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Interim Order of 16 September 2024

Mr Eduardo MENENDEZ REXACH, Chairman of the Complaints Board of the European Schools, ruling on the summary proceedings,

having regard to both this appeal lodged in summary proceedings and the appeal for annulment lodged on 26 August 2024, registered under No 24/60,

having regard to the reply filed on 9 September,

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issued the interim order on 16 September 2024, the reasons for and operative part of which are set out below.

Facts of the case and arguments of the parties

1.

On 9 July 2024, the Management Team of the European School Brussels II (hereinafter referred to as "EEB2") informed the applicants of the decision to unenroll their son,

2.

The pupil, who had been enrolled in the EN section of the EEB2 - Evere Site, suffers from autism spectrum disorder and has significant learning difficulties, notably in terms of language development and navigating social relationships. He struggles with behavioural difficulties as a result of his hypersensitivity and has been enrolled at EEB2 - Evere Site since September 2022, benefiting from intensive educational support as set out in an Intensive Support Agreement (ISA). According to the parties, several meetings were held over the course of [REDACTED] schooling at EEB2, which would have allowed for adjustments to be made to the educational support considered appropriate for his needs. The pupil progressed without promotion from P1 to P2 at the end of the 2022-2023 school year.

In June 2024, the pupil's situation was evaluated at a Support Advisory Group (SAG) meeting, which came to the conclusion that EEB2 was unable to offer an appropriate level of support. Based on the conclusions of this meeting, the Director of EEB2 decided to unenroll him and communicated this decision in a registered letter addressed to the applicants, dated 9 July 2024.

The applicants contested the Management Team's decision, but their administrative appeal was rejected by a decision of the Deputy Secretary-General, dated 9 August 2024 and communicated to the applicants on 12 August 2024.

3.

It is against this decision that the present application in summary proceedings and the appeal for annulment is directed. This latter application is further requesting that the Board promote ██████ to P3, following the decision to progress without promotion taken by the Class Council.

4.

In this appeal in summary proceedings, the applicants are seeking, from the Complaints Board, the suspension of the decision of the Management Team of EEB2, dated 9 July 2024, unenrolling their son and, consequently, the decision of the Deputy Secretary-General dated 9 August, which confirms said unenrollment.

5.

In support of their appeal in summary proceedings, they are, in essence, highlighting: the urgency, as ██████ would be withdrawn from school starting September 2024, the start of the 2024-2025 school year, and that, given his particular condition, it is difficult to find an English-speaking private school that could accept him.

6.

They invoke that the Deputy Secretary-General of the European Schools did not address all the grounds raised, which they allege proves that EEB2 committed serious violations in the application of the Policy on the Provision of Educational Support and

Inclusive Education in the European Schools (2012-05-D-14-en-10) and of the related procedural document (2012-05-D-15-en-14). According to the applicants, neither did the Deputy Secretary-General take into account the proof provided to corroborate the grounds listed in the administrative appeal.

As far as the applicants are concerned, in his decision validating that taken by EEB2, the Deputy Secretary-General primarily relied upon unfounded declarations made by EEB2 and did not sufficiently refer to the documented proof provided, notably with regards to the Type A Intensive Support Agreement (ISA) for 2023-2024, the SAG meetings and the minutes thereof, or the modified curriculum over the two-year period (2022-2024). Furthermore, the Director of EEB2's signature was missing from the Intensive Support Agreements signed in 2022-2023, which may be considered proof of procedural errors by the European Schools.

7.

Furthermore, according to the applicants, the educational support provided to their son over the two-year period did not comply with the Policy or the procedural document. Following this decision, they asked EEB2, on 18 August 2024, for the information and documents mentioned in the Deputy Secretary-General's decision, but did not receive a response until the contentious appeal was lodged.

They further allege that, when making his decision, the Deputy Secretary-General did not take into account emails in which EEB2 invited the applicants to a SAG meeting on 22 March 2023, then postponed it at the last minute, after receiving a medical certificate from their son's paediatric neurologist confirming that he was able to attend lessons full-time. He did not acknowledge that, for two years, their son was only authorised to attend school in the morning, and that no gradual transition to full days was proposed. This decision by EEB2 is therefore not founded on valid reasons and is not defined either in the Policy or in the procedural rules laid down according to the applicants. As such, EEB2 caused significant disruption to █████ education, excluding

him from access to a full-time education for two consecutive years (2022-2024).

They conclude by asserting that the best interests of the child take precedence in the balance of interests, notably in terms of granting temporary measures aiming to suspend the application of EEB2's decision.

8.

In their comments in response, the European Schools request that the Complaints Board declare the appeal admissible but unfounded and to order the applicants to pay the legal and other costs of the case proceedings, assessed to be a total of €800.

They assert, in essence, that even though they acknowledge the urgency invoked by the applicants based on the start of the 2024-2025 school year, said urgency cannot be taken into account by the Complaints Board because the decision to unenroll ██████ was dated the beginning of July, and they had already been notified of it at the SAG meeting on 17 June 2024. They therefore believe that the applicants were given sufficient time to find a school suited to ██████ needs and, consequently, that they alone are responsible for the situation. The Schools also point out that the applicants had not considered enrolling their child in other English-speaking schools offering appropriate educational support for the 2024-2025 school year, even as a temporary solution. Nevertheless, they note that should the Complaints Board decide to suspend the contested decision, ██████ would be able to return to EEB2 - Evere Site with immediate effect and continue his education with the support measures previously in place, even though they deem these measures insufficient.

9.

As far as the European Schools are concerned, the procedural irregularities invoked by the applicants in their claims that they were not invited to a 2023 SAG meeting are not defensible as the SAG met with the parents multiple times and the School regularly

re-evaluates the support measures depending on the child's progress. The appellants also challenged the half-day attendance limit and the exemption from a second language, but did not provide substantial proof to contest the School's decisions, all the more so given that attempts to attend school full-time had not borne fruit. The School's educational judgement remains valid in spite of any procedural irregularities.

10.

In their response, the applicants maintain their initial claims by responding to the arguments expounded by the European Schools and insist, in essence, on the following:

- As regards the urgency, the applicants claim that their comments regarding the minutes of the meeting held on 17 June 2024 were not taken into account and that the School's proposal was not communicated to them. As far as the applicants are concerned, the definitive decision to unenroll ██████ was only taken on 9 July 2024, while they were on holiday and during the official school summer holidays in general, making the task of finding a new school for ██████ very complicated;
- Regarding the serious doubt of the legality of the contested decision, they assert that the ES are at fault because they did not follow the paediatric neurologist's advice on full-time schooling, but did not modify their son's ISA for the 2023-2024 school year. They conclude this point by stating that: *"The European school failed to adhere to its own procedural framework, violating both the principles of inclusive education and its legal obligations under the European Schools educational support policy and procedural document."*
- As regards the real risk of a lack of effectiveness of the right to appeal, they challenge the ES's argument that the prejudice would be remediable with the closing of the substantive appeal because the education support from which ██████ benefits is essential for him to successfully continue his education. The rejection of the application for temporary measures to reintegrate ██████ into the ES would consequently make the right to appeal inoperable, as the very aim is to guarantee the child's right to an education.

In conclusion, they ask the Complaints Board that their child's right to an education be preserved and request that the European Schools be ordered to pay the legal and other costs, assessed at €800.00.

Assessment of the judge of the summary proceedings

Regarding the admissibility of the appeal in summary proceedings and the request for interim measures,

11.

Under the terms of Article 16 of the Rules of Procedure for the Complaints Board, *“The application shall not have suspensory effect unless a member of the Complaints Board orders otherwise, at the applicant’s request, where, in the event of proven emergency and of serious doubt about the legality of the disputed decision, there is, in the circumstances of the particular case, a real risk of absence of effectiveness of the right to appeal. The special procedure provided for that purpose is laid down in Articles 34 and 35”*.

Under the terms of Article 34 of the Rules of Procedure, *‘Applications seeking the suspension of enforcement and other interim measures must be expressed and must be presented in summary proceedings, separately from the main proceedings. The applicant must establish the urgency of the case and set out de jure and de facto elements providing supporting evidence justifying the measure requested.’*

Lastly, under the terms of Article 35 of the Rules of Procedure, *‘1. Investigation of applications for suspension of enforcement and of applications for other interim measures shall be conducted by the member of the Complaints Board designated as rapporteur by the Chairman. They must be conducted as a matter of urgency. The time*

periods allowed to the parties for submission of their written observations on these applications shall be the shortest possible and may not be extended. Unless the rapporteur decides otherwise or the two parties expressly request to be heard at a public hearing, applications of this nature shall not involve oral proceedings. - 2. The designated rapporteur shall give a ruling on these applications following summary proceedings, stating the grounds on which the ruling is based. Where the urgency of the matter so justifies and there is a plea in law likely, at that stage of the investigation, to give rise to serious doubts as to the legality of the disputed decision, the rapporteur may, if he considers that there is, in the circumstances of the particular case, a real risk of absence of effectiveness of the right to appeal, and unless the taking into consideration of the interests at stake precludes this, order any interim measure required to be taken. Such measures may only be temporary in nature and shall end at the latest when the Complaints Board has ruled on the main proceedings [...]'.

12.

These provisions also establish the conditions under which a request for the suspension of enforcement or other interim measures is likely to be admitted: where the urgency of the matter so justifies, where there is a plea in law likely, at that stage of the investigation, to give rise to serious doubts as to the legality of the disputed decision and where there is, in the circumstances of the particular case, a real risk of absence of effectiveness of the right to appeal.

These three conditions are, in accordance with their wording, cumulative and not alternative.

Furthermore, if they are met, the taking into consideration of the interests involved must not run counter to the measure requested.

It may also be added, with respect to the nature of and the need for the measures requested, that *“the very purpose of summary proceedings, as organised by the*

aforementioned provisions of the Rules of Procedure, is to allow, in all cases where the urgency of the matter so justifies, expeditious suspension of an administrative decision contested by the applicant or any other interim measure justified by the circumstances' so as thus to ensure the effectiveness of the decision on the substance of the appeal (see orders 14/37R, 16/50R (points 13 to 15), 19/51R (point 9), 22/37R (point 16), 22/42R (point 13) et 23/40R).

13.

In this case, the formal conditions for deeming the appeal in summary proceedings to be admissible have been met, since the application was lodged separately to the main appeal and since it contains the de jure and de facto elements that justify the requested measure and the urgency.

It remains to be examined if the underlying summary conditions are met in this case: urgency, real risk of a lack of effectiveness of the right to appeal and serious doubt as to the legality of the contested decision.

14.

Urgency and real risk of effectiveness of the appeal

Thus, the European Union General Court recalled in Order of the President of 30 March 2022 (T-125/22 R), '*[...] urgency must, generally, be assessed with regard to the present need for an interim ruling in order to avoid serious and irreparable damage being incurred by the party requesting the provisional protection. It is the responsibility of this party to provide evidence that they cannot wait until the end of the substantive appeal procedure without suffering serious and irreparable damage (see Order of 14 January 2016, AGC Glass Europe and Others/Commission, C-517/15 P-R, EU:C:2016:21, point 27 and cited case law)*'.

In this case, the urgency is established given the imminent start of the school year. The Schools' argument that the parents were made aware of the School's decision to unenroll their child on 17 June 2024 is inconsistent as the final decision by the Deputy Secretary-General, dated 9 August 2024, was only issued and notified to the parents on 12 August 2024, during the school holiday period and just a few days before the start of the new school year; this fact alone, the date of the start of the new school year, is recognised by the Schools as being formally valid to justify the urgency; moreover, it is also recognised by the Board (Decision of 23 August 22, Appeal 22/37 R). Added to that is the difficulty for the parents of finding an educational establishment that can suitably accommodate the child's conditions at such short notice.

In conclusion, the Complaints Board deems that the urgency is justified by the nature of the contested decisions, which include the unenrollment of the pupil from the start of the school year in September; even if the applicants had been made aware of the decision on the date indicated by the School, they contested said decision through the established appeal procedures, first administrative and then contentious. The school holiday period, which affects the management of all school establishments, must also be taken into account. From these elements, we can also deduce the serious and difficultly remediable nature of the prejudice that would result from the non-adoption of the measure sought at this stage of his schooling, which would require him to either change school system or discontinue his education, while he has been educated at the European Schools for the entirety of the 2022-2023 school year.

15.

Serious doubt regarding the legality of the contested decision

Concerning the existence of any serious doubt concerning the legality of the decision, first of all it should be recalled that administrative appeals and contentious appeals are non-suspensive in nature (Article 66.3 of the General Rules of the European Schools and Article 16 of the Rules of Procedure for the Complaints board respectively), since

acts adopted by bodies of the European Schools benefit from a presumption of legality (Order 22/42 R, point 17).

As the President of the European Union General Court recalled in his Order of 31 March 2022, Case T-22/22 R), *'The summary applications judge can only exceptionally order the suspension of an act contested before the Court or prescribe provisional measures'*.

It should also be remembered that *'in the context of an urgency procedure, the Chamber cannot make considerations on the merits which could prejudge the decision of the main appeal'* (Interim Order of 25 June 2020, Appeal 20/22R, point 10, as well as the Interim Order of 19 August 2019, Appeal 19/39R, not published).

The established case law of the Court of Justice of the European Union shows that the condition relating to the *'fumus boni iuris'* (apparently well-founded nature) of the application or serious doubts as to the legality of the disputed decision (Article 35.2 of the Rules of Procedure for the Complaints Board) may be considered met *'when at least one of the pleas relied on by the applicant for interim measures in support of the main action appears, prima facie, not unfounded. Such is the case when one of these pleas reveals the existence of a significant legal or factual difference for which there is no immediately obvious solution and is therefore worth in-depth examination, which cannot be carried out by the summary applications judge, but must be the subject of the substantive procedure'* (Order of the President of the EUGC of 31 March 2022 T-22/22 R, cited).

Thus, it must be examined whether, *prima facie*, there are grounds for the grievances invoked by the applicants and whether at least one of them is sufficiently serious to cast doubt on the legality of the contested decision and justifies adoption of the provisional measures requested.

The applicants justify their application for suspension based on certain irregularities in

the application of procedural document 2012-05-D-15-en-14 - Provision of Educational Support and Inclusive Education in the European Schools - concerning the implementation of intensive support measures, adopted for the first time in 2022, which were revised every two years thereafter. The applicants' allegations are detailed, supported by the relevant documentation and, in this preliminary assessment, do not appear to be lacking in substance. The measures taken for the education of a child benefiting from intensive educational support since his admission to the School in 2022 are those referred to in the Policy on the Provision of Educational Support and Inclusive Education in the European Schools - document 2012-05-D-14-en-10 -as well as the above-mentioned procedural document, whose recommendations must be followed to the letter.

16.

In terms of Article 35.2 of the Rules of Procedure, the interests at stake should be taken into consideration: on the one hand, as it results from the Policy on the Provision of Educational Support, those of the European Schools who must be in a position to offer an inclusive education to all pupils presenting with special educational needs and, if despite their best efforts, the School is not able to make reasonable arrangements to meet the needs of a pupil, this inability must be justified in accordance with the established rules of procedure; on the other hand, the interests of the pupil, in the conditions specific to this case, in continuing his education in the European Schools system while awaiting the definitive decision of the main appeal. This option of rejoining the School with the support measures already in place until now, is itself envisaged in the memorandum of the European Schools (IV A 9.).

For these reasons, the specific interests must take precedence in the decision to suspend the unenrollment.

However, the application regarding the revision of the support conditions - in particular the amount of time the pupil spends at the School or his promotion to the following

year - are questions that fall within the remit of the main appeal and cannot be considered within the limited remit of the summary proceedings, but should be examined in greater detail in the main proceedings.

For these reasons, the contested decision is suspended and the pupil shall be schooled under the same conditions as the previous year, adapted to his current situation, at the European School Brussels II – Evere Site.

Regarding the legal and other costs of the summary proceedings,

17.

Article 27 of the Rules of Procedure states: *‘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... If costs are not claimed, the parties shall bear their own costs’.*

It follows from these provisions, which are in fact quite similar to those in force before most national or international courts, that the unsuccessful party must, in principle, bear the legal and other costs of the case. However, these provisions allow the Complaints Board to assess the conditions under which they should be applied on a case-by-case basis.

Pursuant to these provisions, and in view of the conclusions of the parties, the question of costs shall be reserved until the Complaints Board rules on the main appeal.

**FOR THESE REASONS, The Chair of the Complaints Board, ruling on the
summary proceedings**

D E C I D E S

Article 1: The appeal in summary proceedings lodged by Ms [REDACTED] and Mr [REDACTED], registered under number **24/60R**, has been allowed: the decision of the Director, dated 9 July 2024, to unenroll [REDACTED] from EEB2 Evere and the decision of the Deputy Secretary-General dated 9 August 2024 on the administrative appeal related to said unenrollment are suspended, allowing the pupil to continue his schooling at the European School Brussels II under the previous conditions, adapted to his situation at the time he rejoins the school.

Article 2: The costs of this hearing are reserved until the decision concerning the main appeal registered under No. **24/60**.

Article 3: this order shall be notified under the conditions set out in Articles 26 and 28 of the Rules of Procedure.

E. Menéndez Rexach

Brussels, 16 September 2024

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On behalf of the Registry,
Nathalie Peigneur