, resources and personnel, help with establishing links with other interested parties and assistance with advocacy and communication efforts.
- ❖ Public authorities should also be involved throughout the whole process. While such authorities should theoretically welcome any efforts to align the national practice with the applicable international legislation, in practice public authorities are often hostile to any such efforts. Therefore, while input should be collected from public authorities, it is unlikely any of these would undertake any tasks in order to help with the process. However, given that public authorities in charge of implementing disability policies exist at the level of each county, some of these could be persuaded to also make the case for

a system aligned with the international standards, which should assist with advocacy and communication efforts.

- ❖ Other human rights NGOs could also assist with expertise and advocacy throughout the process.

Selection of the right

This National Legal Innovation Strategy focuses on the right to inclusive education. This is one of the rights of children with disabilities that is most consistently breached in Romania. Given that the entire Romanian education system is operating under an outdated and nonconforming paradigm, it could be considered that all children with disabilities in Romania do not fully enjoy this right. Given also the grossly inadequate conditions for children with disabilities present in the current system, we can conclude that the breach of the right to education in Romania is both systematic and grave.

Apart from the seriousness of the violations of this right, the current national and international context is favorable to attempting a reform of the Romanian education system, given that the ratification of the CRPD by Romania has made this Convention directly applicable in the national legal system. Several cases of abuse of children with disabilities in special schools have been brought to the attention of the public,^{4 5} and similar efforts in other countries could be replicated in order to advocate for the necessity of such reform in Romania as well.

However, litigation by itself cannot overhaul the entire Romanian education system, therefore additional efforts will be required, especially regarding advocacy for a new system to be put in place once the current one is invalidated by the courts.

Therefore, the goal of the strategic litigation would be to ultimately obtain a favorable ruling from the Romanian Constitutional Court, declaring unconstitutional the provisions of the internal legislation setting forth the current education system, due to their noncompliance with the international covenants to which Romania is a party.

Once such provisions are declared unconstitutional, advocacy efforts will need to be continued in order for a new system of inclusive education to be implemented in place of the current one. Otherwise, the new system that Parliament must put in place after such a decision might also not be appropriate.

Overview of the legal remedies

Regarding the internal remedies, as stated before, the ultimate goal is obtaining a ruling from the Constitutional Court whereby the legal provisions setting forth the current segregated educational system are deemed unconstitutional due to their noncompliance with the international treaties to which Romania is a party.

⁴ <http://www.digi24.ro/stiri/actualitate/social/acuzatii-grave-la-o-scoala-speciala-profesor-toti-batem-la-ei-toti-697911>.

⁵ <http://romaniaibera.ro/societate/educatie/elevi-si-parinti-protesteaza-la-o-scoala-din-pitesti-impotriva-primirii-unui-copil-cu-adhd-430904>.

However, according to the Romanian legislation, a person cannot directly address the Constitutional Court. The Constitutional Court can examine whether a piece of legislation is compliant with the Constitution if the constitutionality of such legislation is contested in a lawsuit pending before the ordinary courts.

Therefore, the proposed order of the legal remedies to be used is as follows:

- ❖ Initiate litigation before an ordinary court concerning the inclusion of a child with mental disabilities in a mainstream school in a case where the current legislation mandates that the child must be included in a special school.
- ❖ The legal provisions forbidding the selected child from inclusion in a mainstream school will then be invoked before the court by the defendant education authority.
- ❖ The plaintiff will then raise the objection of noncompliance of the relevant legal provisions with the Constitution, asking the court to address the Constitutional Court with a view to their examination.
- ❖ The ordinary court will reject the plaintiff's demands,⁶ but will address the Constitutional Court.
- ❖ The Constitutional Court will declare the provisions as unconstitutional, effectively abolishing them, and Parliament will have to replace them with provisions that are constitutional; at this stage, advocacy efforts must be undertaken. However, if Parliament does not act, the system will remain virtually the same.

This approach is preferable to simply addressing an ordinary court because:

- ❖ An ordinary court's ruling is mandatory only for the parties involved; that is, it can only be used in an individual case. While it is true that such a ruling can be invoked in front of other courts, sometimes successfully, it will be by no means mandatory for such courts. At the same time, a ruling from the Constitutional Court will address the general situation, but it can also be used to obtain specific remedies for individual cases where the provisions deemed to be unconstitutional are applicable.
- ❖ There are no additional issues of legal standing, except for the requirement that the Constitutional Court must be first addressed by an ordinary court, which in this case would be bound to do so. However, the ordinary court does not examine the merits of addressing the Constitutional Court, meaning that if the contested provisions are relevant in the particular case brought before the court, such court has to address the Constitutional Court when requested.

In addition, there are two other avenues which can be used:

- ❖ Requesting the Constitutional Court to address the Court of Justice of the European Union for a preliminary ruling; this will require additional analysis as to whether the CJEU can issue a preliminary ruling regarding the provisions of the CRPD.
- ❖ If the Constitutional Court rejects the claim, bringing the case before the European Court of Human Rights. The case can be brought to the EHCR even before this, as this is not an internal remedy that has to be exhausted.

⁶ This is due to the fact that while unconstitutional and noncompliant with the international legislation, the contested provisions of the internal legislation are still in force and an ordinary court cannot refuse to apply them.

Case selection

The ideal case to be selected as part of this strategic litigation is that of a parent of a child with a disability that has been or is being refused the right to attend a mainstream school, for reasons such as the perceived seriousness of their disability or socio-medical evaluations which recommend that the child be placed in a segregated special school.

In addition, the parent and child will have to be informed of and agree to the strategic nature of the litigation and to the fact that this implies that an individual benefit will not be immediately available for them. However, given that currently there are a large number of parents of children with disabilities who are extremely against the current education system, and that individual court cases are rare and focus only on particular issues, finding a parent willing to support the strategic litigation efforts should not prove to be too difficult.

As stated before, addressing the Constitutional Court would be the only “true” strategic avenue, able to effect systemic changes, so therefore all risks will be analysed in relation to this approach. The main risks involved are as follows:

- ❖ The first and most obvious risk is rejection of the constitutionality objection by the Constitutional Court. While legally the Court would have to agree with the objection, the Court is quite conservative on social matters and it might simply find a way around issuing a favorable ruling. This risk can be mitigated by proper use of all resources and legal arguments available. In any case, in the event of failure, the case could be brought before the ECHR.
- ❖ The second risk is that the CJEU would issue an unfavorable preliminary ruling. As stated above, whether or not to address the CJEU will require additional analysis, so it remains to be determined if this risk will apply in practice.
- ❖ The third risk is that, even in the event of a favorable ruling from the Constitutional Court, the system with which the Government will replace the current system will still not be adequate or compliant with the CRPD. This risk can be mitigated by using all parties and resources involved in order to advocate for the proper changes to be implemented.
- ❖ Regarding client-related risks, given the complex and lengthy nature of the procedure, there is a risk that the client abandons the procedure at a certain point. However, this can be mitigated by a strong case selection process.

Litigation plan

Regarding the client intake process, this can be achieved through multiple alternatives:

- ❖ Through the monitoring activity of the Center for Legal Resources; while the CLR usually visits institutions for persons with disabilities and not special schools, monitoring of special schools is done occasionally and could provide litigation opportunities. Also, children from monitored institutions could have their right to education breached, as education of institutionalised children is often very poor. In addition, parents or guardians of institutionalised children from the institutions monitored might bring possible cases to the attention of the CLR monitors.
- ❖ Parents organisations, which will be involved at all steps of the litigation, can also provide cases.

- ❖ A public call by the CLR or other organisations addressed to parents of children with disabilities who are willing to undertake litigation. Such call will of course detail the strategic nature of the litigation, the risks involved and the actions to be undertaken by the client.

Regarding the key partners, these can be one or more of the following:

1. Parents organisations;
2. Other human rights NGOs;
3. Education, social care and / or medical professionals;
4. Law firms willing to work on a pro bono basis; and
5. Public authorities willing to support the project.

The timeframe for the litigation will include approximately 3 months for the client intake and selection, another 3 to 6 months for the first instance court litigation to be filed and for the objection to be sent to the Constitutional Court, approximately 1 to 1 and a half years to obtain a decision from the Constitutional Court, and approximately 1 more year to advocate for the proposed changes to be implemented.

Follow up activities

As stated above, follow up and advocacy activities are extremely important not only during the litigation, but especially after, given that even if the Constitutional Court rules in our favor, it cannot state how the new education system should look, but only that the current one is unconstitutional.

Therefore, once a favorable ruling is obtained, advocacy efforts will need to be undertaken to encourage the Parliament and Government to replace the provisions deemed unconstitutional with an education system compliant with the CRPD.

Such advocacy efforts would have to be started at the same time as the initial litigation, in order to properly acquaint all relevant parties with the litigation and its purpose and to prepare for the significant efforts required post-litigation. Advocacy efforts will include:

1. Publicising the activities undertaken and stating a clear and concise proposal for a CRPD-compliant education system;
2. Campaigns aimed to raise public awareness of the issue of inclusive education;
3. Training sessions for education professionals working for public authorities, in order to inform and reassure them of the necessity for an inclusive education system;
4. Keeping and maintaining contact with members of Parliament and Government officials who are supportive of reform; and
5. Forming a broad coalition of NGOs, professionals and public authorities willing to fully support education reform;

Resources

The project will not need significant resources, and most of these can be provided by networks and projects that already exist as follows:

- ❖ Litigation can be handled pro-bono by lawyers already working pro-bono with NGOs (such as the CLR) and parents' organisations;
- ❖ If additional legal input is required, law firms willing to work on a pro bono basis can be identified and used;
- ❖ Professionals needed in the project (e.g. education experts) can be identified from already existing networks;
- ❖ Costs of litigation (apart from lawyer fees, which should not apply) should be very low and, in any case, can be covered by the common efforts of the organisations involved;
- ❖ Client support can be provided through additional legal assistance provided to the client for accessing various available benefits or supports or through already existing informal support networks; and
- ❖ In addition, funding can be obtained by submitting project proposals if financing for such litigation will be available at that time.