

NATIONAL LEGAL INNOVATION STRATEGY Slovakia

INNOVATING EUROPEAN LAWYERS TO ADVANCE THE
RIGHTS OF CHILDREN WITH DISABILITIES



Belgium



Bulgaria



Czech Republic and
Slovakia



Ireland



Lithuania



Poland



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Coordinator



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Introduction

Slovakia ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2010 but has only slowly started to implement its provisions. Most of the core CRPD rights are not yet implemented. The biggest challenges are a non-functioning system of early intervention, the deinstitutionalisation process and shortage of community-based services, and denial of inclusive education for children with mental disabilities.

The policy framework is primarily regulated by the *National Action Plan for Children 2013-2017*¹ and the *National programme for the development of the living conditions of citizens with disabilities in all areas of life 2014-2020*.² The National Action Plan recognises that the CRPD is particularly relevant, especially as regards the rights of children with disabilities. Chapter Five of the National Action Plan deals with health care, disability and social services, however concrete and targeted objectives to ensure comprehensive inclusion of children with disabilities in society are missing. The lack of precisely identified goals and benchmarks, as well as a lack of timelines and assigned responsible authorities makes the coordinated implementation of the rights of children with disabilities enormously difficult.

In the area of **early intervention**, an amendment to the Act on Social Services entered into force in January 2014 which introduced a specialised social service for early intervention for children with disabilities up to seven years of age. While this development is a positive step, there are two significant concerns. Firstly, the number of early intervention centres continues to be absolutely insufficient, and parents often need to travel long distances with children with disabilities, leaving their family circle for long periods. By 2015, only three centres have been opened, all of them being funded by private donors. Thus, secondly, there is a significant lack of financial support from local authorities and the Ministry of Social Affairs. Therefore, the issue is primarily availability and accessibility of specialised services for early intervention in all Slovak regions, including rural areas.

In terms of **institutionalisation**, the Slovak Republic continues to segregate a large number of children with disabilities. According to the last available statistical data, in 2013 there were 1,205 children placed in social care homes.³ Most of the children placed in these institutions are facing lifelong isolation. Slovakia adopted a deinstitutionalisation policy aimed at the transformation of the residential social care system, but this policy is facing significant delays. Another issue of concern is the institutionalisation of children under the age of six. The Act on the Social and Legal Protection of Children and Social Guardianship requires that children under the age of six are placed in foster care instead of children homes, but there is an exception for children with disabilities, who can be institutionalised regardless their age.

The right to **inclusive education** of children with disabilities is widely violated. Firstly, most children with disabilities are educated in “special” segregated schools. Statistics from 2015 show that

¹ Government of the Slovak Republic, *National Action Plan for Children 2013-2017*, available online at: <https://www.employment.gov.sk/files/slovensky/ministerstvo/konzultacne-organy/rada-vlady-sr-ludske-prava-narodnostne-mensiny-rodovu-rovnost/vybor-deti-mladez/vlastnymat.pdf>

² Government of the Slovak Republic, *National programme for the development of the living conditions of citizens with disabilities in all areas of life 2014-2020*, available online at: <https://www.employment.gov.sk/files/slovensky/rodina-socialna-pomoc/tazke-zdravotne-postihnutie/narodny-program-rozvoja-zivotnych-podmienok-osob-so-zdravotnym-postihnutim-roky-2014-2020.pdf>

³ Ministry of Labour, Social Affairs and Family of the Slovak Republic, *National priorities for development of social services for 2015-2020*, available at <https://www.employment.gov.sk/files/slovensky/rodina-socialna-pomoc/socialne-sluzby/nprss-2015-2020.pdf>

22,189 children with special educational needs were educated in special primary schools or special classes.⁴ This number includes children with autism, mental disability, sensory disability, communication problems, physical disability, behavioural disorders and talented children. Only 3,767 children, presumably with intellectual disabilities, were integrated into mainstream primary schools. However, integration in education does not equal inclusion in education, and falls short of implementing international standards.

Even though the sixth chapter of the National Action Plan for Children 2013-2017 deals with education, the lack of subordinate objectives for inclusive education is identified as a major problem to ensure real implementation. Even more, Slovak legislation does not recognise the term “inclusion” or “inclusive approach” in education and does not provide for accommodations which would be enforceable by the child or his or her parents. There are also no national policies providing for transition from a segregated to an inclusive educational system.

On a positive note, in 2015, the Supreme Court delivered a crucial judgment on inclusive education. The court used international law to confirm that Ela - a child with disabilities - had the right to be provided with the individualised support she needed to be educated alongside her peers in a mainstream school. The Court also found that denial of support to enable Ela to access mainstream education could amount to unlawful discrimination which breached international law.

SLOVAK SUPREME COURT RULES THAT DENIAL OF INCLUSIVE EDUCATION TO CHILDREN WITH DISABILITIES CAN AMOUNT TO DISCRIMINATION

Ela is 10-years-old and has an intellectual disability and a hearing impairment. She lives in Bratislava (Slovakia) with her parents who wanted her to study at the local mainstream primary school. In 2013, the school refused to enrol Ela saying they could not cope because of her disabilities, a decision backed by the local government. Ela’s parents lost a legal appeal and took their case to the Supreme Court. In its judgment, the Slovak Supreme Court used international law to confirm that Ela has the right to be provided with the individualised support she needs to be educated alongside her peers in a mainstream school. The Court also found that denial of support to enable Ela to access mainstream education could amount to unlawful discrimination that breached international law.

Methodology

The strategy was developed in consultation with various stakeholders – organisations of parents of children with mental disabilities, organisations supporting and advocating for the rights of children with mental disabilities, lawyers representing children with mental disabilities and lawyers involved in pro bono activities, social workers from services for children with mental disabilities, experts and advocates in the field of the rights of persons with disabilities, and representatives of the Ombudsperson’s office and the office of the Commissioner for the rights of persons with disabilities.

⁴ Centre for scientific and technical information of the Slovak Republic, *Statistical Yearbook*, available at: http://www.cvtisr.sk/cvti-sr-vedecka- kniznica/informacie-o-skolstve/statistiky/statisticka-rocenka-publikacia.html?page_id=9580

The meeting was organised with these stakeholders in Bratislava in January 2017. The debate was focused on discrimination, access to public services, including the right to inclusive education, and how to best secure this right for children with disabilities irrespective of their disabilities. The participants shared their experiences with the denial of access of children with mental or other disabilities to public services, including schools and educational settings. Many practical obstacles were mentioned, such as the approach of the school or its representatives, financial constraints, assessment, administrative procedures, and lack of support. The discussion then proceeded with defining which problems are already seeing progress, where stakeholders are already taking steps, and which problem remain unaddressed. The stakeholders then debated the 2015 judgment of the Slovak Supreme Court on inclusive education and how to use it in other similar cases (see above).

Individual steps of the strategy were formulated through a directed discussion, with each participant including their own experience and expertise. First, stories where the stakeholders encountered a related violation of rights of children with mental disabilities, were shared. Then, the participants proceeded with identification of key problems in these stories and discussion of possible remedies, i.e. identification of systemic problems that should be addressed.

The discussion concluded that no organisation or institution has been systematically dealing with access to public services for children with disabilities, including access to education, although organisations of parents with children with mental disabilities provide support to some families. It was agreed that, in the absence of a coordinated response from authorities to implement the right to education for all children with mental disabilities, further strategic litigation was needed.

The stakeholders agreed that they will communicate cases with strategic potential to lawyers at FORUM who will (within their capacities) provide counselling and possibly representation to children with disabilities who have been denied their right to inclusive education and whose cases are evaluated as strategic.

Selection of the right

Children with mental disabilities face multiple serious problems in Slovakia including the lack of early intervention services, lack of community-based residential services, lack of support services for families, institutionalisation and denial of inclusive education. The stakeholders agreed that all of these issues are important but, for the reasons stated below, they agreed that the right to inclusive education is most appropriate for strategic litigation at this moment. Since the education of children with disabilities is mostly based on segregation in Slovakia, the shift to inclusive education is a massive step that will need substantial political, financial and administrative support (which now is completely missing). Many stakeholders and interest groups are involved (including mainstream and special schools, diagnostic centres, service providers, etc.). In the absence of any steps from the side of the authorities, it is crucial to draw attention to this issue now. After the 2015 judgment of the Supreme Court on inclusive education, it is a good time to highlight existing problems and demand reforms. In addition, this judgment will provide an important support for future strategic cases.

Definition of the problem

The majority of children with mental disabilities are educated in segregated “special” schools instead of in mainstream schools. They face multiple obstacles in accessing inclusive

education, including within mainstream education (in particular, denial of reasonable accommodations).

Underlying reasons

The system of “special” schools for education of children with mental disabilities is deeply rooted and there is no political will for reform. The existing legislation and policies are problematic. The current Education Act enables children with special educational needs to attend, under certain conditions, mainstream schools through “school integration”. However, individual “integration” of children with disabilities is not recognised in the law as a priority, neither is the right to be taught primarily in inclusive settings. Moreover, despite the Education Act allowing for integration (not inclusion) of children with disabilities, it does not provide for enforceable support measures and contains several provisions hindering the effective access of children with disabilities to mainstream education. The legislation does not recognise the term “inclusion” or “inclusive approach” in education and does not provide concretely identified accommodations, which would be enforceable by a child or his or her parents. There are also no national policies providing for required transition from the segregated into the inclusive educational system. The financing of support measures is not ensured on a systemic level.

The current educational system does not allow for creating flexible educational environments in mainstream schools which could absorb children with special educational needs without difficulties. Methodological and personal support to regular teachers is unsatisfactory, with a particularly low number of assistants, psychologists, special pedagogues and other experts in schools. The allocation of material, financial and human resources is insufficient.

Change needed

- a. Create inclusive settings within mainstream education.
- b. Ensure effective access by all children with disabilities to mainstream education and their effective inclusion in mainstream schools.
- c. Ensure that reasonable accommodation is provided to children with disabilities to facilitate their education in mainstream schools.

Goal of the litigation

Enforce the right of all children with disabilities to be educated in an inclusive setting and the obligation of mainstream schools (and other relevant authorities) to provide for inclusive education, including provision of reasonable accommodation.

Partial goals

- a. Clarify that children with mental disabilities have a right to be educated and effectively included in mainstream schools (ideally through amendment of the Education Act which should explicitly provide for this right).
- b. Ensure that schools are obliged to adopt reasonable accommodations for children with disabilities enrolled in mainstream education (physical supports, assistants, etc.) and that financing of these accommodations is secured from relevant authorities.
- c. Adopt a national policy on transformation and de-segregation of the special education system.

- d. Secure sufficient material, financial and human resources as well expert support in order to enable primary and secondary schools to ensure inclusive education in practice for all children with disabilities.
- e. Ensure that children with disabilities are not discriminated against in their right to inclusive education.

Overview of the legal remedies

There are several legal remedies to secure the right to inclusive education. The first remedy targets the local school (director) that has denied a child with disabilities enrolment in a mainstream class or refused to provide reasonable accommodations, and/or the regional government that refused to allocate financial resources to enable inclusive education of a child in a mainstream school (e.g. failure to pay a sufficient number of teacher assistants). The second remedy is directed against the same authorities but attempts to resolve the problem through the lenses of anti-discrimination legislation. The last remedy constitutes a special tool in the Anti-discrimination Act intended to solve systemic problems.

- a) **Administrative action** against the school (director) and/or regional authority that has denied a child with disabilities enrolment in mainstream class and/or failed to provide reasonable accommodation.

- Available remedies
 - Annulment of the administrative decision;
 - Reconsideration of the case;
 - Award of damages (in subsequent proceedings)
- Towards the goal of litigation
 - Establishing jurisprudence declaring that schools are obliged to enroll children with disabilities in mainstream classes;
 - Establishing jurisprudence recognising the obligation to provide reasonable accommodation to ensure effective inclusion of a child in a mainstream class.
- Risk assessment
 - Administrative actions are relatively accessible and easy to litigate as well as cost-effective. There is favourable national jurisprudence.
 - The case may help the individual child to enroll in the school and/or access necessary accommodation but such litigation has only limited impact on other similar cases.
 - Time factor: children have only a few months between denial of enrolment and the start of the next academic year.
 - It is mandatory to have legal representation at the judicial phase.

- b) **Anti-discrimination action** against a school and/or regional authority (as above)

- Available remedies
 - Declaration of discrimination;
 - Apology; and/or
 - Compensation for damage.
- Towards the goal of litigation

- Reparation of the situation;
 - Ensuring favourable jurisprudence, which can be directly implemented; and
 - Deterring other schools and motivating them to ensure inclusive education.
- Risk assessment
 - Anti-discrimination actions are demanding in terms of evidence, take a long time and may be costly;
 - National jurisprudence in this area is so far limited; and
 - The positive decision could have a more significant impact.
- c) *Actio popularis* - anti-discrimination action lodged by an NGO against a specific school, regional authority or the Ministry of Education for systemic discrimination (segregation) of children with mental disabilities in “special” schools or systemic failure to ensure reasonable accommodation to children with mental disabilities.
- Available remedies
 - Declaration of discrimination;
 - Apology; and
 - Redress of the situation.
 - Towards the goal of litigation
 - Ensuring favourable jurisprudence, which can be directly implemented; and
 - Deterring other schools and motivating them to ensure inclusive education.
 - Risk assessment
 - National jurisprudence regarding segregation of Roma children can be applied;
 - The impact may be very significant;
 - There is no need for an individual client who would have to carry the costs and risks of litigation;
 - Additional resources will be needed for research; and
 - This litigation may be lengthy and unpredictable.

After each of the first-level domestic legal remedies sought, an appeal, cassation complaint or appeal on points of law and a constitutional complaint are available. If not successful at the domestic level, the case can be referred to the European Court of Human Rights, CRPD Committee, UN Committee on Economic, Social and Cultural Rights or UN Committee on the Rights of the Child.

Case selection

Considering the fact that *actio popularis* is one available measure, case selection may not be of material importance in this strategy. It is, however, relevant for other legal avenues.

Strength

- The motivation of the client is compatible with ours;
- The client is well connected within the network of other parents of children with mental disabilities and support NGOs;
- The client is not in a particularly vulnerable position in regard to the school (i.e. is already enrolled in another school); and

- The evidence in the client's case is easy to collect and present.

Potential

- The client is willing to talk openly about the issue.
- The client has suffered in the exercise of his or her rights as a result of the issue described.

Resources

- There are other NGOs already engaged with the case.

Ethical considerations

- Is the client willing to carry on litigation even when settlement is available?
- Is the client willing and able to handle the pressure of long-term litigation?
- Is other potential support available?

Litigation plan

Client intake processes

- Potential clients will be contacted by networking with organisations of parents of children with mental disabilities and support organisations working closely with them;
- Other potential clients can be found through cooperation with the Office of Ombudsperson and the Office of the Commissioner of persons with disabilities; and
- A request to identify pro bono lawyers will be sent to the Pontis Foundation which runs a pro bono clearing house in Slovakia. The pro bono lawyer will be supported and the case will be supervised by a lawyer from FORUM who specialises in the issue.

Litigation route

- Based on the risk assessment, one of the litigation routes described above will be followed.

Support activities

- Research: to map the situation, extent of the problem, and good and bad practice:
 - How many children are educated in "special" schools in the area and how many children are educated in mainstream education?
 - Do schools in the area provide reasonable accommodation to children with disabilities? If yes, how are they financed?
 - Do the schools receive support (financial, methodological, other) from the regional governments to secure inclusive education?
 - What information do parents receive when they enrol their children in mainstream school?
 - What alternative educational resources are available to parents who decide to initiate a lawsuit against a school?
 - Are combined vulnerabilities relevant e.g. ethnicity, gender, placement in institutional care and other disability?

Key partners

- The Ombudspersons office to help search for clients, formulate the strategic issue, and submit an amicus curiae;
- Other stakeholder NGOs to help search for clients, formulate the strategic issue, submit an amicus and help find appropriate support for the client; and
- Media to map the situation and popularise the stories of children denied enrolment into mainstream schools.

Estimated time-frame

- June 2017 – client fulfilling the case selection criteria is found;
- August 2017 – basic research into the overall situation;
- October 2017 – Draft of legal submission is prepared and ready to consult with other stakeholders;
- December 2017 – the legal actions are filed;
- Estimated time for final domestic decision – December 2020.

Risk management

- Identified risks
 1. We will not be able to find a suitable client;
 2. The client will not be able to handle the pressure of litigation;
 3. The client will end the litigation prematurely;
 4. We will not be able to provide evidence necessary for the court;
 5. There will be negative media coverage because of suing schools; and
 6. A positive decision will not be implemented due to lack of knowledge or resources.
- Mitigation of risks
 1. The client will be referred to us by a cooperating NGO or Ombudsman's office, and we will have other routes of finding a client.
 2. The client will be guided properly through the litigation process i.e. prepared for the fact that litigation can be lengthy, all steps will be properly discussed with the client, and effective participation will be ensured.
 3. We will ensure adequate support for the client by other organisations or a psychologist. We will ensure the client is able and ready to speak about the issue openly.
 4. We will find a client whose motivation is the same as ours, i.e. reaching an important decision with potential impact. Two cases will be litigated to mitigate the risk.
 5. The case we chose will have strong evidence.

Follow up activities

Advocacy

- Target the Ministry of Education to adopt amendments to the Education Act and other relevant legislation (see above);
- Target the Government to adopt a comprehensive action plan with concrete time frames to desegregate education of children with disabilities; and
- Target regional governments to adopt a comprehensive financing policy to secure material, financial and human resources as well expert support in order to enable primary and secondary schools to ensure inclusive education.

Media/communications

- To help spread awareness and information about children with mental disabilities, their lives and available support.
- Creation of a leaflet providing information on inclusive education; and
- Creation of a brochure about children educated in inclusive environments and how they cope.

Education

- To ensure teachers and school management have the necessary information about inclusive education.

Resources

Personal

- Local organisation of parents of children with mental disabilities
 - Providing information on the lives of families with children with mental disabilities and the challenges they face in accessing education.
- Local NGO defending rights of children with mental disabilities
 - Providing information on the importance of inclusive education;
 - Supporting the clients, cooperating with the lawyer and parents of children with mental disabilities;
 - Conducting research;
 - Supporting and organising education, communications and media; and
 - Organising advocacy activities.
- Local lawyer or NGO
 - Searching for clients in cooperation with the NGOs;
 - Conducting domestic litigation; and
 - Cooperating on advocacy activities.
- International NGO
 - Supporting advocacy and communications activities;
 - Supporting litigation at domestic level;
 - Supporting litigation at international level; and
 - Helping disseminate the outcomes of the research.

Financial

- Court fees
 - By law court fees should be waived in relation to children;
 - The cases will be litigated by pro bono lawyers; and
 - Other activities will be carried out according to the capacity of other NGOs.

- Related cost of litigation
 - Funds can be raised by a public campaign.