

Appeal 23/40 R

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COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS

Interim Order of 5 October 2023

In the case registered with the Registry of the Complaints Board under No **23/40 R**, concerning an appeal lodged in summary proceedings on 24 August 2023 by Ms ■■■■■, residing at ■■■■■, acting in her capacity of legal representative of her daughter, ■■■■■,

Mr Eduardo Menéndez Rexach, Chairman of the Complaints Board of the European Schools, ruling on the summary proceedings,

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

having regard to both this appeal lodged in summary proceedings and the main appeal lodged on 16 August 2023, registered under no 23/40,

having regard to the written observations submitted, on the one hand, by the applicant and, on the other hand, for the European Schools, by Me Muriel Gillet, lawyer registered with the Brussels Bar,

having regard to the final sentence of Article 35.1 of the Rules of Procedure, which states that, *‘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’*,

issued the interim order on 5 October 2023, the grounds for and operative part of which appear below.

Main facts of the case and arguments of the parties

1.

The applicant's daughter, [REDACTED] (hereafter "the pupil"), regularly attended secondary 3 in the Greek language section of the Luxembourg II European School during the 2022–2023 school year.

The pupil was promoted to the class above in secondary 4.

2.

On 5 May 2023, the applicant had submitted an application to change her daughter's Languages 2 and 3 on the assumption that German, taught as Language 2, would be taught as Language 3 from the 2023–2024 school year onwards, and that English, taught as Language 3, would be taught as Language 2 from the 2023–2024 school year onwards.

The application was based on the excellent results obtained by her daughter in English, her expressed lack of confidence while learning German and her plans to continue her studies, after obtaining the European Baccalaureate, in the English-speaking part of Canada.

3.

An English level test was conducted, and [REDACTED] scored 98%.

The request to change Languages 2 and 3 was then examined at the Class council of 19 June 2023. The conclusion was: *“Good pupil, good mark, many absences. No work during the last semester. No reason to change”*.

4.

On 29 June 2023, the Director of the Luxembourg II European School communicated the decision refusing the languages change application in the absence of any pedagogical reasons: *“The main reason for the decision was despite the good mark in the L2 English test [REDACTED] has a good mark in L2 German and the Class Council cannot see any pedagogical reasons for agreeing to this request”*.

The decision was communicated by ordinary post on 29 June 2023 and by email on 3 July 2023.

5.

On 6 July 2023, the applicant has communicated a report from a psychologist.

6.

On 14 July 2023, the School completed her decision to refuse the requested change of Languages 2 and 3, while explaining in details the Language Policy and the role of the Class council, and indicating that [REDACTED] would have the possibility of requesting a change of options once she started secondary 6.

7.

On 21 July 2023, the applicant submitted an administrative appeal against the dismissal of the request to change Languages 2 and 3.

With his decision dated 4 August 2023, the Secretary-General of the European Schools ruled the administrative appeal inadmissible *ratione temporis* unfounded.

8.

Through a request dated 16 August 2023, the applicant submitted a contentious appeal and on 24 August 2023, an appeal in summary proceedings based on Articles 34 and 35 of the Rules of Procedure of the Complaints Board of the European Schools invoking an urgent situation.

9.

In her appeal in summary proceedings, the applicant requests, as specified in her reply, that the Complaints Board orders that the European School Luxembourg II changes the L2 for her daughter from German to English language, as a medium of teaching not only L2 but also History, Geography and Economics), with immediate effect. She also asks to charge the European Schools with the legal and other costs of the case, valued at € 1.000.

In support of her appeal in summary proceedings, the applicant submits, in essence, the following:

Firstly, she justifies the urgency and the risk of absence of effectiveness of the right to appeal by the start of the new school year and by the fact that the disputed decision is affecting the school planning of her daughter.

She refers to the psychologist's report who emphasizes the pedagogical and psychological factors that most affect the mental and physical health of [REDACTED] but who recommends the urgent need to switch L2 and L3 in order to avoid aggravation of her state.

She also adds the silence of the Director, who did not reply to her requests for having a meeting, and the lack of an appropriate help from the School.

Secondly, the applicant argues that there are various serious doubts as to the legality of the disputed decision:

- The School's decision equates [REDACTED]'s outstanding performance in English (98 %) with her merely "good" performance in German. This misinterpretation can be seen as a failure to accurately assess her academic capabilities and needs while the sole reason provided for the decision appears to be based on this misinterpretation.
- The decision appears to be based on the evaluation of just one teacher, rather than a collegiate decision-making process.
- The School did not provide a full copy of the minutes of the Class council's meeting, which could be seen as a breach of transparency and procedural fairness.
- The advice provided by the School's director seems inconsistent with the School's own policies and with [REDACTED]'s academic and professional goals.
- Principle of equal treatment and of non-discrimination: similar requests were granted to other students.

10.

In their observations in response, the European Schools request that the Complaints Board reject the appeal as inadmissible and unfounded, and that orders the applicant to pay the legal and other costs, which have been *ex aequo et bono* assessed, of 800 €.

Concerning the current appeal in summary proceedings, the Schools submit, in essence, that:

- the conditions for summary proceedings are not met: the applicant is not applying for the suspension of an administrative decision or any other provisional measures, nor is she establishing any urgency for the Complaints Board to rule pending its substantive decision by demonstrating serious and irreparable damage.
- the appeal for suspension submitted on 24 August 2023 against the decision of the Secretary-General notified on 4 August is inadmissible *ratione temporis*.
- *subsidiarily*, the Schools consider that the applicant does not report the existence of any serious doubt affecting the legality of the disputed decision; they underline the following:

a) *concerning the pupil's performances in English and in German*: the sole circumstance of a pupil having better results in Language 3 than those obtained in Language 2 is not sufficient to consider *automatically* that Language 3 should become Language 2 and Language 2 become Language 3 ; it belongs to the Class council to assess the pupil's pedagogical skills in the different languages studied (L1, L2 and L3) and to decide, based on its overall assessment, whether the change of Language 2 is necessary for pedagogical reasons. A grade C in German is a 'good' grade and not an indicator of any noticeable learning difficulties.

b) *concerning the deliberation of the Class council*: in accordance with Article 18 of the General Rules of the European Schools, it must be exclusively accepted that the Class Council is positioned, on a collegiate basis, to reject the application for a change of Languages 2 and 3; it considered that [REDACTED]'s performance in German was satisfactory overall and that she would not face any major difficulties in studying it as Language 2. The applicant's speculations regarding the content of the deliberations (according to her, all the teachers would have ruled in favour of the change Languages 2 and 3, with the exception of the German teacher) are not established. The disputed decision of 14 July 2023 contains relevant parts of the minutes of the Class Council, which has enabled the applicant to submit the administrative and contentious appeals.

- c) *concerning the pupil's plan to continue her higher education in English*: the teaching of English as Language 3, which was moreover chosen by the applicant when the pupil was enrolled, does not constitute any obstacle to higher education in this language, especially because she has already excellent skills in English.
- d) *concerning the principle of equality of treatment and non-discrimination*: since assessment is carried out on a case-by-case basis by the Class councils, the circumstance that a change of Language 2 could be accepted for one pupil in no way implies that all changes of Language 2 should be. Moreover, this would run directly contrary to the Language Policy, which imposes as a principle the continuity of language options, at least for the first five years of the secondary cycle.

11.

In her reply, the applicant maintains her initial claims and asks the European Schools to pay her the legal and other costs, *ex aequo et bono* assessed of 1.000 €.

She reminds the two reports (from the psychologist and from the German's tutor), estimating that her daughter's psychological stress and learning difficulties in the German language were totally ignored.

She also relates an incident occurred on 07/09/2023 with the L2 German's teacher (Ms [REDACTED]) who told [REDACTED] that she would be taught economics in her Language 2 German instead of English as indicated on her timetable and that this error would soon be corrected) ; the applicant exposes the "*subsequent triggering of new psychosomatic symptoms of [REDACTED]*" (stress, tears, cries, feeling dizzy, shaking and trembling, with gastrointestinal problems) and explaining that her daughter develops now a reluctance to be taught in German, physically and mentally unable to follow German classes, especially Ms [REDACTED]'s classes ; according to her, this will

lead to more and more frequent absences.

Finally, she denounces once again the non-communication of the minutes of the Class council and that a screenshot incorporated in the response to her administrative appeal is not sufficient and *“raises questions and suspicion of possible forgery or falsification of documents”*.

12.

Upon request, the European Schools have submitted a rejoinder in order to highlight two points:

- a) concerning the incident occurred on 7 September 2023: the School, and, in particular Mr [REDACTED], the secondary cycle's coordinator, confirms that an unfortunate error occurred in the timetable attributed to [REDACTED], indicating that she would be able to take the economics class in English, whereas, in accordance with the Language Policy of the European Schools, this class must be taught in Language II, which in [REDACTED]'s case is German. Mr [REDACTED] confirms that this error was corrected immediately and that he responded to the applicant's various questions the very next day.
- b) concerning the repeated absences of [REDACTED] since the beginning of this new school year (she is quite often absent from economics and Language 2 classes) and her negative attitude towards the school: The Schools underline that the applicant cannot reasonably excuse her daughter from attending all classes on her timetable as was set out in accordance with the rules in force at the Luxembourg II European School and that the harm potentially suffered by [REDACTED] resulting from her non-participation in classes taught in German shall be of her own doing and that of the applicant, but shall not be attributable to the Luxembourg II European School.

Assessment of the Chairman of the Complaints Board

Preliminary remarks,

13.

- a) the disputed decisions must be identified as the one of the Director dated 14 July 2023 and the one of the Secretary-General dated 4 August 2023 dismissing the administrative appeal.
- b) the European Schools have stated in their submissions that *“at the contentious appeal stage, the European Schools will no longer contest the admissibility of the original administrative appeal”*.
- c) the current appeal must be read as seeking suspension of enforcement of the disputed decisions and an interim measure to switch L2 and L3.

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

14.

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 express 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’*.

15.

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) and 22/42R (point 13)).

16.

In this case, despite the unclear and wrong information given by the School to the applicant concerning the appeal procedures and deadlines, she lodged a contentious appeal, and then an appeal in summary proceedings which must be considered as admissible since the application was lodged separately to the main appeal and contains the *de jure* and *de facto* elements that would justify the suspension of the disputed decision and the urgency.

17.

It could firstly be admitted that the urgency and the real risk of absence of effectiveness of the right to appeal are justified by the start of the new school year and by the fact that the disputed decision is affecting the school planning of the pupil.

The time needed for investigating the main procedure, and for issuing a decision on the main appeal, will not allow a switch of L2 and L3 within a short and reasonable term.

It must be paid attention to the mental health and well-being of a teenager, and the incident occurred on 07/09/2023, related by the applicant in her reply, illustrates a climate of misunderstanding and a stressful environment for the pupil.

18.

Moreover, 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 judge of the summary proceedings but must be the subject of the substantive procedure*' (Order of the President of the EUGC of 31 March 2022 T-22/22 R).

In this case, it should be noted that the Director's disputed refusal is essentially motivated by an equal assessment of the pupil's knowledge of L2 and L3: "*The main reason for the decision was despite the **good** mark in the L2 English test [REDACTED] has a **good** mark in L2 German and the Class Council cannot see any pedagogical reasons for agreeing to this request*" (emphasized by the Board).

This must be seen as a manifest error of assessment since a score of 98 % in English (A) is obviously not equivalent to a C note (scored 70 or 75 %) in German.

The motivation of the Class Council's deliberations ("*good pupil, good mark, many absences, no work during the last semester, no reason to change*") does not justify sufficiently, except if based on this erroneous assessment, the decision to refuse the L2 and L3 change, once the pupil's performances in English had been tested

This finding is sufficient to consider, without the need to examine the other pleas of the appeal, that the request in summary proceedings sets out a plea that, at this stage of the investigation, must be considered likely to give rise to a serious doubt about the legality of the disputed decision.

19.

In the light of the above, it seems then appropriate to suspend the disputed decisions refusing the L2 and L3 change (switch) and allow it.

Nevertheless, in order to take into account, the pupil's interests as well as the School's ones, the School may decide, for organizational reasons, whether only the Economics class is affected by this measure.

20.

The Complaints Board will also draw the applicant's - and her daughter's - attention on the following:

- a) The Board did not base her decision on the report dated 6/7/2023 (produced after the Class council's deliberations) by which the psychologist only *recommends* the L2 and L3 change – and only "*since this is not against the school regulations*". This report does not present the requested change as an essential measure for the well-being of the pupil.

- b) The applicant and her daughter should adopt a more constructive attitude in order to avoid a “school dropout” which they should create themselves; the European Schools remind adequately, in their rejoinder, the rules concerning school and classe attendance. By her regular absences and her lack of investment in the German classes (especially L2 and economics, since the L2 German teacher indicates that the pupil could improve upon the grade C if she invested more in this course), the pupil could creating *herself* a more and more difficult situation, taking for granted that the switch of L2 and L3 will then finally have to be conceded.
- c) This suspension of enforcement is ordered without prejudice to the decision to be issued on the main appeal; indeed, in the context of an urgency procedure, the Board cannot make considerations on the merits which could prejudge the decision of the main appeal.

In any case, the pupil will stay taught in German (which is also the language of her living country), except in Economics, as a provisional measure waiting for the decision of the main appeal. It is why a more constructive attitude towards the German classes is more than expected.

Regarding the legal and other costs of the summary proceedings,

21.

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 those provisions, and having regard to the conclusions of the parties, it should be decided that the legal and other costs shall be reserved until the Complaints Board rules on the main appeal.

**ON THESE GROUNDS, the Chairman of the Complaints Board ruling on the
summary proceedings**

D E C I D E S

Article 1: The appeal in summary proceedings of Ms [REDACTED], registered under No **23/40 R**, is declared admissible and founded: the disputed decisions refusing the Languages 2 and 3 change (switch) must be suspended. The School may decide, for organizational reasons, whether only the Economics class is affected by this measure.

Article 2: The legal and other costs shall be reserved until the Complaints Board rules on the main appeal 23/40.

Article 3: This interim order shall be notified in accordance with the conditions under Articles 26 and 28 of the Rules of Procedure.

E. Menéndez Rexach

Brussels, on 5 October 2023

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On behalf of the Registry,
Nathalie Peigneur