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Budapest, 2 December 2014.

Dear Director and Head of Unit,

We are writing to draw your attention to and to express our concerns regarding the Hungarian Government's attempt to legalise segregated education of Romani children, by introducing a proposal to amend the Hungarian Public Education Act. Please, see attached our legal analysis regarding the matter.

We think that this legal proposal, if adopted, would be in breach of the Racial Equality Directive, and would also violate the Hungarian Fundamental Law and domestic laws.

Therefore we urge the European Commission to make its view on this matter public and to remind the Hungarian Government to adhere to their obligations and take steps to prevent these violations of fundamental rights. The Commission should call on the Hungarian Government to withdraw the proposal to the Education Act in breach of EU and domestic law.

Yours Sincerely,

András Ujlaky  
Executive Director  
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**Legal Opinion of  
the Chance for Children Foundation, the European Roma Rights Centre and the  
Romaversitas Foundation  
on the Government's proposal (T/2085.) to modify the Act on Public Education (CXC of  
2011)**

The Chance for Children Foundation (CFCF), the European Roma Rights Centre (ERRC) and the Romaversitas Foundation are writing to the European Commission to express their deep concern over the Government's proposal to modify the Act on Public Education in order to legalise segregated education of Romani children. Therefore the organizations drafted this legal opinion analysing the unlawfulness of the proposed amendment urging the European Commission to call on the Hungarian Government to refrain from amending the Education Act in breach of European Union and domestic law.

**1. Hungarian courts banning segregated education for Romani children**

On November 6, 2014 the Debrecen Regional Court of Appeal as the court of second instance ruling in the case of the re-opened Roma-only school in Nyíregyháza (Huszár-settlement) stated that it is illegal to educate Romani children separately even with the justification of the school being a church school.<sup>1</sup> The case concerned the local primary school of the Roma settlement of Nyíregyháza which is situated on the outskirts of the city which was closed down in 2007, as a result of CFCF's Court action. After closing the segregated school in the Guszev settlement and providing a free school bus for Roma children who were integrated to mainstream primary schools in the city centre in 2011, the new mayor decided to have the school reopened as part of the Greek Catholic Church's primary school. The school building was provided for free and substantial local funds were allocated for extra financial support. Alongside Roma Education Fund, CFCF were engaged in advocacy and lobbying against the move, as well as in negotiations with the Bishop of the Greek Catholic Church, but to no avail, therefore the only tool remained was the litigation which resulted in the final judgment on declaring that it was an unlawful segregation and that the school has to be closed down.

During the trial, Zoltán Balog, Minister of Human Resources in the Hungarian National Government, also responsible for education, have appeared at court as witness supporting the

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<sup>1</sup>For the background see CFCF press release (in Hungarian):

<http://cfcf.hu/hu/sajtoszoba/sajtokoezlemenyek/310-a-cfcf-reagal-az-emmi-koezlemenyer-sajtokoezlemenye.html>

Greek Catholic Church which reopened the segregated school and the Minister declared his support for „segregation with love.” The Minister stated that what the church did was not segregation, but it provided social catch-up for its students. He therefore made a distinction between „good segregation” and „bad segregation”, although under the law only „bad”, thus unlawful segregation exists. The Minister did not accept the first instance Court’s ruling, nor did he agree with the second instance decision: on the day of the second instance Court decision, the Ministry have issued a statement promising that it will try to find the way which makes it possible to exempt schools similar to the one in the trial from the ban on segregation.<sup>2</sup>

In less than two weeks after the final judgment was delivered, **the Government proposed a modification of the Public Education Act (Proposal nr. T/2085., point Z, section 5, paragraph 27), which would authorize the Government to decide through government decree on the exemptions from the ban on segregated education.**

**According to the undersigning organisations the proposed amendment is clearly contrary to the Racial Equality Directive and the Fundamental law of Hungary.**

## **2. The proposed amendment is in breach of European Union Law**

Under EU law, the Race Equality Directive (Council Directive 2000/43/EC, RED) explicitly prohibits discrimination in the access to education on grounds of racial and ethnic origin. The RED has been transposed into Hungarian law, and discrimination based on ethnicity is banned under domestic legislation, including the fields of education.

In the field of education the RED allows only one exemption for difference treatment, when it is applied as positive (affirmative) measures „to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.” (Article 5 of the RED)

Positive measure shall only mean specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

The so called “remedial” education which was the main argument for justifying the school in Nyíregyháza, and which could be introduced by the amendment does not comply with Art. 5 of the RED.

The scope, the aim and the content of the remedial education is not defined in an act of law, it is uncertain exactly who and to whom should be remedied. As far as practice is concerned (e.g. the Nyíregyháza case) remedial education does not reflect disadvantages linked to race or ethnic origin, but it is only referred to as an excuse for racial segregation.

## **3. The amendment can serve the legalization of segregated catch-up education of Romani and socially marginalized children**

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<sup>2</sup><http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/szocialis-ugyekert-es-tarsadalmi-felzarkozasert-felelos-allamtitkarsag/hirek/sajtokozlemeny>(in Hungarian)

The Ministry of Human Resources issued a press release reacting on the binding court decision regarding the above mentioned case in Nyíregyháza on November 6, 2014:

*„The case of the school in the Huszár settlement calls our attention at the necessity to examine what kind of legal options are available to allow the operation of such schools which help the catching up of marginalized children creating more opportunities for them”* thus helping their successful future integration.

The reason behind the amendment is therefore clearly stated by Minister Balog: to allow the operation of Roma-only schools which provide this undefined social catch up.

According to the current Proposal for the Modification of the Public Education Act a government decree will be able to dilute the conditions for the organization and operation of religious or ethnic schools, which are now defined in section 2, paragraph 28 of the Equal Treatment Act.

Section 2 paragraph 28 of the Equal Treatment Act details the few exemptions from the ban on segregation. According to current ruling it is not banned to educate children separately based on ethnicity, gender and religion **if it is upon the parents’ request and free decision, provided that the goal, schedule and content of the studies justify segregated setting and that it is of no disadvantage for the students.**

The Courts have stated that it is impossible to reach social inclusion by segregation and all available scientific studies and research prove that for the integration of socially marginalized, mostly Romani children, it is necessary to educate them together with their majority peers.

**The amendment therefore would allow the Government to add further exemptions in a governmental decree to segregation, and include e.g. catch-up education as a justification for segregated setting.**

#### **4. Restricting a fundamental right by government decree**

The right to equality before law and the right to non-discrimination is not only protected under EU law, but under domestic law. Currently the prohibition of discrimination guaranteed in the Fundamental Law of Hungary is elaborated in law, the Act CXXV. of 2003 on Equal Treatment and the Promotion of Equal Opportunities. It is elaborated in law, which is the second most highest level legal document after the Fundamental Law, more primary than government decrees or Parliament decisions. **The current proposal for the amendment of the Public Education Act could give legal authorization for the Government to realize what Zoltán Balog has promoted in several press statements: segregated catch-up education for Roma children.**

In the Fundamental Law under Chapter „Freedom and Responsibility” (Article I paragraph 3) we read „(3) The rules for fundamental rights and obligations shall be laid down in an Act and fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

**The Proposal (Point Z of Section 5 in Paragraph 27 of Proposal T/2085) – given that it would give exemption from the ban on segregation through a government decree – is against the Section of the Fundamental Law regarding the restriction of fundamental rights.**

#### **5. Lack of Public Debate on the Issue**

The amendment proposal submitted to the Parliament without any public debate in the most rapid fashion is a direct response to the binding court decision in the case of the Huszár-settlement school: the Government will be able to grant further exemptions from the ban on segregation (by elaborating on the current exemptions) through government decrees.

The Government did not inform the self-governments of the various nationalities in Hungary, nor did they inform the relevant NGOs about the proposal. The Government released the proposal on November 18, appointing Zoltán Balog as minister responsible. On November 24 the Proposal was discussed in the Committee of Hungarian Nationalities and on November 25 it was already submitted to Parliament for general debate. There was no public debate on the issue, no opinions were asked from expert groups and NGOs, which would be necessary for the possible introduction of an educational model contradicting European and Hungarian constitutional regulations.

**In the organisations view' thus the Government and the responsible Minister violates Act CXXXI of 2010 on Public Participation in Developing Legislation (Point a) section 1 of paragraph 5), according to which proposals for law and their justification have to be released for public debate.**

We therefore urge the European Commission to make its view on this matter public and to remind the Hungarian Government to adhere to their obligations and take steps to prevent these violations of fundamental rights. The Commission should call on the Hungarian Government to withdraw the proposal to the Education Act in breach of EU and domestic law.

2 December 2014, Budapest