



**The Complaints Board of the
European Schools**

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**ANNUAL REPORT FOR THE YEAR 2019 OF THE CHAIRMAN OF THE
COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS**

BOARD OF GOVERNORS OF THE EUROPEAN SCHOOLS

Meeting on 15-17 April 2020



The Complaints Board of the European Schools

ANNUAL REPORT FOR THE YEAR 2019

For the Complaints Board, the year 2019 was marked by:

- an appreciable increase in the number of appeals (II.1)
- the emergence of new kinds of dispute:
 - consideration of cases of *force majeure* invoked in the event of non-compliance with the phases for enrolment in the Brussels Schools, which is sanctioned by outright rejection of the belated enrolment application, regarded as inadmissible (II.1.2.4)
 - requests for a change of language (L1 and L2) in mid-schooling (II.1.3)
- more frequent involvement of lawyers (II.1.4)
- a still stable percentage of annulments (II.2)

I - Composition, organisation and operation of the Complaints Board

1.

Mr Eduardo MENENDEZ-REXACH continues to preside the Complaints Board; he was re-elected as Chairman until 30 June 2022.

2.

The Complaints Board continues to be 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). Only the term of office of Mr Aindrias Ó CAOIMH will need to be renewed in April 2021.

4.

There were no changes in the Registry.

II – Judicial activity of the Complaints Board in 2019

1) Number and categories of appeals registered¹

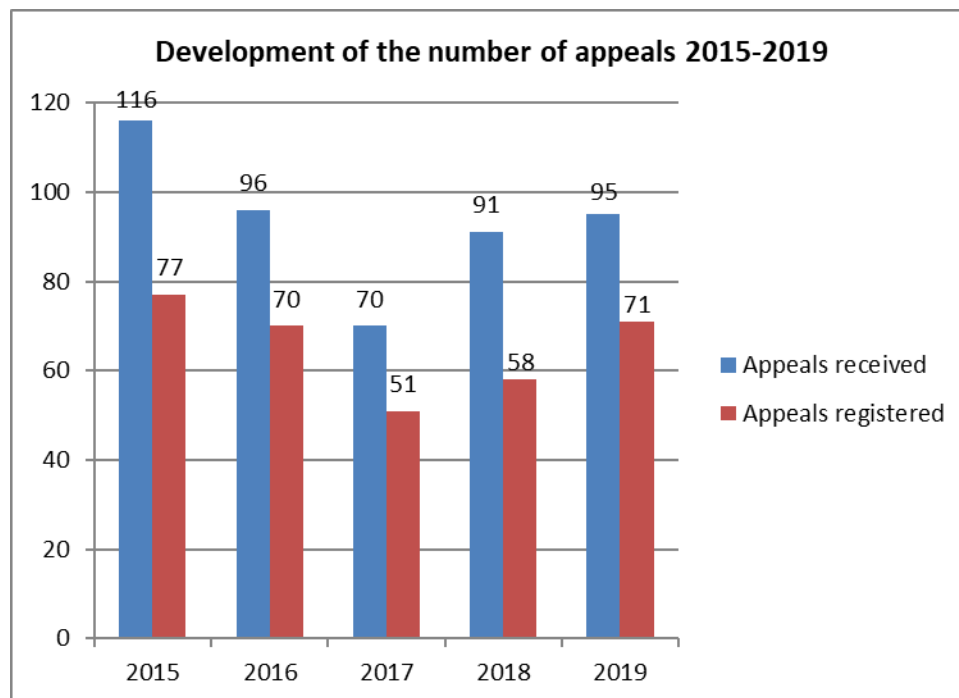
1.

The year 2019 was marked by an appreciable increase in the number of appeals lodged with the Board: 71 appeals (including 8 in summary proceedings) were registered and submitted to the Complaints Board for consideration.

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 firstly, of a slightly different classification of categories of appeals and secondly, 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).

The graph below illustrates the pattern of development of the number of appeals over the period 2015-2019.

Appeals ‘received’ are those dealt with without being formally registered, following an exchange between the Registry and the applicant, given the manifestly inadmissible and/or unfounded nature of the appeal.



2.

As in previous years, appeals lodged direct against decisions of the Central Enrolment Authority for the Brussels European Schools (hereinafter referred to as the CEA) remained the most numerous.

2.1

The disputes continued to concern the language section determined at the time of enrolment (Article 47(e) of the General Rules of the Schools) and the taking into consideration of health problems to secure a place in the first-choice school as a pupil with priority.

2.2

A reduction is to be noted in appeals against refusals of category III pupils' enrolment (only one appeal in 2019).

2.3

Furthermore, even though successive Enrolment Policies have for years ruled out both the geographical argument (travel between home / school assigned / parents' place of work) and the constraints involved in the organisation of travel and of family life, and despite the Complaints Board's settled and consistent case law, which points out that they are not priority criteria, appeals are still being lodged, highlighting the (very) long journeys between the child's home and the school assigned and the ensuing consequences: excessive tiredness (especially for the youngest children), loss of time (time that cannot be devoted to studies, to extra-curricular activities or to sleep) and environmental considerations (pollution, wasted energy, green mobility more difficult to put into practice).

2.4

Finally, the emergence of a new type of dispute in 2019 is to be noted: consideration of cases of *force majeure* invoked in the event of non-compliance with the phases for enrolment in the Brussels Schools, which is sanctioned by outright rejection of the belated enrolment application, regarded as inadmissible (Articles 2.5 to 2.7 of the 2019-2020 Enrolment Policy).

The CEA does not, then, allocate any place in any school, even though the applicants have a right of access to the European Schools as officials of the institutions (category I).

In some cases, parents have alternatives (Belgian schools, *Deutsche Schüle*, British School or staying at the current school) but in other cases they do not. The right to education and the principle of proportionality are then at issue.

Eight appeals of that nature were lodged with the Complaints Board in 2019. They were all dismissed, with the exception of one agreement and one withdrawal, leading to their removal from the register.

Amongst those dismissal decisions, the following decisions can be highlighted:

In its **decision 19-32 of 23 August 2019**, the Complaints Board established the principle that it is the parents' responsibility to show due diligence, taking all necessary precautions to ensure that the application file is submitted by the deadlines set by the Enrolment Policy.

“Following the applicants' line of reasoning (i.e. allowing them to claim a case of force majeure only for the sole day that they chose) would enable the parents concerned to very easily evade the rules requiring all applicants for enrolment to comply with strict deadlines and sanctioned as laid down in Article 2.5.”

“The applicants have not proven, to the requisite legal standard, that they were “in an objective situation beyond their control preventing them from submitting their application during the first phase.”

“The fact of having missed the first phase deadline is the result of their decision to submit the

application file on the last day of the time period allowed, a decision that is strictly personal, associated with the organisation of their professional and/or personal lives, taken on their own initiative and of their own free will. In that case, the applicants cannot claim, to mitigate the negative consequences of their decision, that they are entitled to avail themselves of the derogation provided for in Article 2.7 of the Enrolment Policy for the day of 1 February 2019 alone.”

That decision also enabled it to be underlined that *“the organisation of enrolments in two phases and the setting of strict deadlines for the submission of applications constitute essential measures for the smooth operation of the Brussels European Schools that are reasonable and proportionate.”*

In its **decision 19-39 of 29 August 2019**, the Complaints Board also considered that it *“is up to applicants claiming a case of force majeure to justify submission of their application file during the second phase, to provide evidence, at the time of this submission, of the reality of purely objective events, beyond their control, of such a nature as to indisputably prevent them, contrary to the wish of the persons concerned at that point in time, from submitting the application during the first phase. It should be pointed out, in this connection, that the legality of an administrative decision is assessed at the time when it was taken, according to the elements of which the administrative authority was aware or was supposed to be aware at that time.”*

Finally, in its **decision 19-44 of 12 September 2019**, the Complaints Board considered that:

- *force majeure “is characterised, according to the settled and consistent case law of the Court of Justice of the European Union, by the emergence of unusual and unforeseeable circumstances, beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised (see, for example, judgment of the CJEU of 5 February 1987, case 145/85, Denkavit v Belgium). An event or a situation that might be the result of an action or intentional inaction on the part of people who intend to rely on it as being a case of force majeure cannot therefore be regarded as such.”*
- *“the rules of the 2019-2020 Enrolment Policy, particularly those relating to the time periods and deadlines for enrolment, are clear and available through a number of channels.”* The argument based on the inadequacy of the system of information for parents cannot be sustained, given all the official sources of information.
- *“All parents wishing to enrol their child(ren) in the European Schools, or in other schools incidentally, must ensure that they take the administrative steps necessary, whilst also performing the occupational and family tasks required.”*

That case law therefore clarifies the concept of *force majeure* and the conditions under it may be invoked.

3.

The other contentious appeals submitted to the Complaints Board 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 refusals of a change of Language 1;
- appeals associated with the opening of a Lithuanian section at the European School, Luxembourg I;
- appeals against Class Council decisions (repeating a year);
- appeals lodged by members of the teaching staff (seconded or locally recruited teachers);
- appeals against disciplinary decisions;
- appeals against refusals of a change of Language 2;
- and, finally, appeals against decisions taken by the European Baccalaureate Examining Board.

Amongst the ‘atypical’ appeals lodged in 2019, the following are to be noted:

- an appeal against a Director’s decision to place a pupil in an English L2 class whose level was considered by the pupil’s parents to be below their child’s linguistic abilities;
- an appeal against a Director’s refusal to change a pupil from one teacher’s class to another teacher’s one (same course, same number of teaching periods).

4.

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 activities need to be highlighted here:

- a) The complexity of the pleas in law put forward by applicants in support of their appeals, in particular when they are assisted by a lawyer – something which was more frequently the case in 2019 – leads to a substantial amount of work: the arguments are more detailed and complex and require the members of the Board to engage in a considerable amount of work involving analysis and searching for case law, particularly that of the Court of Justice of the European Union, in order to take account in their decisions of the general principles of law recognised in the European Union.

- b) The Board 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 has to deal in this way with complaints over which it does not have jurisdiction: civil or criminal liability, bullying, bad management, teachers' teaching skills, questions concerning the management of day care and after-school centres or school transport, 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, often raised in previous annual reports, is still very much an issue.
- e) The introduction of the measures required to comply with the GDPR (personal data protection).

2) **Decisions delivered by the Complaints Board in 2019**

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.

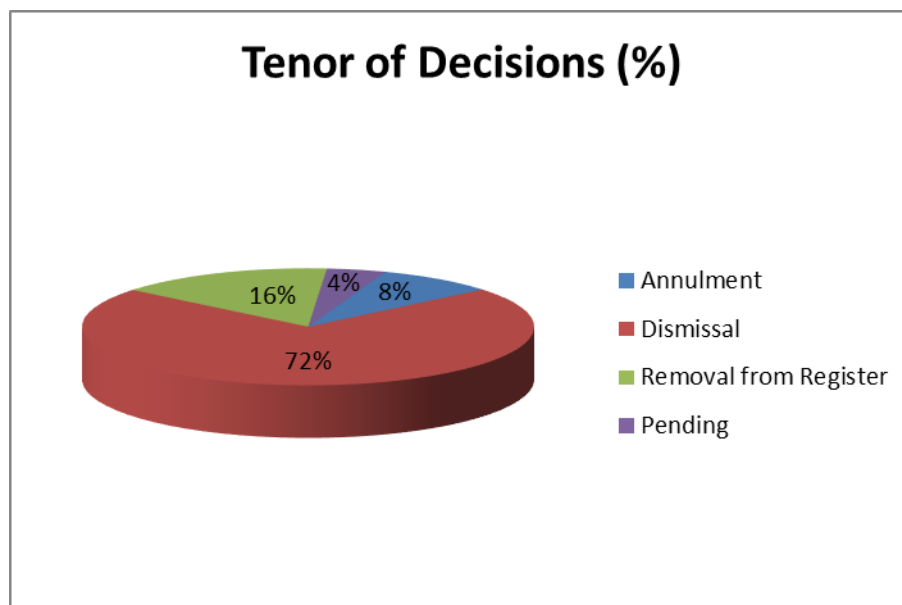
To investigate and rule on the 2019 cases, the Complaints Board held three hearing sessions. The other cases were considered *without a hearing*, as allowed by Article 19 of the Rules of Procedure, in so far as decisions of principle in similar cases could be used as a benchmark.

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 only one applicant made use of the internal referral mechanism put in place 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:



The figures for 2019 show a **stable annulment percentage** (8% en 2019², compared with 9% in 2018 and 8% in 2017), subject to the three 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.

In any event, the Complaints Board is a place where litigants are listened to carefully and many of them often say that they are pleased to have had the opportunity to express their views and to be heard and to have received answers to their questions.

² This percentage was calculated on the basis of all the appeals registered with the Complaints Board (71). On the other hand, if all the cases investigated are considered, the annulment percentage rises to 15%.

3.

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

3.1 Decisions resulting in annulment

- **In the disciplinary area**

In its **decision 19-15 of 26 August 2019**, the Complaints Board allowed an appeal against a disciplinary decision, in the name of the principle of proportionality, considering in the case in point that *“expulsion from the school, is disproportionate in relation to the seriousness of the breaches actually established and in relation to the limits of what is necessary and appropriate from an educational and training viewpoint.”*

It also pointed out in this connection that *“there is a need to proceed carefully and without prejudging the outcome, in such a way as to ascertain the facts and find decisive evidence and to establish proof, which is a necessary requirement; exculpatory facts must also be sought and established.”*

It should be noted that a disciplinary measure, less severe but nevertheless contested by his legal representatives, was imposed on another pupil involved in the same incident; in that particular case, the Complaints Board dismissed the appeal (**decision 19-16 of 19 December 2019**), considering that the principle of proportionality had been respected, since *“the presumption of innocence was overturned by the evidence provided”* and *“(…) the difference in treatment is objectively justified in the light of the circumstances of each case.”*

In connection with that appeal, the Complaints Board looked at Article 42(a) of the General Rules of the Schools, which lays down that *“All disciplinary measures from detention onwards shall be entered in the pupil’s personal file and kept for a maximum of three years.”*

It thus emphasised that *“In applying this rule, the principle of proportionality must also be respected: the Board considers that the School should adapt the length of the disciplinary measure’s entry in the pupil’s personal file to the nature and severity of the disciplinary measure taken, taking account of the fact that the maximum period is three years and that the disciplinary measure imposed in this particular case is not too severe.”*

Those two decisions provide a good illustration of the fact that the Complaints Board exercises its power of review of the legality of decisions taken in the light both of the regulatory texts governing the European Schools’ *sui generis* system and of the general principles commonly accepted and of the case law of the Court of Justice of the European Union (principle of proportionality and rights of the defence in these particular cases).

- **Concerning the Central Enrolment Authority**

By its **decision 19-18 of 8 August 2019**, the Complaints Board allowed the appeal against a CEA decision, considering that the child *"(...) finds herself in a particular situation causing psychological fragility associated with the treatment of her condition and which requires, in addition to strict paediatric and ophthalmic monitoring, permanent wearing of corrective glasses, doing without which, in the event in particular of loss or breakage, obviously necessitates emergency support. In such a context, the calling into question of her specific treatment and of the minor improvements observed in her vision and her behaviour would have unacceptable consequences and would therefore impose disproportionate constraints on her. This situation consequently requires there to be a journey that is as short as possible and appropriate support. The distance between the child's school and her home therefore necessarily needs to be borne in mind in assessing how the said treatment is to be provided. It follows from all those considerations that in the light of the particular circumstances as they emerge from the file, the enrolment of the applicants' daughter in the European School closest to her home can be regarded, within the meaning of the aforementioned provisions of Article 8.4.3. of the Enrolment Policy, as an essential measure for the treatment of the condition from which she suffers."*

By its **decision 19-24 of 20 August 2019**, the Complaints Board allowed the appeal against a CEA decision refusing to accept the medical circumstances invoked for the granting of a priority criterion, considering that *"Even though the legality of an administrative act is assessed at the time of its enactment, it should be acknowledged that in the presence of the particular circumstances invoked at the time of submission of the enrolment application, and explained in the letter dated 30 January 2019 included in the enrolment application file and accompanied by medical certificates of 18 and 22 June 2018, the CEA could have invited the applicants to provide it with more explanations about this state, in order to be able to gauge its real seriousness, given that they had already produced a set of items of information that, although inadequate taken individually and examined without relating them one to the other, nevertheless, taken as a whole, provided indications of a seriously impaired state of health likely to constitute a particular circumstance justifying a priority criterion for admission to a specific school."*

- **Concerning application of the European Baccalaureate rules**

By its **decision 19-38 of 28 November 2019**, the Complaints Board allowed the appeal against a decision of the European Baccalaureate Examining Board imposing a punishment on a student for attempted cheating in an oral examination.

The Complaints Board first reiterated the fundamental principles and rights of the European Union, recognised by the Court of Justice of the European Union, such as the right to effective legal protection and observance of the rights of the defence of any person in a procedure, both judicial and administrative, that may lead to an act adversely affecting him or her (right to be heard, presumption of innocence, investigation of incriminating and exonerating evidence, in particular).

As regards the substance, the applicant invoked an infringement of the principle of proportionality on account of the excessively harsh nature of the punishment imposed on her on the basis of Article 9.2. of the Baccalaureate Regulations.

The Complaints Board considered that the decision to award the mark of 0 out of 10 to the applicant was taken as a result of an error of law, in so far as the administrative authority had deemed it to be the *mandatory* minimum punishment in the event of attempted cheating:

"The reason is that it should be noted firstly, that this provision lays down that "In the event of (...) attempted cheating, (...) the Chairman of the Examining Board or the Vice-Chairman representing him or the Director of the School's Examination Centre will decide on the measures to adopt", something which indicates conferral of discretionary power with respect to adoption of the punishment, and is the reason why, moreover, the Baccalaureate Handbook warns candidates, on page 26, that in the event of cheating or attempted cheating, they "risk" receiving a mark of 0 and that they may be subject to other disciplinary measures. Furthermore, award of a mark of 0 cannot be mandatory in nature in so far as the European Schools are only empowered to adopt such a measure, and not obliged to adopt it. The reason is that empowerment confers discretionary power (...)."

- **Concerning the opening of a new language section**

Finally, the opening of a Lithuanian language section at the European School, Luxembourg I led to several appeals, lodged by parents who were contesting the automatic admission of their young children, formerly SWALS, to the newly created section.

In the decisions delivered in that connection, the Complaints Board first reiterated the principles:

- In accordance with the eighth paragraph of Article 47(e) of the General Rules, a change of Language 1 can be authorised only for "*compelling pedagogical reasons*", the finding of which is a matter solely for the Class Council.
- As this is a question of a purely pedagogical nature, the Complaints Board has only marginal power of scrutiny over the Class Council's assessment and could only therefore cast doubt upon the Class Council's conclusion because of a manifest error of assessment or a procedural irregularity.
- Finally, the aforementioned eighth paragraph of Article 47(e) must be interpreted in the light of the European Schools' fundamental principle, whereby a pupil in the European Schools is educated in his/her mother tongue/dominant language as Language 1 (L1).

The Board thus developed the following arguments:

" (...) the automatic admission of a SWALS into a new language section within the meaning of that eighth paragraph presupposes that the said pupil's dominant language (L1) corresponds to the language of that new section.

However, the automatic nature of this admission may well, in some cases, involve pupils whose dominant language does not correspond, or no longer corresponds, to that of the new section, in breach of the aforementioned fundamental principle.

In such cases, the presumption based on the items of information in the School's possession, notably the data provided by the parents at the time of enrolment, may be weakened when a pupil's parents provide serious, concrete and coherent new items of information allowing it to be considered prima facie that the SWALS has been automatically admitted to a language section that might no longer correspond to his/her current dominant language.

In such cases, the European Schools are required to conduct a detailed and exhaustive examination of each of those items of information, even organising language tests, in order to check whether or not they give rise to compelling pedagogical reasons making a change of Language 1 advisable, in accordance with the eighth paragraph of Article 47(e) of the GRES, and also to comply with the fundamental principle in question.

Consequently, the decision to refuse a change of Language 1 can be legally well founded only if it contains a statement of the grounds on which it is based reflecting the detailed and exhaustive nature of that examination and which, for that reason, must in particular explicitly justify, for each of the items of information provided by the pupil's parents, why they did not allow the latter's request to be acceded to.

Whilst it is indisputable that in the event of an application for a transfer from one language section to another, the dominant language constitutes, by definition, a decisive pedagogical criterion, it is, however, advisable to consider, in each particular case, whether it also constitutes a compelling pedagogical reason, taking account of each pupil's file as a whole.

Now, for mother tongue/dominant language to become a 'compelling reason' justifying a change of L1, it has to be found that there is a substantial gap between command of the language for which the new section has been created and of that of the vehicular language section to which the child was attached when he/she was a SWALS, so that continuation of education in one or other language is clearly justified. In the case of SWALS, the conclusion of this comparison is obviously more difficult to reach, given that in most cases, their command of the two languages is broadly comparable.

In this context it is worthwhile pointing out that the Language Policy of the European Schools, approved by the Board of Governors at its meeting of 9-12 April 2019, states that "In the European Schools system, the term 'dominant language' is used to refer to the language in which a pupil, at the moment of enrolment in the system is the most proficient, especially in education-related domains of language use, and/or in which the child is most likely to perform well academically, linguistically and emotionally in the course of his/her education in the European Schools System."

On the basis of those principles and of those arguments as developed, the Complaints Board allowed the appeal in one case (**decision 19-45 of 29 November 2019**) and rejected the applicants' claims in the other cases (in particular **decisions 19-48 of 13 December 2019 and 19-50 of 13**

January 2020), according to whether or not the Class Council had examined, in detail and exhaustively, all the relevant information invoked by the parents of the pupils concerned to argue that there were "*compelling pedagogical reasons*" justifying the pupil's not being admitted to the newly created Lithuanian section.

3.2 Decisions rejecting the applicants' claims

Amongst the – more frequent – decisions rejecting applicants' claims, the following deserve our attention.

1.

An important decision was awaited, concerning the new Service Regulations for Locally Recruited Teachers in the European Schools.

In its **decision 18-26 of 19 September 2019**, the Complaints Board first examined the legal situation of Locally Recruited Teachers, subject on the one hand, to a contract and on the other, to working conditions determined by the Service Regulations and which cannot be changed by the parties except in very specific cases, if the Service Regulations so allow.

Drawing on a judgment of the Court of Justice of the European Union, the Board considered that *"This restriction of the freedom of will of the parties to the contract meets the requirements inherent in the general interest represented by the institution (...), which requirements may necessitate modifications or adaptations over time in order to better protect the general interest."* Thus, it accepted *"the principle whereby the legislator can at any time amend the statutory regulation in the interest of the service and adopt in the future rules that are more unfavourable for the subjects concerned, as long as there is no encroachment on existing rights, and, where appropriate, provide for a transitional period with respect to rights whose substance is economic; in other words, officials, other staff and other persons subject to the Regulations are not entitled to retain their status as it existed at the start of their employment relationship, so that in the event of amendment of the general provisions contained in the Service Regulations, a new rule immediately applies to the legal effects of future situations ensuing from the previous rule. In European Union law, this principle has been accepted and reiterated by the case law of the CJEU (for example, judgments of 29 November 2006, Campoli v Commission, T-135/05, of 23 January 2007, F-43/05, of 15 December 2010, Saracco v ECB, F-66/09 and of 29 September 2011, Strobl v Commission, F-56/05, in particular).*

(...)

The principle of good administration, such as that of legitimate expectations, cannot be invoked to call into question the legality of a new regulatory provision, "... particularly in a field whose purpose involves constant adjustments to meet changes in the economic situation (judgments of the Court of First Instance of 7 July 1998, Mongelli et al. v Commission, T 238/95, T 239/95, T 240/95, T 241/95 and T 242/95, ECR-SC p. I A 319 et II 925, points 52-54, and Telchini et al. v Commission, T 116/96, T 212/96 and T 215/96, ECR-SC p. I A 327 and II 947 points 83-85), also applies to the principle of good administration (aforementioned judgment in the case of Rijnoudt and Hocken v Commission, point 104), like that of the civil service, whose purpose involves constant adjustments in the light of changes in the economic situation (Judgment of 23 January

2007, F-43/05, C. v Commission) (Judgment of the European Civil Service Tribunal, 23 January 2007, F-43/05, C. v Commission)."

As regards the substance, the applicant contested the length of the period of notice of which she had been notified in the context of the termination of her contract of employment, calculated by applying the new Service Regulations for Locally Recruited Teachers (2016),) whereas she considered that she was entitled to a period of notice applying Belgian law, or, in the alternative, applying the old Conditions of Employment.

The Complaints Board considered that "(...) even though the contract in question predates the entry into force of the Service Regulations, the right to notice provided for by the arrangements applicable at the time cannot be regarded as an acquired right, since the decisive event for application of the rule, namely termination of the contract, had not yet occurred at the time of that entry into force. In conclusion, the School did not retroactively apply an unfavourable rule at the expense of a right acquired by the applicant, since entitlement to a certain period of notice arises only at the time of termination of the contract, which, if it had been before 1 September 2016, might justify the argument, but being after (13 December 2017), the new arrangements are applicable, these introducing, moreover, an element of equal treatment amongst all Locally Recruited Teachers in that respect, given the diversity of national legislation on the subject."

In addition, the Board had to examine the applicant's alternative application, seeking to have the Service Regulations for Locally Recruited Teachers, which entered into force in 2016, ruled invalid, on account of the infringement of general principles of law (rights of the defence, effective legal protection, legal certainty, infringement of acquired rights, principle of equality and of non-discrimination, principle of proportionality and obligation to state reasons, principles of good administration, of non-discrimination and of equal treatment, infringement of Article 27 of the Charter of Fundamental Rights, absence of social dialogue, infringement of Article 21 of the European Social Charter and of Articles 11 and 12 of the European Charter of Rights).

In that connection, the Board pointed out first of all that it does not in principle have jurisdiction to rule on an appeal seeking annulment of a regulatory act and that it can only annul individual decisions on account of the raising of the plea of illegality of the generally applicable standards on which these decisions are based:

"That possibility, acknowledged by this Board, does not mean that as from the time when an individual act is challenged, the legality of the Service Regulations as a whole can be called into question. What is sought is the invalidity of the individual act on account of the possible finding that the general rule on the basis of which it is applicable might infringe a superior rule of law or a general principle. And, should such an infringement be found, only the individual act would be annulled, but not the general rule itself. Thus, the ground for invalidation of an individual act, based on the invalidity of the general rule, can be accepted only when the rule's alleged illegality has a direct legal link with the specific act. Hence, in the case in point, the applicant's entire line of argument is inadmissible, limited as it is to challenging the legality of the 2016 Service Regulations in the abstract, invoking procedural irregularities in their drafting, an inadequate statement of the grounds on which it is based or the inadequate content of its rules, as is clear

from several arguments set out, such as the absence of social dialogue, the infringement of general principles, the right to a fair trial and to legal protection."

2.

By its **decision 18-54 of 8 April 2019**, the Complaints Board dismissed as inadmissible the appeal lodged against the decisions and Policies of the Board of Governors of 7-9 December 2016 and of 5-7 December 2017 concerning the 2017-2018 and 2018-2019 Enrolment Policies.

According to the applicants, by referring the Anglophone population to the Brussels II and Brussels IV European Schools and by lowering the threshold of classes to 20 pupils, the Enrolment Policies introduced restrictions on enrolment in the nursery classes of the Anglophone section at the Brussels III School and caused imbalance in those classes between SWALS and Anglophone pupils, at the latter's expense.

Abiding by its case law, the Complaints Board declared that it did not have jurisdiction to rule on this subject: *"Thus, in the absence of an individual act adversely affecting the applicants and having regard to the submissions of the applicants, who request the imposition of urgent measures aimed at changing the composition and operation of the classes, the appeal must be declared inadmissible."*

In response to the pleas of inadmissibility *ratione temporis* and of absence of a prior administrative appeal raised by the Schools, the applicants drew attention at the hearing to the approaches made to the school's Director and to the Secretary-General of the European Schools and to the communications to the European Ombudsman and to the European Commissioner.

The Board replied clearly that *"Those initiatives, inspired by a praiseworthy wish to ensure that their children receive the most appropriate education, do not, however, fulfil the condition of all administrative channels having been exhausted, as laid down in Articles 66 and 67 of the General Rules"* and that *"the right to effective legal protection (...) cannot (...) constitute an obstacle to application of the rules on ways and means of appeal as laid down by the regulatory acts and which both the parties and the Complaints Board are required to respect."*

3.

In his **reasoned order 19-01 of 15 March 2019**, the designated judge-rapporteur dismissed an appeal against a Director's decision to place the pupil in an English L2 class whose level was deemed by her parents to be below her linguistic capability, the reason for dismissal being the fact that there is no provision under the General Rules for the lodging of appeals against decisions on the distribution of pupils in the different classes, groups and sections taken by Directors.

That decision also provided an opportunity to point out that *"According to the Complaints Board's settled and consistent case law, pedagogical assessments of pupils' academic abilities, both generally and in the case of language tests, are, however, a matter solely for teachers and cannot be submitted to the Complaints Board for judicial review. It can be otherwise only should they be vitiated by a manifest error of assessment or should they infringe procedural rules (...) or, again,*

in the case of the emergence of a relevant new fact, in accordance with Article 50a of the General Rules, all of which are grounds for annulment that are non-existent in the case in point."

4.

On two occasions, a conflict between a teacher and a pupil – supported by her parents – was referred to the Complaints Board.

4.1

The first case concerned a conflict between the pupil and her parents on the one hand and a teacher and the school's management on the other, about the teacher's teaching method.

The pupil's parents considered that a change of school was necessary because of the medical problems that had emerged following that conflict. Following the refusal of their transfer application by the CEA, the parents lodged a direct contentious appeal.

The Complaints Board dismissed the appeal, by its **decision 19-02 of 12 April 2019**, reiterating its case law, which states that *"by enrolling at a school, the pupil – and his or her parents – undertakes to attend all the courses organised by the said school and to accept the learning methodology established by the competent school authorities."* It considered in this particular case that the school's Management had rightly refused the pupil's transfer to another class (in the same school) on the ground that she allegedly did not have good relations with the teacher and did not approve of the teaching method used by the teacher.

It also pointed out that it was not competent to make pedagogical assessments, considering that it could not make a judgement as to the method contested in itself – and all the more so because the applicants themselves had not provided any element explaining how this method might be fundamentally different from the so-called 'conventional' method or harmful – or as to the decisions, of a purely pedagogical nature, taken by the school's Management (choice of methods, arrangements for introduction and/or assessment).

As regards the medical argument, the Board further noted that the transfer application was not proven to the requisite legal standard, as being *"an essential measure for the treatment of the condition from which the person concerned suffers"*, reiterating its settled and consistent law, whereby the need for a transfer must be established by a health professional, who explains why the medical treatment prescribed could not be administered, or could not be properly administered, without a transfer, or how the transfer applied for can have an impact on the pupil's state of health.

4.2

In the other case, the appeal was lodged against a Director's refusal to transfer the pupil from one teacher's class to another teacher's class (same course, same number of periods) on account of the pupil's psychological problems associated, from what her parents said, with the first teacher's behaviour and teaching and assessment methods.

The appeal was dismissed, by **reasoned order 19-57 of 31 October 2019**, on the ground that a Director's decision to refuse a change of group (class) is not amongst the decisions against which an appeal may be lodged: *"(...) not only is there no provision under the regulatory acts for the lodging of appeals against acts such as the one contested by this appeal but furthermore, that act clearly does not belong to the category of decisions profoundly affecting the fundamental link between the school and the pupil. The fact is indeed that contrary to what the applicants claim, the fundamental link between [...] and the School has not been broken; at most, she is currently missing four hours of lessons per week, as a result not of a decision on the School's part but because of her initiative alone and/or that of her parents."*

The designated judge-rapporteur pointed out, moreover, that *"(...) by enrolling at a school, the pupil – and his or her parents – undertakes to attend all the courses organised by the said school and to accept the choice of teachers made and the learning methodology established by the competent school authorities."*

(...)

The Complaints Board would point out in this connection that it does not have jurisdiction to rule on the legality of decisions of a purely pedagogical nature taken by the school's Management with respect to the choice of methods, the arrangements for introduction and/or assessment of pupils."

5.

Finally, amongst the dismissal decisions, those delivered in the context of appeals against refusals of changes of languages, namely Language 1 and Language 2, should be highlighted.

- **Change of Language 1**

The decisions contested before the Board here are refusals of a change of language section in mid-schooling, outside the context of opening of a newly created language section.

In its **decision 19-26 of 18 September 2019**, the Complaints Board recalled the principles applicable:

- Language 1 is determined at the time of the pupil's enrolment;
- it is definitive in principle and valid throughout the pupil's school career;
- a change of Language 1 is possible *"only exceptionally, in the conditions laid down in Article 47(e), paragraph 7 of the GRES, i.e. for compelling pedagogical reasons, duly established by the Class Council and on the initiative of one of its members"*;
- it is a pedagogical decision and not a choice to be made by the pupil or his or her parents;
- the Class Council is responsible for taking the decision: *"Class Councils are best placed to assess pupils' abilities and it is not up to the Complaints Board to censure the pedagogical assessments made by the teachers (...). Pedagogical assessment is a matter for the teachers, whom the Complaints Board cannot supersede, unless there has been a manifest error of assessment or procedural irregularity"*;
- finally, there is provision for language tests to be conducted only at the time of enrolment and should there be any doubt about mother tongue/dominant language; they are not mandatory in the event of a request for a change of L1.

By its **decision 19-59 of 21 February 2020**, the Complaints Board dismissed the appeal, on the basis of the principles thus reiterated, on the ground that the applicants were fully aware at the time of their daughter's enrolment of all the factual elements that they invoked; those elements could have justified enrolment in the language section requested today, but that was not the section that they had requested at the time of enrolment two years previously.

On the occasion of this appeal, the Board further expanded on its case law regarding a change of Language 1: *"It is important in this context to draw a clear distinction between determination of the pupil's L1 at the time of his or her enrolment and the finding that there are compelling pedagogical reasons making a change of L1 in mid-schooling advisable."*

And it went on to say the following about pedagogical assessment and language tests conducted when a change of Language 1 is requested: *"In fact, in the case of consideration of a request for a change of L1, it is not a question for the Class Council of determining the child's L1 again – that having been determined, definitively in principle, at the time of the pupil's enrolment – but instead of checking whether the pupil has the ability to continue his or her schooling successfully in the language in which he or she has been educated since the start of his school career in the ES."*

(...)

In fact, these tests were organised by the ES on a purely voluntary basis, with a view to examination by the Class Council of a request for a change of L1 from the parents. This situation is, therefore, clearly different from the one provided for in the fifth paragraph of Article 47(e) of the GRES, where, in a context of contestation by the parents of the determination of the child's L1 on his or her enrolment, the organisation of comparative language tests is mandatory and regulated (...).

It follows from all the above that the different arguments put forward by the applicants against the organisation, the conduct and the results of the language tests are ineffective to call into question the legality of the contested decision. The reason is that all those arguments concern alleged shortcomings in assessment or breaches of form, assuming the tests' purpose was to determine the pupil's L1 again, quod non."

- Change of Language 2

By its **decision 19-35 of 29 August 2019**, the Complaints Board first considered the question of the admissibility of an appeal relating to a change of Language 2, in so far as no text containing provisions implementing the Convention defining the Statute of the European Schools lays down appeal procedures allowing the legality of a decision rejecting a request for a change of Language 2 to be contested; it ruled on the question by considering that the absence of appeal procedures laid down by the texts containing provisions implementing the Convention may infringe the principle of the right to an effective remedy, in so far as a refusal of a change of Language 2 is of such a nature as to affect the right to education of the pupil concerned.

As regards the substance of this appeal, the Board noted firstly, that no regulatory provision applicable to a change of Language 2 provides for the organisation of comparative tests and secondly, that a change of Language 2 is conceivable in exceptional cases and for compelling reasons. *"Consequently, it has to be conceded that it is for the Complaints Board, to which, as in this case, an appeal calling into question of legality of the grounds given by the Class Council to reject such a request has been referred, to check that those grounds are not based on materially*

inaccurate facts and that they are not vitiated by a manifest error of assessment." After consideration of the pleas put forward by the applicants to contest the Class Council's decision, the Complaints Board dismissed the appeal.

By its **decision 19-40 of 2 September 2019**, the Complaints Board dismissed the appeal as inadmissible, since it had not been preceded by an administrative appeal to the Secretary-General: *"In the absence of appeal procedures provided for by the texts implementing the Convention defining the Statute of the European Schools, it was agreed to apply, by analogy, the provisions of Article 50.a 1 and 2 of the General Rules of the European Schools, which require an administrative appeal to be lodged prior to a contentious appeal. Now it is clear that in this particular case, the applicants did not lodge an administrative appeal with the Secretary-General of the European Schools. It must be remembered that the admissibility rules, in accordance with the general principle of legal certainty, are public policy rules."*

* *

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 actively contributes 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 2019. 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 2020

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