



**The Complaints Board of the
European Schools**

Ref.: 2019-03-D-13-en-1
Original version : FR

**ANNUAL REPORT FOR THE YEAR 2018 OF THE CHAIRMAN OF THE
COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS**

BOARD OF GOVERNORS OF THE EUROPEAN SCHOOLS

Meeting on 9-12 April 2019 – Athens (Greece)



The Complaints Board of the European Schools

ANNUAL REPORT FOR THE YEAR 2018

For the Complaints Board, the year 2018 was marked by:

- changes at the level of its composition and of its Registry (I)
- a slight increase in the number of appeals (II.1)
- a stable percentage in terms of the number of annulments (II.2)

I - Composition, organisation and operation of the Complaints Board

1.

Mr **Eduardo MENENDEZ-REXACH** was elected, in plenary session and unanimously, as Chairman of the Complaints Board (Article 6 of the Statute).

His term of office as Chairman took effect on 1 November 2017 and will end on 30 June 2019.

2.

The Complaints Board is still organised in two sections (Article 12 of the Statute of the Complaints Board), the first now chaired by the Chairman of the Complaints Board, Mr **Eduardo MENENDEZ-REXACH**, and the second by Mr **Andreas KALOGEROPOULOS**.

The seven members of the Complaints Board are assigned to one or other section in rotation, so as to prevent any compartmentalisation between the two formations.

3.

The terms of office of six members were renewed until 21 April 2024 by decision of the Board of Governors of 4 December 2018 (Article 1 of the Statute) – except for the term of office of Mr Aindrias **O’CAOIMH**, which will only need to be renewed in April 2021.

4.

There were also changes in the Registry.

Following the end of the assignment of the administrative assistant in January 2017, the Registry had received temporary administrative support on a part-time basis from a person assigned to the Accounts Unit of the Office of the Secretary-General.

A recruitment procedure was initiated and with effect from 1 June 2018, Mr **Thomas VAN DE WERVE D'IMMERSEEL** joined the Registry as a full-time assistant with a permanent contract.

II – Judicial activity of the Complaints Board in 2018

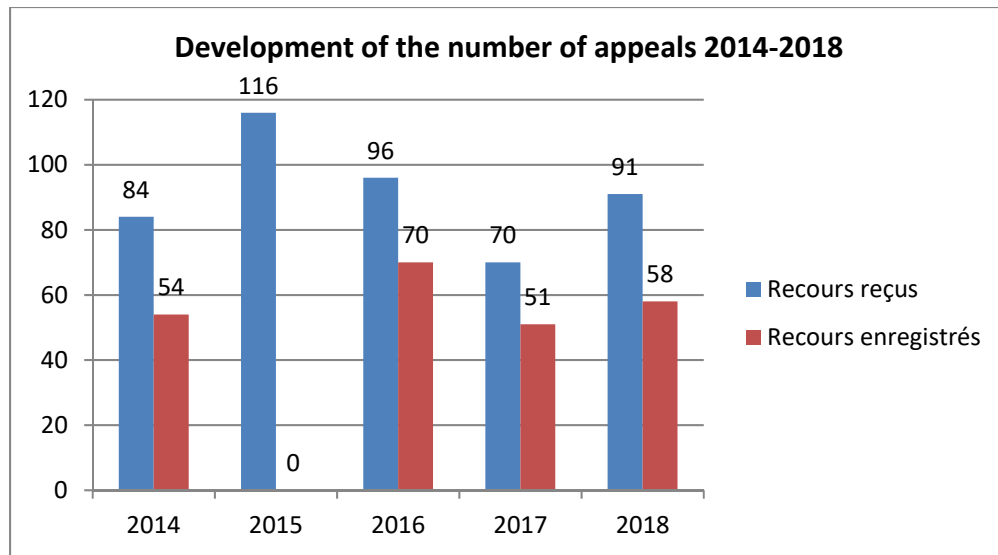
1) Number and categories of appeals registered¹

1.

The year 2018 was marked by a **slight increase in the number of appeals** lodged with the Board: 58 appeals (including 2 in summary proceedings) were registered and submitted to the Complaints Board for consideration.

The graph below illustrates the pattern of development of the number of appeals over the period 2014-2018 (the difference between appeals ‘registered’ and appeals ‘received’ being those which were dealt with without being formally registered, following an exchange between the Registry and the applicant, given their manifestly inadmissible and/or unfounded nature):

¹ The figures presented may not correspond exactly to those put forward in the Annual Report of the Secretary-General of the European Schools on account of a slightly different classification of categories of appeals and of a possible lag timewise from one year to the next (the administrative appeal is dealt with during year N and the contentious appeal during year N+1).



Appeals received
Appeals registered

2.

As in previous years, appeals lodged direct against decisions of the Central Enrolment Authority for the Brussels European Schools remained the most numerous.

Most of the ‘CEA appeals’ concern either determination of the language section at the time of enrolment (Article 47(e) of the General Rules of the Schools) or the taking into consideration of health problems to secure a place in one school rather than another, this being an “*essential measure for the treatment of the condition from which the person concerned suffers.*”

The other contentious appeals were lodged after rejection of a prior administrative appeal to the Secretary-General of the European Schools. They broke down, in descending order in number, as follows:

- appeals against Class Council decisions;
- appeals lodged by members of the teaching staff (seconded or locally recruited teachers);
- appeals against decisions relating to the enrolment or the school fees of category III pupils;
- appeals concerning application of the specific rules of the European Baccalaureate;
- appeals seeking review of decisions;
- and, finally, appeals in the disciplinary area.

Amongst the atypical appeals lodged in 2018 the following are to be noted:

- an appeal against refusal of access to Irish language (ONL) courses;
- an appeal against the effects of the latest Policies on Enrolment in the Brussels European Schools on composition of the nursery classes of the English section at the Brussels III School;
- an appeal against the decision to open a Spanish section at the European School, Frankfurt.

3.

It should be emphasised, moreover, that the Complaints Board's activity cannot be reduced to figures or statistics on the number of appeals lodged and dealt with.

Other aspects of its activity need to be highlighted here:

- a) The Complaints Board regularly analyses the case law of the Court of Justice of the European Union in order to take account in its own decisions of the general principles of law recognised within the Union.
- b) It also takes care to publish and summarise its case law so as to ensure its coherence; case law that is relatively consistent and accessible via the database allows the organs of the European Schools to learn from it (the European Schools' bodies do, moreover, draw lessons from certain decisions delivered by the Complaints Board) and allows applicants to scrutinise it before lodging an appeal in order to evaluate their chances of success. Updating of this database is essential and contributes to maintaining the number of appeals within reasonable proportions and to dealing with them with an appropriate and efficient tool.
- c) The Complaints Board deals administratively (without formal registration) with appeals that are manifestly inadmissible or unfounded, which do not, therefore, appear in the statistics and which are settled without the Schools even being informed. The Board deals in this way in particular with complaints over which it does not have jurisdiction: civil or criminal liability, bullying, recruitment of teachers, questions concerning the management of daycare and after-school centres or school transport, content of textbooks, etc.
- d) The revision of translations: this represents a substantial workload – which cannot be seen from the figures and statistics – for the Registry and the members of the Complaints Board concerned. The reason is that the translators made available to the Complaints Board are not generally lawyer-linguists and, with exceptions, they do not have a command of legal language and/or of the terms specific to the regulations applicable in the European School system. This question, already raised in previous annual reports, is still an issue.

- e) The introduction of the measures required to comply with the GDPR (data protection).

2) **Decisions delivered by the Complaints Board in 2018**

1.

In accordance with the provisions of the Rules of Procedure of the Complaints Board, the different appeals were investigated and ruled on, depending on the cases, by decisions delivered in proceedings with the written submissions of the parties followed by a hearing, by decisions delivered in proceedings with the written submissions of the parties, but not followed by a hearing, by reasoned decisions or orders without the submissions of the parties, by interim orders or by orders to remove cases from the register.

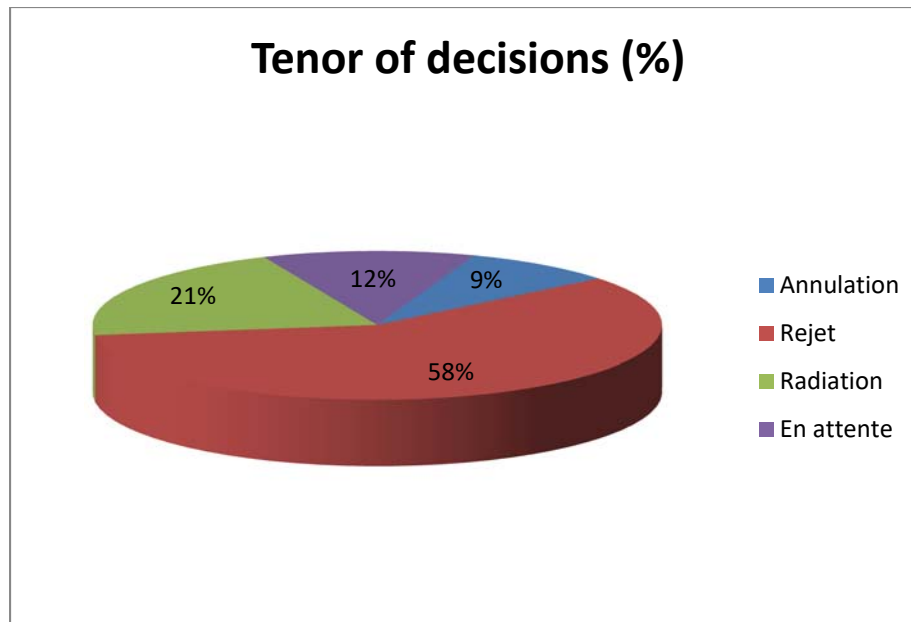
To investigate and rule on the 2018 cases, the Complaints Board held **three hearing sessions (in May and October 2018 and in January 2019)**. The other cases were considered *without a hearing*, as allowed by Article 19 of the Rules of Procedure, in so far as decisions of principle in similar cases could be used as a benchmark.

Use was also made of the possibility of having several appeals heard and ruled on by a **single judge**.

Finally, it should be noted that two applicants made use of the internal referral mechanism introduced in May 2016.

2.

The graph below illustrates the proportions in which appeals were **allowed** (annulment of the decision adversely affecting the applicant(s)), **dismissed** (after investigations or by reasoned decision) or **removed from the register** following a withdrawal or a negotiated solution which had made the appeal devoid of purpose:



Annulment
Dismissal
Removal from the register
Pending

The figures for 2018 show a **stable annulment percentage** (9% in 2018, compared with 8% in 2017 and with 9% in 2016), subject to the five decisions pending.

In addition, there were some removals from the register because there was no need to adjudicate, or because of withdrawal, in so far as the parties had reached an agreement, implicitly or explicitly. Those removals from the register are annulments that are not visible in the figures but are the reflection of an equally favourable outcome for the applicant.

3.

Amongst the most **interesting decisions** delivered by the Complaints Board during the year 2018, some deserve to be mentioned.

➤ **Amongst the decisions resulting in annulment, mention can be made of the following:**

. In its **decision 18-01 of 25 June 2018**, the Complaints Board allowed an appeal against the decision of the management of the European School, Brussels I no longer to allow the applicants' daughters to have **access to Irish ONL (Other National Language) courses**. As regards the appeal's admissibility *ratione materiae*, the Board considered, on the basis of the right to effective legal redress, that *"the plea of lack of competence entered against this appeal by the European Schools must be dismissed, since the appeal concerns the right to be enrolled in Irish ONL courses, which right comes into existence at the time of enrolment in the European Schools and which, as*

a result, can be the subject of an administrative appeal and, if need be, of a contentious appeal, pursuant to Articles 50a, 66 and 67 of the General Rules of the European Schools, under the conditions laid down therein, which are applicable by analogy.”

As regards the substance, the Complaints Board considered that the applicant’s daughters derived their right to take Irish ONL courses from the regulations applicable at the time of enrolment and that having always continued to take those courses notwithstanding the change to the access conditions, which entered into force in 2014, the new condition (enrolment in the Anglophone section) did not apply to pupils who had taken the course previously without being enrolled in the Anglophone section. The Board further concluded that: “... *the lack of individual notification, the lack of a transitional measure when the new rules were adopted in 2014, the subsequent attitude adopted by the school – which allowed the applicant’s daughters to continue with Irish ONL classes at school as had been the case prior to entry into force of the new access conditions – and the reservations associated with the logistical timetabling constraints mean that it can be concluded that the condition of enrolment in the Anglophone section was never applicable to the situation of the applicants’ daughters.*” .

. In its **decision 18-04 of 27 September 2018**, the Complaints Board examined the question as to whether the **maternity leave** provided for by Article 42.1 of the Regulations for Members of the Seconded Staff should be suspended or not during the school holidays determined in Article 39.2 of those Regulations.

The Complaints Board allowed the appeal, **applying the general principles of law** commonly accepted and of the **case law of the Court of Justice of the European Union**: “*The principles applicable are the right of workers to paid annual leave and **the protection of women during and after pregnancy**, which are indisputable principles in the legal system of the Member States that are signatories to the Convention defining the Statute of the European Schools, as is **the principle of equality between men and women**; that principle, which is one of the pillars of the European Schools’ legal system, as well as that of the Union and of its Member States, is applicable in the case in point, where the comparison should not be with European Union officials, who are governed by their Staff Regulations, but with the rest of the teaching staff: the women teachers in a European School, as is the case here, who intend to take maternity leave are **discriminated against in relation to the other teachers** (men teachers and women teachers who are not on maternity leave) if, as is the practice in the Schools, the length of maternity leave competes with the school holidays; in other words, the Schools’ administration creates discrimination by shortening the length of the school holidays of women teachers on maternity leave.*”

. In its **decision 18-12 of 11 July 2018**, the Complaints Board allowed the appeal, concerning **determination of the language section** at the time of enrolment (Article 47(e) of the General Rules), pointing out that pedagogical assessment of the results of language tests is a matter for teachers – whom neither the CEA nor the Complaints Board can supersede – subject, however, to judicial review, concerning a possible manifest error of assessment or a breach of the procedural rules for assessment of the child’s mother tongue/dominant language, which must be carried out with due regard for the principle of sound administration, something which had not been the case here.

. In its **decision 18-19 of 2 August 2018**, the Complaints Board annulled a decision of the Central Enrolment Authority, on the ground that it had been taken on an inappropriate legal basis (namely Article 8.4.3. of the Enrolment Policy, a provision relating to medical complaints): in this case, the parents did not justify their request by the state of health *of the sister* of the child whose enrolment had been applied for but by the heavy workload that treatment of the sister's serious illness involved and that had an impact on the whole family's life. It was therefore the general rule laid down in Article 8.4. of the Enrolment Policy that was applicable in this particular case, the said rule allowing priority to be granted when a) the exception is made in the child's best interest, b) there are duly justified particular circumstances and c) these particular circumstances are beyond the control of the applicant or of the child.

. Finally, in its **decision 18-21 of 2 August 2018**, again concerning **determination of the language section at the time of enrolment** (Article 47(e) of the General Rules), the Complaints Board reiterated the principles, namely that parents are not free to choose the dominant language, that the decision is taken by the School's Director on the basis of comparative language tests and of the information provided by the child's legal representatives on the enrolment form and that the Director must also take account of the particular circumstances of the case when they are duly justified. It went on to annul the disputed decision, on the ground that the Director had not taken account of the particular circumstances invoked by the family, namely the absence of the father of the child, who would therefore be unable to benefit from help and support from the only person in the family who is a native speaker of Italian.

➤ **Amongst the decisions rejecting the applicants' claims, mention can be made of the following:**

. In its **decision 18-03 of 20 March 2018**, the Complaints Board restated its case law (in particular its decision 10/02) on the subject of **judicial review of the legality of general and regulatory acts**. It thus dismissed as inadmissible, on grounds of the applicant's having no legal interest in bringing an action, an appeal whereby the applicant was not bringing an action against a disciplinary measure affecting him personally (and against which he could have lodged a contentious appeal after all the administrative remedies had been exhausted), but was calling into question before the Complaints Board the legality of the provisions of the General Rules relating to disciplinary measures.

The Board thus pointed out that it had *“been given jurisdiction to review the legality of regulatory provisions only incidentally, i.e. by means of an objection of illegality raised by the applicant when contesting the legality of the act which affects his or her legal position and which was adopted pursuant to those provisions”* and that it was not competent *“to amend the General Rules or to initiate such amendments, that competence lying with the Board of Governors within the framework of an amendment procedure which, by definition, is a step of a legislative and regulatory nature (and not of a judicial nature).”*

. In its **decision 18-27 of 20 August 2018**, the Complaints Board considered an appeal concerning determination of the language section on enrolment (Article 47(e) of the General Rules) and restated its case law on the subject: choice of the language section is not solely a matter for parents but must result from a pedagogical assessment made in the child's interest. This pedagogical assessment is a matter for the teachers, whom neither the CEA nor the Complaints Board can supersede, unless there has been a manifest error of assessment or a breach of the procedural rules established for the carrying out of tests (non-existent in the case in point).

The Complaints Board also considered the applicants' argument based on separation of the siblings as a consequence of their younger daughter's being in a language section different from that of her older sister and found as follows: *"The European Schools must take account of each pupil's best interests, including his or her academic development, ensuring that he or she is educated in a language of which he or she has a sufficient command to keep up successfully with the curriculum. Thus, in the same group of siblings, there can be children in different language sections because of their objectively different pedagogical situations and backgrounds."*

. In its **decision 18-38 of 28 September 2018**, the Complaints Board dismissed as unfounded an appeal concerning the applicant's results in the **Baccalaureate examinations**, which, he claimed, had taken place in disregard of the special arrangements for which he qualified on account of his learning difficulties. Following thorough analysis of each factual allegation in relation to the documents produced by the parties, the Complaints Board deemed that this disregard had not been established to the requisite legal standard, in the absence of any objectively verifiable elements. The Board pointed out in that connection that *"It is indeed up to the person invoking a procedural irregularity to justify it by producing all evidence or by relying, at the very least, on a set of concordant items of evidence of such nature as to make the reality of that irregularity plausible."*

It also pointed out that *"the choice of questions and assessment of the answers given by students is a matter, pedagogically speaking, solely for the teachers and examiners, whom the Complaints Board cannot supersede."*

. In its **decision 18-40 of 22 August 2018**, the Board restated its settled and consistent case law, which holds that **category III pupils** may benefit from the education provided by the European Schools only within the limits set by the Board of Governors and that highly restrictive and cumulative conditions imposed for category III pupils' access to the Brussels European Schools in particular are justified by objective considerations. The European Schools are thus not obliged to admit all category III pupils in order to provide them with an education in their mother tongue in the absence of another school network meeting the needs of their linguistic situation.

. In its **decision 18-45 of 21 September 2018**, concerning an appeal seeking annulment and a compensatory remedy against a **Class Council** decision refusing the pupil's promotion to the year above, the Complaints Board pointed out that "*However regrettable might be certain shortcomings in the school's day-to-day operation, (...) and in particular the lack of sufficient information for parents and their difficulties in communication with the teachers, something which requires greater and constant vigilance on the part of the managements of the ES (...) they cannot be regarded as manifest errors constituting procedural irregularities (...).*"

The Board pointed out especially that "*weighting of the elements taken into consideration in determining the final mark is left to the teacher of each subject concerned, **who exercises his or her discretion in so doing**, and is dependent on his or her strong belief about each pupil's abilities*" and that the Class Council has sole discretionary power in respect of assessment of the particular circumstances referred to in Article 61.B.5 of the GRES (designed to allow a pupil's promotion to the year above, even though he or she has not acquired the competences required for that purpose), and is not open to appeal.

* *

By way of conclusion, attention should be drawn here to the fundamental role of the Complaints Board, the sole tribunal specific to the *sui generis* European School system – and to Accredited European Schools as far as the European Baccalaureate is concerned – whose difficult mission, justifying its legitimacy, involves reviewing on its own the legality of acts of the different organs of the European School system and ensuring respect for the right to effective legal redress.

It ensures, with rigour and independence, effective respect for the rights of litigants (teachers, pupils and parents, but also the decision-making organs of the European Schools) in the system, taking care to ensure that in all circumstances they are afforded "adequate legal protection", as intended by the Convention defining the Statute of the European Schools.

In that connection, the members of the Complaints Board are committed to respecting it as the judicial organ of the European School system: respect for its members, for the staff of its Registry and for its decisions.

Even though they are able to put things in perspective, they can be concerned about sometimes strong reactions on the part of parties dissatisfied with the decision delivered or even of third parties who take a position on a decision without being fully cognisant with the ins and outs of the case, not having participated in the *inter partes* proceedings.

It is therefore worth drawing attention to the fact that by scrupulously discharging the mission assigned to it by the Convention defining the Statute of the European Schools, i.e. to provide adequate legal protection by ruling completely independently on the legality of the acts which it is expected to review, the Complaints Board contributes actively to the smooth operation of the *sui generis* European School system.

That means that the Complaints Board relies on the necessary assistance of the authorities of the European Schools in general and of the Secretary-General in particular, so that it can continue to discharge its mission under proper conditions.

In concluding this report, the Chairman of the Complaints Board wishes to thank publicly his colleagues and the members of staff of the Registry for the diligence which, as is the case each year, they showed during the year 2018. Their ready availability at all times enables the Board to carry out its mission, with due regard for the principle of continuity of public service.

Brussels, March 2019

Eduardo MENENDEZ-REXACH
Chairman of the Complaints Board