



COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS

(2nd section)

Decision of 23 August 2021

In the case registered under No 21/22, the subject of which is an appeal lodged on 13 May 2021 by Mr [REDACTED] [REDACTED] and Ms [REDACTED] [REDACTED] [REDACTED], legal representatives of their daughter [REDACTED], against the decision of the European School of Brussels III dated 21 March 2021 and the decision of the Central Enrolment Authority for the Brussels European Schools dated 30 April 2021,

the Complaints Board of the European Schools, 2nd section, composed of:

- Andreas Kalogeropoulos, Chairman of the 2nd section,
- Aindrias Ó Caoimh, member and rapporteur,
- Brigitte Phémolant, member,

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

in light of the written observations submitted on the hand, by the applicants and, on the other hand, on behalf of the European Schools, by Me [REDACTED],

having decided, as permitted by Article 19 of the Rules of Procedure, that the case would not be examined at a public hearing, the parties having been informed accordingly,

has handed down the following decision, the grounds for and the operative part of which appear below, on 23 August 2021.

Main facts of the dispute and arguments of the parties

1.

The applicants and their daughter [REDACTED] born the 5th December, 2011 are of Czech nationality, language and cultural identity.

During the first enrolment phase, they submitted an application for the enrolment of their daughter [REDACTED] at the European School of Brussels III (hereinafter referred to as “EEB3”) in P4 of the Czech language section for the 2021-2022 school year.

In the application form it was indicated that the child’s mother tongue was Czech and that the child’s knowledge of same was “excellent”, while it was also indicated that the child was learning the French language for 4 years, two of which were at the Lycée français in Vienna, Austria and subsequently for two years, including the year 2020-2021 at the Collège Saint Michel in Brussels.

2.

In light of the fact that it appeared that the child is multilingual it was considered necessary to determine her dominant language to establish what the child’s L1 should be upon enrolment.

Pursuant to Article 47(e) of the General Rules of the European Schools (hereinafter referred to as the GRES), following pedagogical analysis of [REDACTED] file, comparative language tests in Czech and French were organised on 2 March 2021.

The assessment reports on those tests produced the following conclusive results: ██████ would be capable of being educated in the French section “*without any difficulty*” (7/10 – *above average*) and in the Czech section “*with some difficulty*” (6/10 – *average*).

On the basis of those results, the management of the EEB3 informed the applicants on 21 March 2021 that the application for ██████ enrolment could be accepted solely in the French language section. The comparative test results were attached to that message.

The applicants requested several times a re-assessment of the language section on the basis of mid-year reports from their daughter's school in Czechia and from the Czech School Without Borders in Brussels attesting to their daughter's excellent results in study of the Czech language.

On 28 April 2021, a meeting was organised between the applicants and the Deputy Director of EEB3, at which the applicants were told that if they produced an end-of-year report from Czechia, proving their daughter's successful completion of the 4th grade in the Czech language (i.e. 'skipping a year' to move up to a higher grade in relation to her current third grade in Czechia), the pedagogical decision on the language section might be reconsidered.

3.

By decision of which notification was given on 30 April 2021, pursuant to the provisions of Articles 6.1., 6.17., 6.18(a), 6.19.1. and 10.6(k) of the Enrolment Policy in the Brussels European Schools for the 2021-2022 school year (hereinafter referred to as the 2021-2022 EP), the CEA offered ██████ a place in the primary cycle, in P5 of the French language section at the European School of Brussels II – Evere Site, this offer being “*conditional upon a new pedagogical decision by the Brussels III School's management*”.

4.

On 13 May 2021, the child's parents lodged this direct contentious appeal against the CEA's decision with the Complaints Board, as allowed by Article 67.2 of the GRES and Article 14.1 of the Policy. They request the Board to annul the contested decisions enrolling their daughter in the French section and to condemn the European Schools to pay the legal costs.

On the same date, they also lodged an appeal in summary proceedings seeking suspension of the disputed decision of the CEA dated 30 April 2021 (and if need be, suspension of the School's decision). This appeal was dismissed for lack of urgency, by order taken by the Chairman of the Complaints Board on 9 July 2021.

5.

In support of their appeal, the applicants put forward several arguments to explain why they think the proposed French language section is not in the child's best interests, by virtue of a possible infringement of Article 47(e) of the GRES.

They explain that [REDACTED] attended a Francophone school during her first four primary years (the first two years in Vienna - Austria and the last two years in Brussels - Belgium). She is currently in year 4 in a (Francophone) Belgian primary school in Brussels. In parallel, since the start of her primary school education, she has been following Czech language classes, and every year she takes Czech exams in Czechia, where she receives an official, government-approved school report. She has thus successfully completed her official grades in the Czech and French languages in both official educational systems. Her scores in the annual Czech language tests in her school in Czechia are excellent and her scores shown in the annual school reports from the Czech School Without Borders in Brussels are also excellent.

They also point out that due to different admission rules in Czechia and in Belgium, ██████ (born in December 2011) is in 4th grade in Belgium but in a *third*-grade class in the Czech educational system. This is the reason why they applied for their daughter's enrolment in year 4 of the Czech section, but they can now agree to enrolment in year 5 (P5) in the Czech section (see their email dated 11 June 2021 to the School).

They explain that they have started a procedure to obtain school results for the 4th grade under the Czech educational system and a formal request for skipping a school year, allowing ██████ to be enrolled in P5, but they estimate that they will not have these documents before early July, or even the end of August, 2021.

6.

The applicants argue in substance that the disputed decision is vitiated by manifest errors of assessment and procedural irregularities. According to them:

1) the contested decision does not take into account all the particular circumstances characterising their daughter's situation (manifest error of assessment):

- the fact that their daughter has been following lessons in both languages since the beginning of her primary education and that she has passed the official grades corresponding to both educational systems with excellent results in the Czech system;

- the fact that both applicants have only a moderate knowledge of French and will be able to help their daughter with homework only to a limited extent. It is therefore in their daughter's best interests for her to join the Czech section, in order not to be deprived of study support from her parents.

2) the contested decision considers wrongly that the dominant language is French in violation of the Language Policy (manifest error of assessment):

- [REDACTED] dominant language is Czech as it is the language that she uses most often with her parents, siblings, caregivers, close friends and teachers; Czech is the only language used at home. The applicant's daughter uses it on a daily basis, including 100% of time during all weekends. She also speaks Czech exclusively during all holidays (at least ten weeks per year in Czechia speaking with her grandparents and her six Czech cousins of similar age, during summer scout camp and judo camp in Czechia). In addition, she attends Czech language classes in Brussels (Czech School Without Borders) for two hours per week, complemented by homework. She attends regular meetings of the Czech scout group in Brussels and she prefers to read in Czech rather than in French. The applicant's daughter's excellent scores in annual Czech language tests (in her school in Czechia and at the Czech School Without Borders in Brussels) indicate beyond any doubt that Czech can be considered as her mother tongue.

The applicants also submit that the contested decision violates the Language Policy when it bases the decision on dominant language solely on the comparative tests, disregarding all factual information provided by the applicants regarding their daughter's Czech mother tongue. They add that their daughter was not treated equally with other children in a similar situation, when she was obliged to take the comparative tests while there was any doubt about her mother tongue;

- as a mono-cultural Czech family, the applicants are trying to support their daughter in maintaining the family's linguistic and cultural identity.

3) the contested decision is based on comparative tests which do not lead to an objective comparison of the results and which are vitiated by several irregularities:

The lack of objectivity of the comparative tests leads to a manifest error of assessment in the contested decision.

The applicant's daughter was tested in both comparative tests at the 4th primary level, although she has been following the third primary level under the Czech educational system; despite being tested for Czech language knowledge of a higher grade than what she can be reasonably expected to have, the CS test result is still very good.

The applicants also point out that their daughter was scored highly twice for the same skill and not scored for vocabulary range in the French test and that there is a difference of only 1 point on the scale of 10 (i.e. 10%), in favour of French: the overall result of the Czech test is 6 points - "average" and that of the French test is 7 points - "above average"; this difference is too small to justify disregarding all the other elements that favour Czech language primacy for the applicant's daughter.

According to the applicants, the Czech comparative tests conclude that their daughter is capable of being educated in the Czech section "*with some difficulty*" but such a comment cannot disqualify the Czech language as a valid language of tuition.

Finally, the tests are vitiated by irregularities as they were organised in violation of the Language Policy (part 3.2), without the applicants being provided beforehand with the procedural documents stipulating the main criteria to be met in the testing procedure.

7.

In their response, the European Schools request the Complaints Board to rule that the appeal is admissible but unfounded, and to order the applicants to pay the costs of the proceedings, estimated at € 800.

They underline first of all that the pedagogical decision concerning the linguistic section could be reconsidered (*« Please note that, as discussed with Mr. [REDACTED] this decision might possibly be reconsidered to allow her enrolment in the Czech language section if you produce in due course documents from the Czech School »*), being reminded

that the Decision on the pupil's dominant language remains in any event within the exclusive competence of the school management (see for example decision 18/27).

Secondly, the European Schools point out that since the amendment of Article 50 of the GRES, the director is no longer required to take particular circumstances into account when determining a pupil's mother tongue/dominant language.

The European Schools consider in any event that the circumstances invoked by the applicants are not relevant: the particularity of the pupil's situation was brought to the attention of the teachers who carried out her assessment on the occasion of the comparative language tests; in particular, the teachers were informed that the applicants initially requested the pupil's enrolment in P4 CS but that the tests were to be carried out with reference to P5 level for both languages.

The first page of the evaluation report of the Czech language test indicates the following with regard to the level/class: « *The girl is currently in a Belgium school P4. The parents request to repeat P4 (CS) again as she has not attended any Czech school previously. She attends the Sunday course for 2 hours per week. Therefore, she was tested for P5.* ».

They add that the applicants must be able to follow their daughter's education in French as they enrolled their daughter for her first four years of primary school in French language schools.

They also point out that the sole fact that a significant part of her social interactions is made in Czech is not such as to call into question the legality of the decision. On this point the European Schools recall, without calling into question the number of situations in which the pupil speaks Czech, that the pupil establishes contacts exclusively in French with school friends and teachers by reason of being 32 hours per week with them over four years. On this basis, it is suggested that it is somewhat

unreasonable to assert that the pupil spends more time integrating in Czech than in French, even when taking into account his holiday periods.

The European Schools consider, moreover, that the tests were conducted with reference to P4 level (with a view to enrolment in P5) for both languages, since this is the year that [REDACTED] will be entering next September, whether in the French or Czech section. The applicants are no longer asking for their daughter to be enrolled in the 4th year, but in the 5th year of the primary cycle (albeit in the Czech section).

The Schools underline finally that the tests were conducted in conditions that allowed an objective comparison of the results to be made: the marks awarded by the two teachers concerned are understandable and do not contradict the comments. There is no reason to consider the teachers' pedagogical assessment to be manifestly erroneous. Given the factual circumstances, it is not surprising that the pupil's proficiency level is slightly higher in French (the language in which she attends school every day) than in Czech.

It is submitted that the language tests to which the pupil was subjected on 2 March, 2021 were, furthermore, conducted in conformity with the procedural requirements posed by this document. The results of the language tests have been exhibited by the applicants and the European Schools.

8.

In their reply, the applicants maintain their claims and arguments, responding to the line of argument developed by the European Schools.

They insist on the following:

The applicants want their daughter to grow with a Czech identity. Aside from the language tests, they insist that all other factors pointing to Czech as her dominant language have been disregarded.

They plead the existence of a new fact, namely, that the Czech section which only exists in the EE Brussels III school at Ixelles, where in 2020/2021 there has been only one primary class at the current 4th year (future 5th year) and they understand that this class has 30 pupils which is the maximum number of pupils permitted under the existing rules in force and that if this number were increased it would be necessary to create a second class by splitting the existing class. The applicants believe that the European School in question has insufficient physical space due to long lasting general crowding and that the school wishes to avoid splitting the existing class and the applicants believe that this influenced the decision taken to enrol their daughter in the French language section, rather than enrol her in her best interest in the Czech section and they suspect that the interest of the School has been put above that of their daughter.

With regard to the pupil skipping a year in the Czech section to facilitate the possibility of the School re-considering its decision with regard to the language section of the pupil, the applicants point out that this was not their decision but followed a suggestion of Mr. [REDACTED] the Deputy Director of the School, with which they claim to disagree. They explain the difficulty of obtaining a favourable decision in this regard from the Czech authorities and that this may not be feasible.

The 'skipping a school year' procedure in Czechia is an exceptional, administratively complex and time-consuming procedure, involving assessment and tests. There is no guarantee that this procedure will be successful (a positive decision depends on the professional judgment of the Czech state educational psychologist and of two panels of teachers in the Czech school).

The applicants deny that they invoked particular circumstances within the meaning of

Article 50 of the GRES. They complain that the European Schools have not explained their decision with regard to having taken into account the circumstances of their daughter with regard to her knowledge of Czech and they contest the assertion that they must be proficient in French having had their daughter educated in francophone schools. They contend that their daughter's interaction in Czech during the year is twice that of her interaction in the French language and that she uses Czech with more significant interlocutors than in the French language.

The applicants deny having agreed to the language tests being carried out at the level for grade 5 and suggested that they should have been carried out at the level of schooling for each of the languages concerned (a higher level for French than Czech). They claim that when the School refused to entertain the idea of enrolling their daughter at the 4th grade that they agreed to her being enrolled at the 5th grade.

The applicants assert that if their daughter is not accepted into the Czech language section that she will stay at the French language Belgian school where she is.

Finally, they request the Complaints Board to order the European School to reimburse the legal costs that they have incurred in these proceedings which they state amounts to € 2236.08 as they engaged the services of a lawyer to assist them in taking the instant appeal and the application for interim measures.

Findings of the Complaints Board

On the admissibility,

9.

The admissibility of this appeal is not contested.

On the legality of the disputed act,

10.

The essential issue is the legality of the decision based on the comparative language tests.

In accordance with Article 46(1) of the General Rules of the European Schools, for the European Schools located in Brussels, it is the Central Enrolment Authority which decides on a pupil's enrolment taking account of the enrolment policy and of the instructions issued by the Board of Governors.

Determination of the language section is governed by Article 47(e) of the GRES, worded as follows:

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

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

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.

(...)

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.

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.
(...)"

11.

In accordance with the settled and consistent case law of the Complaints Board, it clearly follows from those provisions that the choice of language section is not a matter for the parents alone but must result from a pedagogical assessment made by the school in the child's best interests, in the light of the information provided by his or her parents and of the opinion of experts (see, amongst others, decisions 14/17 of 28 July 2014, 16/19 of 29 August 2016, 18/27 of 20 August 2018 and, more recently, reasoned order 19/02 of 15 March 2019).

The pedagogical assessment in question is a matter for the teachers, whom neither the CEA nor the Complaints Board can supersede, unless there has been a manifest error of assessment or infringement of the procedural rules established for the administration of tests.

12.

In the instant case, the applicants question the results of the comparative tests, suggesting that the pupil was marked twice for the same skill and allege a failure to allocate marks for vocabulary range in the French test. A reading of the results does not reveal that the child was marked twice for the same skill or that there was any failure to allocate marks for vocabulary range in French. Vocabulary was marked 7 for Speaking skills (*Expression Orale*) and at 9 for Writing Skills (*Expression Ecrite*). The

reports show a higher mark for Spoken Grammar, Writing Skills vocabulary and Writing Skills Grammar in French when compared to Czech and as conceded by the applicants a higher mark was attributed in the Conclusion in the French language test when compared to the Czech language test.

It is correct that with regard to certain skills the pupil attained the same superior mark in both Czech and French.

The results of those tests allowed the conclusion to be reached that Czech is not the child's dominant language. That finding is not invalidated by the applicants' assertion that their daughter is studying Czech each week and during the Summer period or that it is her mother tongue.

13.

The conclusion was that the pupil could be integrated into the French section of the School without difficulty and that she would be capable of being educated in the Czech section in the 5th year with some difficulty.

While the applicants complaint about the regularity of the tests insofar as both were conducted for P5, it is clear that the tests were a true comparison and no case has been established calling into question their conformity with the procedural rules established for their administration, nor did they allege that the comparative tests were otherwise flawed.

Furthermore, the applicants do not base their case on any legal or regulatory provision, requiring the European Schools to repeat the test or not to take account of the results.

The CEA therefore had valid reasons to enrol the child in the French language section, notwithstanding that Czech appears to be the language of the family.

14.

The Complaints Board has neither a power of control over the Schools' assessments made pursuant to Article 47 e) of the General Rules in order to carry out a comparative evaluation of the test results to which the applicants' daughter was subjected, nor a power of injunction with regard to the administration of the European Schools on this matter.

With regard to the circumstances of the applicants' daughter, the impugned decision cannot be invalidated insofar as the Director, in defining on the basis of the comparative tests and the interest of the child that French is the dominant language as such circumstances cannot amount to particular circumstances as since the modification of Article 50 of the GRES in December, 2018 this article no longer applies in the determination of Language 1. Accordingly, the reliance by the applicants upon the earlier Decision in case 18/21 is misplaced as that decision was based upon the Rules in force at the time and prior to the modification in December 2018.

Furthermore, the impugned decision being a decision of a pedagogical nature the Complaints Board, following its settled case-law, cannot review for the purposes of annulment (see decision of the Complaints Board of 31 May, 2017, in Case 17-07, point 13) except in the case of a manifest error of appreciation or in the case of a violation of the General Rules or in the case of a new fact.

The applicants have failed to demonstrate any manifest error of appreciation or any violation of the GRES and with regard to the alleged new facts pertaining to the fact that there have been 30 pupils in the Grade 4 of the Czech section in the Brussels EEB3 School, this fact of itself is not such as to warrant annulment of the impugned decision as it must be stated that were the language tests to have established that the dominant language of the applicants' daughter to be Czech that she would be entitled to be enrolled accordingly in the Czech section of that School.

Furthermore, reliance cannot be placed on the appreciation of third parties to call into question the decision of competent persons within the European Schools (See in particular Decisions 15/49, 16/21, 17/31 and 19/02).

In all these circumstances, the applicants case must be dismissed as being unfounded.

15

Without prejudice to the foregoing, the Complaints Board recognises that the European Schools have indicated that the impugned decision may be the subject of a revision in the light of the applicants being able to show that the pupil has been permitted by the Czech authorities to skip a school year in all the circumstances of their case and this decision is not in any way intended to preclude a re-consideration of its decision by the School.

On the legal and other costs,

16.

Article 27 of the Rules of Procedure provides that: *“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 is clear from those provisions, which, incidentally, are fully comparable with those in force in most national and international courts, that the unsuccessful party must, in principle, bear the legal and other costs of the proceedings. However, the said provisions allow the Complaints Board to assess on a case by case basis the conditions in which this should be applied.

In the particular circumstances of this case, and in view of the fact that the applicants have failed in this appeal, it is appropriate that they be ordered to pay the costs of the Respondents measured in the sum of € 400.

ON THESE GROUNDS, the Complaints Board of the European Schools,

HAS DECIDED AS FOLLOWS

Article 1: The appeal lodged by Mr [REDACTED] and Ms [REDACTED], registered under No 21/22, is hereby dismissed.

Article 2: The applicants shall pay the sum of € 400 to the European Schools in respect of costs and expenses.

Article 3: Notification of this decision will be given as provided for in Articles 26 and 28 of the Rules of Procedure.

A. Kalogeropoulos

A. Ó Caoimh

B. Phémolant

Brussels, 23 August 2021

Original version: EN

pp. The Registry,
Nathalie Peigneur