

# NATIONAL LEGAL INNOVATION STRATEGY Czech Republic

INNOVATING EUROPEAN LAWYERS TO ADVANCE THE  
RIGHTS OF CHILDREN WITH DISABILITIES



Belgium



Bulgaria



Czech Republic and  
Slovakia



Ireland



Lithuania



Poland



Romania



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## Introduction

The Czech Republic ratified the UN CRPD in 2009 and since that time has been taking steps to implement several of its provisions with focus on the right to live in the community and inclusive education. The Ministry of Social Affairs responsible for provision of social services essential to enable the life in the community of people with disabilities has taken steps to deinstitutionalise them, the Ministry of Education plans to implement inclusive education and more supervision by the State Prosecutor's office to institutions are going to be implemented to prevent ill-treatment. However, the situation remains problematic for all key rights, and children with mental disabilities face serious obstacles in accessing all of those.

Children with mental disabilities have the right to be accepted in a **local mainstream school** according to the School Act, and since the 2016 amendment of this law, they also have a legally enforceable right to obtain support necessary to realise their study potential. At the same time, however, most children with mental disabilities remain in special schools (approximately 75%) and schools are not in practice willing to accept them. The Ministry of Education has taken no steps to adopt a realistic plan of transforming the segregated education system into an inclusive one, and is failing to put in place measures to prepare teachers and schools to respond to all children's needs. The schools therefore still expect children to adjust to them and a large section of teachers and their professional societies are largely unfavourable to the above-mentioned amendment introducing support measures and inclusive education. For this reason, often the child with mental disability is not sufficiently protected and supported by the school, which is used as a proof of failure of "inclusive education".<sup>2</sup>

**Right to live in the community** was implemented into the Act on Social Services and recent jurisprudence confirms that any person with disability has the right to choose social service other than institutionalisation, and alternatives must be readily available and accessible. This is not the situation in practice in the experience of FORUM lawyers as well as other participants of the "Innovating European Lawyers" event. Children with disability are often taken away from their parents at a very young age, or right after birth, as their institutionalisation is presented as the only option to provide adequate care. Parents do not receive necessary information right at the birth of the child or during their growth, often they are even pressured to put them into an institution. Often, children are being forcefully taken

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<sup>1</sup> According to information provided by ČOSIV, Czech Professional Society for Inclusive Education. Online: [http://cosiv.cz/wp-content/uploads/2016/10/inkluze\\_v\\_cislech.pdf](http://cosiv.cz/wp-content/uploads/2016/10/inkluze_v_cislech.pdf).

<sup>2</sup> This experience was shared among participants of the three-day training and meeting with stakeholders "Innovating European Lawyers to Advance the Rights of Children with Disabilities". FORUM lawyers have represented at least four cases in the Czech Republic, where this dynamic occurred.

away from their parents, as the parents fail in providing appropriate care for the child with mental disability due to lack of support available.<sup>3</sup>

Children with mental disabilities also face serious problems in **access to justice**, as very few procedural accommodations are readily available and few judges are ready to apply them. Most children with mental disabilities are not heard in proceedings directly related to them, for fear of re-traumatisation or of inability to communicate with the child. There is a lack of education of judges, police, state prosecutors and other related professionals. Often, violations of the rights of children with mental disabilities are not recognised by those with the power to initiate proceedings, which are inaccessible to children themselves.

Access to **universal and free health care** in the Czech Republic applies also to children with mental disabilities, however, their participation in giving informed consent to any medical information is often undermined. There are no guidelines to recognise legal capacity for children with mental disability, informed consent is therefore generally only given by the legal guardian, with participation of the child not being required by law. For some invasive and irreversible medical interventions, such as sterilisation, a medical commission must give consent. This is, however, not true for chemical contraception or even abortion.

Children with mental disabilities can be especially vulnerable to ill-treatment by both the authorities or other people surrounding them. They therefore require specific protection to prevent possible ill-treatment in all settings. As many children with mental disabilities live in institutions, the risk of **ill-treatment** is especially high. Supervision is conducted by independent inspections and the state prosecutor, however officers are not provided with any kind of training on the types of rights violations children can face in institutions, nor on communication with children with mental disabilities.

## 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, advocates representing children in such cases, social workers from social services for children with mental disabilities and representatives of the ombudsperson's office, who conduct monitoring in institutions. The idea of the organisers was to gather a sufficient representation of different stakeholders with different perspectives on the issue and primarily, parents of children with mental disabilities and children themselves were invited. Probably due to the formal format of the meeting, however, this group was represented only by representatives of organisations of parents of children with mental disabilities.

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<sup>3</sup> For example, in the case of M.T. and Z.T., two children with mental disabilities were put into an institution, as the care became for their mother (also with mental disability), without assistance, too demanding. The father had to work to provide for the family. No services to the family to prevent institutionalisation have been considered, although the family had very strong emotional ties.

In the invitation for the event, participants were informed about the work of MDAC and FORUM and the purpose of the meeting, which was to share ideas to advance rights of children with mental disabilities. They were asked to think about the gaps in protection of rights of children with mental disabilities in our country, as they encounter them in their work or private life. The purpose of the meeting was to discuss the most important strategic issue which can be addressed by litigation.

The discussion in the meeting started by brainstorming on stories where stakeholders encountered a violation of rights with children with mental disabilities. All stories were somehow connected to children being separated from their family or community, for various reasons, including unavailability of prevention, early care services, information, social services and support, schools and assistants. The discussion then proceeded with defining which problems are being addressed and where relevant stakeholders are already taking steps, and which problem remain unaddressed. The results of the discussion are reflected in the previous section on the rights of children with mental disabilities in the Czech Republic.

Regarding availability and accessibility of schools, the amendment introducing support measures and surrounding discussion about inclusive education led the participants to conclude that other topics will be more effectively addressed. Deinstitutionalisation of services and existence of sufficient available community services is a topic of many other active organizations and although the situation is still not very good, it is progressing. For these reasons, the participants concluded that concentrating on the separation of children and their parents right at the beginning of the children's lives as an unaddressed topic and at the same time, the root cause of institutionalisation of so many children, should be chosen as the topic.

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

In the discussion, we concluded that Society for Support of People with Mental Disabilities and LUMOS, both professional organisations working to advocate for rights of children with mental disabilities and focusing on capacity building of people with mental disabilities, are already involved in this problem, representatives of both organisations being present in the meeting. Both organisations would like to take part in the effort as supporting and consulting organisations.

The ombudsperson's office is ready to provide information and consulting in the process and likely also contacts of parents who would potentially be willing to litigate the issue. The advocates present in the meeting are ready to litigate a potentially higher number of cases. A journalist agreed to provide media coverage of the issue, mainly of stories of family separation and possible remedies accessible to those families.

The participants also discussed which other stakeholders should be involved in the effort to support the litigation and advocacy objectives with relevant insider information - mainly hospital employees and social workers from the Child Protection Authority were mentioned.

## Selection of the right

Despite the fact, that all children with mental disabilities face problems regarding all key rights in the Czech Republic, inclusive education, access to justice and right to live in the community were identified as the most pressing. The country has had a turbulent discussion and changes in inclusive education over the last year, and the stakeholders assessed that it is not efficient to start new litigation in the area at the moment. Based on the shared stories of parents being forced to give up their children right at the hospital after birth due to inadequate information of the hospital workers, the right to live in the community and particularly accessibility of early childhood intervention, was chosen as the topic of this strategy.

### Definition of the problem:

Too many children with mental disabilities are institutionalised at a very early age; they constitute almost 50% of all children in institutions for children under three.<sup>4</sup> Children are often institutionalised right after their birth, as the necessary support is not available and accessible or the parents are not informed about it.

### Underlying reasons:

The underlying problem identified by social care workers, lawyers and representatives of the Ombudsperson, is the lack of available and accessible early childhood intervention and, primarily, pressure the parents face right after the birth of a child with disability. The primary problem is the following: when a child with disability is born, early care is not available or accessible. If it is, the parents do not receive information from the hospital, usually as the hospital is not aware of the existence of the service. The flow of information between medical and social care services is very weak and hospitals do not employ social workers to ensure continuity of the care provided by networking the clients to appropriate services. This often results in helplessness of the parents, when the newly born child needs assistance and care they have no information about and are told is extremely demanding. Too often, they are automatically recommended and referred to an institution as the only available option. Parents are often told institutions are a much better option both for the child and the parents.

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<sup>4</sup> Statistics available at the Information Agency of the Ministry of Health Care. Online: <http://www.uzis.cz/category/tematicke-rady/zdravotnicka-zarizeni/kojenecke-ustavy-detske-domovy-dalsi-zarizeni-pro-deti>.

### Change needed:

- a. Availability of services, especially early childhood intervention (responsible subject – the regional government);
- b. Ensuring access to appropriate information and assistance for the parents in the hospitals (responsible subject – the hospitals and the Ministry of Health Care).

### Goal of the litigation:

Creating progressive jurisprudence advancing rights of children and requiring that laws are interpreted and implemented in accordance to the CRPD. The right to live in the community is to be interpreted as requiring all responsible subjects to take steps to prevent institutionalisation, including establishment of accessible appropriate services and ensuring access to appropriate information and assistance right at the birth of the child.

### Specific goals:

- a. Ensuring hospitals have a position of social worker responsible for assisting and informing parents of children with mental disabilities;
- b. Ensuring the Ministry of Health Care adopts guidelines for hospitals stressing that institutionalisation is not an appropriate option and rather, the parents must be informed about all possible choices of services and connected to appropriate assistance;
- c. Ensuring regional governments maintain a sufficient network of available and accessible services for children with mental disabilities.

## Overview of the legal remedies

There are, in general, three available types of legal remedies, first directed toward the responsibility of the regional government to ensure adequate available services to prevent institutionalization; the second one directed against the hospitals for lack of information provided to parents leading to ill-treatment of children in institutions, family separation and breach of children's rights to live in the family and community; and the third against the Ministry of Health Care and Ministry of Social Services for not providing any guidelines as to informing and supporting the parents of children with mental disabilities to the hospitals or social workers, which would lead to prevention of institutionalisation.<sup>5</sup>

In this regard, two litigation targets were identified: a) Regional governments for the lack of adequate available services and b) Hospitals for the lack of information provided to families.

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<sup>5</sup> This is not even reflected in the Ministry of Social Affairs Conception for Support of Transformation of Social Care Services (the „deinstitutionalization strategy“). Online: [http://www.mpsv.cz/files/clanky/3858/Koncepcie\\_podpory.pdf](http://www.mpsv.cz/files/clanky/3858/Koncepcie_podpory.pdf)



- a) Administrative action for unlawful interference caused by inaction of regional governments in cases of lack of information provided to parents of newly born or young children with mental disability, inaccessibility and unavailability of adequate support services in the community.
  - a. Available remedies
    - i. Declaration of unlawful interference;
    - ii. Order to take steps to undo the interference;
    - iii. Provision of non-pecuniary damage (in subsequent civil proceedings, see below)
  - b. The goal of litigation
    - i. Ensuring jurisprudence declaring responsibility to ensure appropriate information is given to families of children with disability at an early stage;
    - ii. Ensuring jurisprudence declaring responsibility to create sufficient network of available community-based services for children with mental disability and early childhood intervention.
  - c. Risk assessment
    - i. Administrative actions are relatively accessible and easy to litigate, cost-effective.
    - ii. The responsibility of regional government is distant to the situation in the hospital itself. The effect may not be as direct.
  
- b) Civil action against hospitals claiming damage for family separation and institutionalisation of children
  - a. Hospitals have the responsibility to provide adequate information with professional care. If false, inadequate or insufficient information leads to family separation and institutionalisation of children, it amounts to unlawful act by the hospital.
  - b. Available remedies
    - 1. Declaration of violation of rights;
    - 2. Apology;
    - 3. Non-pecuniary damage;
    - 4. Reparation of the situation.
  - c. The goal of litigation
    - i. Ensuring favourable jurisprudence, which can be directly implemented;
    - ii. Deterrence/motivation for other hospitals to create an effective system.
  - d. Risk assessment
    - i. Civil actions are demanding on evidence, take a long time and are costly. Burden of proof must be carried.
    - ii. The decision would affect the hospital directly and could have a more intensive impact.

After each of the first-level domestic legal remedies sought, an appeal, cassation appeal and constitutional appeal is available. If not successful on the local level, the case can be referred to international human rights bodies, especially the European Court of Human Rights, and UN treaty bodies, namely CCPR, CEDAW, CERD, CAT, CRC. The choice of the forum should reflect risk assessment of failing to meet admissibility criteria as well as prospect of success, including the core of the arguments, e.g. to rely on Council of Europe standards predominantly or UN standards.

Another litigation route would be filing a collective complaint under the European Social Charter without exhausting domestic remedies. The collective complaint mechanism has obvious advantages in tackling systemic issues as it does not require exhausting any domestic remedies. In addition, the collective aspect does not require representing a concrete victim of human rights violation. On the other hand, it can be submitted only by international organisation or a union, which significantly limits its accessibility for domestic organisations with specific know-how and requires appropriate inter-organisational cooperation and case management.

## Case selection

To make the client intake process and litigation as effective as possible, the following criteria were developed to identify characteristics of a prospective client.

- Relevance

Selected case must, naturally, be relevant both to the organisation's goals and to the issue at stake – i.e. prevention of early institutionalisation of children with mental disabilities. The selected issue is highly relevant to the organisation, as children who are separated from their families at an early age and institutionalised, are likely to be institutionalised throughout their adulthood, placed under guardianship, face ill-treatment and continue to experience other rights violations throughout their lives.

Litigating this issue would therefore tackle one fundamental cause of CRPD rights violations for a large number of children.

- Potential

The issue of lack of early intervention affects hundreds or thousands of children with disabilities in the Czech Republic, causing them to be removed from their families, placed in institutions from which they may never leave and in which they suffer severe rights violations because of failure to meet their basic developmental needs (e.g. for social integration and education) and because the closed environment facilitates torture and ill-treatment.

The issue has also never been addressed openly by litigation or advocacy initiatives. Therefore, the potential of one case is to affect the situation of large number of other children

facing serious human rights violations, and at the same time, open an issue which is not well-known to the public and the decision makers. Therefore, the potential of one such case can be relatively large.

- Strength

A strong case presents many advantages for litigation. The following qualities, when met in a case, make it stronger and safer, and hence, ensure that litigation is beneficial for the target group and the individual client:

- The motivation of the client is compatible with ours, i.e. the clients wish is to advance the rights and protection of rights of children with mental disabilities and is not seeking primarily a solution to his/her particular problem (e.g. the client will prefer finishing the litigation even if settlement offer is available)
- The client's situation is stable now, i.e. the client is not currently facing any substantial risks regarding their family life, which can be worsened by litigation
- The client is well connected within the network of other parents of CWMD and support NGOs
- The evidence in the client's case is feasible to collect and convincing for the court.

- Resources

Another important criterion is that the organisation in fact has the resources to undertake the litigation of the selected case. Resources needed are identified below. An advantage to the case is if there are other NGOs already engaged with the case and the workload can be shared with them, or if there are other organisations willing to cover part of the costs.

- Ethical

Naturally, during litigation, several issues can come up which can compromise clients' situation and in some cases even put them in danger.

- The most important consideration is whether the client's and client's family's situation is stable now, i.e. the client and the family has adequate support (both formal and informal) to carry out long-term litigation.
  - In case such support (non-formal) is not available, it should be sought within the network and support parents' groups, and considered together with the client if undergoing litigation is possible.
  - In case formal support, i.e. community based services, are not available and accessible, the litigation effort must be accompanied with research of available services and their contracting;
  - If no services are available, request of ensuring such services in the community to the regional government will be filed. The client will be consulted on whether or not litigation should be carried out.

- Added value

Apart from the above described strengths of the case, the following qualities will be looked for either on the part of the client or the partners who might be involved in the case:

- The client herself/himself is a social worker/hospital worker and knows the situation on the ground
- The client herself/himself knows somebody, who is a social worker/hospital worker and knows the situation on the ground and is ready to support the case

## Litigation plan

### - Client intake processes

- During the discussion at the event, two potential cases were identified by the employees of the Ombudsperson's office.
- Other potential clients will be contacted by networking with organisations of parents of children with mental disabilities and support organisations working closely with them.
  - Parents organisations will be contacted by our lawyer with an offer of representation of such case by an email to a contact person and request to spread such offer.
  - An advantage would be the networking (parents) organisations support of the cause in related activities – clients support, advocacy activities.
- If such cases are referred to us by the parents' organisations, the potential clients will be contacted and a personal meeting will be organised in order to consult the client's wishes, whether or not those meet our criteria, and what our role in the process can be. The meeting will ideally be organised together with the parents' organisation representative, if the potential clients agree to it.
- If cooperation is agreed on, a contract on support of the client will be signed by both parties, together with an agreement of next steps to be taken by each party.

### - Litigation route

- Based on the risk assessment provided above, both litigation routes can be followed to maximise the potential impact and to complement each other.

### - Support activities

- Support: ensuring both formal and non-formal support to the client and the family during litigation;
- Research: to map the situation, extent of the problem, good and bad practice,

- How many children are put into institutions right after their birth;
  - How many hospitals employ a social worker who assist and inform parents on the needs of children with mental disabilities and available services; in a positive case, how many consultations does the social worker provide per month and how many complaints are filed in relation to the social worker;
  - Whether any educational scheme exists on children with mental disabilities and available services for hospital workers;
  - How many parents were, after the birth of a child with a mental disability, directly recommended to put them in an institution;
  - How many parents were, after the birth of a child with a mental disability, informed of their needs and available services.
- **Key partners**
    - o Legal experts will support the litigation team in framing the argument from the point of UN CRPD standards;
    - o The parents' organisation will help search for the clients, support the clients in the process and cooperate in related advocacy activities;
    - o Other support and professional organisations can formulate their support for the cause and help frame the argumentation from the social workers and health professional perspective;
    - o The Ombudspersons office will help search for clients and possibly, submit an amicus before the high courts;
    - o Media will help map the situation and popularise the stories of separated families.
- **Estimated time-frame**
    - o June 2017 – client fulfilling the criteria of case selection is found
    - o August 2017 – basic research into the overall situation
    - o October 2017 – Draft of legal submission is prepared and ready to consult with other stakeholders
    - o December 2017 – the legal actions are filed
    - o Estimated time for final domestic decision – December 2020
- **Risk management**
    - o Identified risks
      1. We will not be able to find a suitable client;
      2. The potential client's cases will already be time-barred.
      3. The client will not be able to handle the pressure of litigation;
      4. The litigation can negatively affect the children and their families;
      5. The client will end the litigation prematurely;
      6. We will not be able to provide evidence necessary for the court;
      7. There will be negative media coverage of suing hospitals;

8. Positive decision will not be implemented due to lack of knowledge or resources.
- o Mitigation of risks
    1. The client will be referred to us by a cooperating NGO or Ombudsman's office, we will have other routes of finding a client.
    2. 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.
    3. 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.
    4. Child/client protection policy will be developed and implemented.
    5. See above – preferred client's motivation will be the strategic issue itself, not an individual solution.
    6. The case we chose will have strong background in evidence. Two cases (civil and administrative) will be litigated with different requirements as to the evidence, to mitigate the risk.
    7. Media strategy will be adopted to cover the case from a positive perspective.
    8. An implementation strategy will be adopted to make sure positive decision contributes to the desired outcome.

## Follow up activities

After both a successful and unsuccessful litigation, follow-up activities must be implemented in order to ensure the goal of litigation is reached. Therefore, the follow-up activities must respond to the goals of litigation described above.

Most likely follow up activities will be the following: advocacy (ensuring the goal is implemented), education (ensuring the implementation is effective) and media/communications (ensuring the issue is widely known and understood).

- a. Advocacy:
  - Ministry of Health Care to adopt guidelines for hospitals (see above);
  - Regional governments to adopt acceptable plans for social services and ensure sufficient networks of social services.
- b. Education: to ensure hospital workers have the necessary information.
  - About children with mental disabilities and their rights, effects of institutionalisation, existing available services.

- c. Media/communications: to help spread awareness and information about children with mental disabilities, their lives and available support.
  - Creation of leaflet informing about available services in the region;
  - Brochure about families with children with mental disabilities and how they cope.

## Resources

Resources must be identified prior to carrying out litigation to ensure long-term litigation is sustainable. Both human and financial resources are identified below.

### A. Human Resources

- a. Local organisation of parents of children with mental disabilities
  - i. Informing on the lives of families with children with mental disabilities, challenges they faced with available services
- b. Local NGO of social workers
  - i. Informing of the type of services, known good practice of cooperation of social workers and hospitals
  - ii. Supporting the clients, cooperating with the lawyer and parents of children with mental disabilities
  - iii. Conducting research
  - iv. Supporting and organising education, communications and media
  - v. Organising advocacy activities
- c. Local lawyer
  - i. Searching for clients in cooperation with the NGOs
  - ii. Conducting domestic litigation
  - iii. Cooperating on advocacy activities
- d. International NGO
  - i. Supporting advocacy and communications activities
  - ii. Supporting litigation on domestic level
  - iii. Supporting litigation on international level
  - iv. Help disseminate the outcomes of the research, litigation of advocacy efforts

### B. Financial

- c. Court fees
  - i. Will be waived in relation to children with mental disabilities, according to the law;
  - ii. The cases can be litigated by pro bono lawyers.
  - iii. Other activities will be carried out on the capacity of other NGOs.

- d. Related cost of litigation
  - i. Funds can be raised by a public campaign, using crowd sourcing activities;
  - ii. Funds can be raised by targeted fundraising, e.g. targeting concrete entrepreneurs, companies, charities;
  - iii. Pro-bono lawyers can be involved either in research or in the litigation, as well as volunteers and law-faculty students.