



COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS

(1st section)

Decision of the 21st of August 2023

In the case registered with the Registry of the Complaints Board under the number **23/08**, having as its object an Appeal introduced the 11th of May 2023 by Mr. [REDACTED] et Mrs. [REDACTED] legal representative and parents of [REDACTED] (hereinafter 'the child'), residing together at [REDACTED], the application seeking to have quashed the decision of the Management of the Brussels I European School notified to the Applicants by the Central Enrolments Authority (hereafter the CEA) of the 5th of May 2023 by which the child was offered a place in the nursery cycle, Italian language section at the Brussels I European School, Berkendael Site,

The Complaints Board of the European Schools, 1st section, comprising:

- Eduardo Menéndez Rexach, President of the Complaints Board
- Mario Eylert, member and
- Aindrias Ó Caoimh, member and rapporteur

assisted by Ms. Nathalie Peigneur, Registrar, and by Mr. Thomas van de Werve d'Immerseel, legal assistant,

having regard to the written observations presented on the one hand by the Applicants and on the other hand by Marc Snoeck, advocate at the Brussels Bar on behalf of the European Schools,

without having held a public hearing in light of the decision of the Applicants not to attend a proposed hearing or to be represented at same,

delivered the 21st of August 2023 the decision in respect of which the reasons and grounds and the operative part thereof appear as follows:

Main facts of the case and arguments of the parties

1.

On 29 January 2023, in the first enrolment phase, the Applicants submitted to the Brussels I European School (Berkendael site), an enrolment application in respect of the child in the nursery cycle, English language section. In addition, the Applicants have a daughter schooled in the nursery section, English language section in the Brussels III European School. They did not request the regrouping of the siblings within the meaning of Article 8.2 of the Enrolment Policy.

2.

During the school year 2022-2023, the child attended the infants' school of the British Junior Academy Brussels.

3.

The application form furnished by the Applicants shows that the infant and the Applicants are of Italian nationality, that the child speaks English and Italian for a similar number of years, namely 3 years, that the Applicants consider the linguistic competences of the child in Italian and English to be identical (namely excellent), that the child speaks Italian with the two parents but she only speaks in English with one of them, namely her mother.

4.

In light of this information, the Management of the Brussels I European School considered it necessary, in accordance with Article 47 e) of the General Rules of the European Schools, to verify the linguistic skills of the child in order to determine the child's mother/dominant language.

5.

The comparative tests were organised on the 3rd of March 2023 from 8 :17 to 8.42 for Italian and from 9 a.m. to 9 30 a.m. for English. These formed the object of reasoned reports which revealed as follows: An oral understanding distinctly higher for Italian and inferior for English; A superior oral expression for Italian and distinctly inferior for English; A superior vocabulary for Italian and distinctly inferior for English; a grammatical level ranked superior for Italian and distinctly inferior for English.

6.

The conclusions drawn from these reports are clear: in Italian the child's abilities are, having regard to her age, are superior and she could be integrated into the section and level requested in the Italian language. On the other hand, in English her abilities are inferior, and she could not be integrated into the section and level requested without the greatest of difficulties.

7.

The reports of the comparative tests and the decision of the Director of the Brussels I European School taken on foot thereof, were notified to the Applicants by e-mail of the 9th of March 2023.

8.

By e-mail of the 13th March 2023, the Applicant considered that they were in position to contest the results of the language tests and the decision in submitting in substance that the child was very much ill-at-ease during the English language

test, that the tests were not carried out under conditions which enabled the child to express herself completely at ease in English, that the reports of the tests illustrated incoherencies and that Elena, the sister of the child, is schooled in English and expresses herself perfectly in English and that it will be traumatic and damaging to the relationship between the two sisters that the infant will be schooled in Italian.

9.

The decision was nevertheless maintained, and the Applicants were advised of same by an e-mail from the Assistant Director of the School of the 31st of March 2023.

10.

On the 5th of May 2023, pursuant to the decision of the Management of the School, the CEA proposed a place for the child in the Italian section, which proposal is the subject matter of this Appeal.

11.

In support of their application the Applicants raise 4 grounds:

- a) That the conditions under which the English test was carried out was not of a nature to reassure the child, such that she was perturbed and the results of the tests cannot be considered to demonstrate the true abilities of the child; The Applicants cite Decision 16/22 and suggest that the conditions of the tests in the instant case were not comparable as the child was not at ease during the second test;
- b) That the reports show inconsistencies such that they cannot truly support the impugned decision; the Applicants refer to the fact that the child responded in using words in English during the Italian language test but did not respond in Italian during the English language test and they consider that this shows that the dominant language of the child is English;
- c) The criteria of evaluation used by the teachers in charge of the tests were

manifestly different, such that they could not be usefully compared; The Applicants refer to the child having many faults in Italian in using English words but was attributed a mark of 8/10 but with a similar number of faults in English she was attributed 3/10. This the Applicants contend demonstrates that the criteria applied by the teachers were not similar;

- d) That the child's sister is schooled in English, and it will be harmful to the relationship between the siblings were the child to be schooled in Italian.

12.

In their response to the Applicants' case, the European Schools invite the Complaints Board to hold that the Appeal is admissible but unfounded and in holding against the Applicants to hold them jointly and severally liable to pay the costs of the case taxed in the sum of € 750.

13.

On the first ground,

The European Schools indicate that it is beyond doubt on a reading of the reports that the child was considerably more at ease and receptive during the Italian language test than during the English language test. They indicate that it cannot be excluded that this unease results from the fact that she was tested in a language of which she had a poor command.

They add that no element on the file permits one to conclude, in the circumstances which surrounded the two tests, that those for the English language were more unfavourable than those for the Italian language. `having taken place on the same day, the one after the other, in the same place and under the same relevant conditions, there is no reason to assume significantly different circumstances to have influenced the results.

14.

On the second ground,

The European Schools submit in particular that, contrary to the contentions of the Applicants, the reports of the tests appear perfectly coherent in themselves and with the other. Further, in Italian the child listened and followed the instructions, identified the images during the discussion, showed the objects referred to and understood the questions (even if, on occasions she used a word in English); she made simple phrases which were complete and correct. When she expressed a need (for example, to drink water) she spoke spontaneously in Italian. On the other hand, in English she identified and named few objects, made errors, did not follow the instructions and often limited herself to answering 'Yes' or 'No', did not form complete sentences. The assessments ticked by the teachers are perfectly coherent with these descriptions.

15.

On the third ground,

The differences in marking of the two tests does not, having regard to the observations made, enable one to deduce a significant difference in the assessment criteria applied.

16.

On the fourth ground,

The European Schools refer to the fact that the Complaints Board has had occasion to pronounce clearly on the first circumstance referred to, that is that the sister of the child is schooled in English.

In Case 14/15, the Complaints Board indicated that the European Schools must take account of the superior interest of each pupil, including his/her academic development, in ensuring that they are educated in a language which they master sufficiently to be able to successfully follow the school programme. Furthermore,

one may have sibling-children who are schooled in different linguistic sections, considering the different situations and objectively different learning experiences.

The Complaints Board has already recalled in its case law that the mere fact that the brother or sister of a pupil be educated in another language section cannot be considered as a particular circumstance which, in accordance with Article 50 of the General Rules, could be taken into account by the Director to derogate from the admission principle of the pupil into the language section corresponding to his/her mother/dominant language.

17.

In their reply, the Applicants maintain their initial claims by responding to the arguments expounded by the European Schools.

Findings of the Complaints Board

On the substance of the Appeal,

18.

In the first place, it must be noted that the decision of the Management of the Brussels I European School whereby it considered it necessary, in accordance with Article 47 e) of the General Rules of the European Schools (hereafter the General Rules), to verify the linguistic skills of the child in order to determine the child's mother/dominant language has not been contested. What is at issue is the manner in which such verification was carried out.

19.

Art. 47(e) General Rules specifies the following:

"(1) A fundamental principle of the European Schools is the teaching of mother tongue/dominant language as first language (L1).

(2) This principle implies the pupil's enrolment in the section of his/her mother tongue/dominant language where such a section exists.

(3) This principle may be waived only where the child has been educated in a language other than his/her mother tongue/dominant language for a minimum of two years at primary or secondary level. The European Schools will presume in that case that the child will be capable of continuing his/her schooling in the language in question.

.....
(5) Parents will not be free to choose their child's first language (L1), its determination being the responsibility of the school's Director. L1 must correspond to the child's mother tongue or dominant language, in the case of multilingual children, the dominant language being the one of which they have the best command.

(6) Should there be any dispute about the pupil's L1, it will be the Director's responsibility to determine which language it is, on the basis of the information provided by the pupils' legal representatives on the enrolment form and by requiring the pupil to take comparative language tests, organised and under the control of the school's teachers. The tests will be organised whatever the pupil's age and teaching level, i.e. including the nursery cycle.

(7) Determination of L1 at the time of the child's enrolment is definitive in principle.
....."

20.

In accordance with Art. 50a. (1) of the General Rules:

The only case in which an appeal may be lodged by the pupil's legal representatives against decisions taken on an application for enrolment shall be when it has been demonstrated that there has been a procedural irregularity or when a new and relevant fact needs to be taken into consideration.

21.

The principles of the consistent and settled case law of the Complaints Board (see in particular decisions 14/17, 15/51, 17/13, 18/27, 19/51, 20/69 and most recently:

21/10 and 21/ 28) on the above provisions of the General Rules can be summarised as follows:

- a) According to the fundamental principle of the ES, mother tongue/dominant language should be taught as first language, in so far as such a language section exists at the time of enrolment.
- b) The mother tongue/dominant language is the language of which the child has the best command, in order to give him or her a solid grounding for a successful school career and subsequently to facilitate the gradual learning of other languages. This fundamental principle therefore corresponds to the child's well-understood interests (see in particular decisions 16/20 – point 24) and 21-19 (point 11)).
- c) Language L1 is determined at the time of the pupil's enrolment. It is definitive in principle and is applicable throughout the nursery cycle and the whole of schooling.
- d) The provisions of the autonomous General Rules do not entitle parents to enrol their child in the language section of their choice. Responsibility for this (pedagogical) decision lies solely with the school's Director, who has to determine the appropriate language section in accordance with a prescribed procedure.
- e) The choice of language section is thus not left to parents. Instead, it is the result of a pedagogical assessment, which is carried out by the school in the child's interest, taking into consideration the information provided by the parents, and in the event of doubt or of dispute, the decision being taken having regard to the results of comparative (compatible) language tests organised and supervised by teachers.
- f) The pedagogical assessment for which teachers and the Director are responsible cannot in principle be reviewed in greater detail or replaced by the Complaints Board. A judicial review is possible by way of an exception and is restricted to the existence of a manifest error of assessment or a procedural irregularity (see decisions 17/13, 19/51 (point 8), 19/55 (point 7), 21/28 (point 11 *et seq.*)).
- g) For the purposes of organisation of language tests, the individual schools have a degree of autonomy. However, the prerequisites for comparability of language tests have to be fulfilled. Language tests must be conducted in such a way that an objective comparison of the results is possible (decisions 17/23 and 21/28).
- h) In order to ensure the comparability of language tests, the ES drew up 'Regulations for the organisation of language tests in the nursery classes and primary year 1', which are appended to the document 'Establishment of a

harmonised procedure for the organisation of language tests (Article 47(e) of the General Rules of the European Schools)' as Annex I and were approved by the Joint Board of Inspectors on 10 October 2018 (Ref.: 2018-09-D-23-en-2).

22.

Contrary to the circumstances referred to in Case 21/29 where the tests administered to a very young child of 4 were carried out without a break, in the instant case the tests were carried out with a break in excess of 15 minutes and the duration of the tests was 25 minutes for Italian and 30 minutes for English. There is no indication that the tests were not carried out in like circumstances or in any irregular manner. In addition, while the Applicants refer to the Decision of the Complaints Board in Case 16/22 where the tests were carried out in different schools on different occasions in circumstances which were not comparable, no such circumstances have been shown to exist in the instant case. Accordingly, it must be concluded that the unease experienced by the child in the instant case has not been shown to have resulted from failing to carry out the language tests in question under similar conditions. Accordingly, it must be concluded that the Applicants have failed to show that the manner in which the tests were administered to the child failed to meet the requirements of Article 47(e) of the General Rules or of the 'Regulations for the organisation of language tests in the nursery classes and primary year 1' referred to above.

23.

With regard to the second and third grounds advanced by the Applicants it must be emphasised, as referred to above, that the pedagogical assessment for which teachers and the Director are responsible cannot in principle be reviewed in greater detail or replaced by the Complaints Board. A judicial review is possible by way of an exception and is restricted to the existence of a manifest error of assessment or a procedural irregularity. The circumstances relied upon by the Applicants whereby the child uttered words in English during the Italian language test and did not utter words in Italian during the English language test cannot be considered as demonstrating a manifest error of assessment or any procedural irregularity in the

assessment carried out in relation to the child and in these circumstances the Complaints Board can only reject the second ground referred to by the Applicants. While the Applicants refer to the marks attributed by the teachers and suggest that they were not comparable, the Applicants have failed to show any manifest error of assessment in the reports of the language tests referred to and no procedural irregularity has been demonstrated to have occurred.

24.

With regard to the fourth ground advanced by the Applicants to the effect that the child's elder sister is already schooled in an English language class in the European Schools, as has been correctly observed by the European Schools, the Complaints Board has already recalled in its case law that the mere fact that the brother or sister of a pupil be educated in another language section cannot be considered as a particular circumstance which, in accordance with Article 50 of the General Rules, could be taken into account by the Director to derogate from the admission principle of the pupil into the language section corresponding to his/her mother/dominant language. The presumed consequences referred to by the Applicants cannot, even if established, justify setting aside the impugned decision.

25.

Having regard to the above it must be concluded that the Applicants have failed to establish any ground of appeal warranting the setting aside of the impugned decision.

On the legal and other costs,

26.

In accordance with the provisions of Article 27 of the Rules of Procedure of the Complaints Board "The unsuccessful party shall be ordered to pay the legal and other costs of the case if they have been applied for by the other party. However, if the particular circumstances of the case so warrant, the Complaints Board may

order the latter party to pay the legal and other costs or may order that they be shared between the parties. Where the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement. If costs are not claimed, the parties shall bear their own costs.”

27.

It follows from these provisions, which are furthermore entirely comparable to those in force in the majority of jurisdictions, national or international, that the party which succumbs should, in principle, pay the costs and expenses of the proceedings.

However, these provisions permit the Complaints Board to assess case by case the conditions under which it should apply same.

28.

In application of these provisions and in light of the observations of the parties, it is appropriate to condemn the Applicants who have failed in the present case to pay the costs and expenses.

In the particular circumstances of the instant case, it will be a just assessment of these costs and expenses to fix them *ex aequo et bono* in the sum of € 500.

FOR THESE REASONS, the Complaints Board of the European Schools

DECIDES

Article 1: The Application to annul the disputed decision, brought by Mr. [REDACTED] et Mrs. [REDACTED], registered under the number 23/08, is rejected.

Article 2: The Applicants shall pay to the European Schools the sum of € 500 in respect of legal and other costs.

Article 3: The present decision shall be notified in accordance with the conditions of Articles 26 and 28 of the Rules of Procedure.

E. Menéndez Rexach

M. Eylert

A.Ó Caoimh

Brussels, the 21st of August 2023

Original version: EN


For the Registry,
Nathalie Peigneur