

Appeal 23/41

██████████

THE COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS

(First section)

Decision of 5 December 2023

In the case registered with the registry of the Complaints Board under No **23/41**, the purpose of which was an appeal for annulment submitted on 14 August 2023 by Mr ██████████ and Ms ██████████, directed against the decision of the Class Council of 3 July 2023 that their son ██████████ ██████████ should repeat the year,

the Complaints Board of the European Schools, first section, consisting of:

- Eduardo Menéndez Rexach, Chairman of the Board,
- Paul Rietjens, member,
- Pietro Manzini, member and rapporteur,

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

in the light of the written comments submitted, on the one hand, by the applicants (appeal and reply) and, on the other hand, for the European Schools, by Mr Marc Snoeck, lawyer registered with the Brussels Bar (memorandum in response and rejoinder),

in the light of the questions posed by the judge-rapporteur (Order of 17 October 2023 issued pursuant to Article 18.1 of the Rules of Procedure),

having decided that, as permitted under Article 19 of the Rules of Procedure,

the case would not be heard at a public hearing,
on 5 December 2023, issued the decision whose reasons and instrument are
set out below.

Facts of the case and arguments of the parties

1.

- The pupil, ██████████, has been enrolled in the ██████
section of the Brussels III European School since the beginning of the 2019–
2020 school year. He was in the fifth year of the secondary cycle during the
2022–2023 school year.

Since he enrolled at the Brussels III European School, the pupil has been given
intense support (A) as he has various learning difficulties, documented by
medical, neuropsychological and speech therapy reports. In August 2022, the
pupil was also diagnosed with scoliosis and has been required since then to
wear a brace.

The results obtained by the pupil during the first and second semesters of the
year resulted in warning letters being sent to the applicants concerning the risk
of having to repeat the year, on 16 November 2022 and 24 April 2023. In
response to this last letter, the applicants sent the School a detailed letter.

At the end of the school year, the pupil obtained a general average of 4.5 and
did not achieve the required level in eight of the subjects required for promotion.

On 3 July 2023, the Class Council for the fifth year of the secondary cycle
decided that the pupil should repeat the year pursuant to Articles 61.D.2. and
61.D.3. of the General Rules. The applicants were notified of this decision in a
letter from the School Director, Ms ██████████, dated 5 July 2023.

2.

On 10 July 2023, the applicants submitted an administrative appeal against the decision of 3 July 2023 that the pupil should repeat the year.

In a decision dated 8 August 2023, the Deputy Secretary-General of the European Schools rejected as unfounded the administrative appeal submitted on 10 July 2023 challenging this decision to repeat the year.

3.

The applicants present three pleas in support of their appeal.

In the first plea, the applicants argue that their son was entitled to the assistance of a scribe and a reader for exams, pursuant to Article 1.3.1.2.2.1. of the educational support and inclusive education offer available at the European Schools and that he had not benefitted from this. They state that they only became aware of this specific support measure at the end of the school year.

In the second plea, the applicants complain that the decision to repeat the year and the decision to reject the administrative appeal, was based only on the pupil's academic results, without taking into account his learning difficulties and his scoliosis.

In the third plea, the applicants raise the behaviour of certain teachers towards their son. In particular, they state that a teacher had shown '*persistent rejection*' and '*racist behaviour*' towards the pupil.

4.

In their memorandum in defence, the European Schools argue the following.

The admissibility of the appeal, both *ratione temporis* and *ratione materiae*, is not discussed.

Concerning the first plea, the Schools state that although the presence of a scribe and reader is not indicated in the successive learning plans established for the pupil, he nevertheless benefited from these support measures for the examinations in December 2022 and June 2023. The Schools admit, however, that the School's communication with the applicants could have been clearer on the subject.

Concerning the second plea, the Schools observe that Article 61 of the General Rules governs educational decisions taken by the Class Councils concerning promotion/non-promotion, calling on considerations other than the simple graded results. The Schools affirm that in this case the members of the Class Council certainly kept in mind the pupil's particular circumstances, of which they were all fully aware from the beginning of the school year. The Schools also underline that the educational assessment is a matter for the teachers who meet in the Class Council and that it is not for third parties – especially the Complaints Board or parents – to replace the assessment of the teaching staff with their own on these matters.

Concerning the third plea, the Schools contest the notion that teachers – who are anyway not identified – could have an attitude of rejection or racism towards the applicants' son. There is no evidence of any such behaviour. In any case, even considering the alleged facts as being established – *quod non* – they would not alone mar the legality of the decision to repeat the year.

5.

In their response, the applicants maintain their initial claims and insist, in essence, on the following:

Concerning their first plea, they persist in affirming that no scribe was present alongside their son at the examinations in December 2022 and June 2023.

Neither their son nor his assistant was aware of the possibility of such support. They emphasise that the tests were handwritten by their son, which indeed demonstrates that he was not provided with any writing assistance.

Concerning the second plea, the applicants observe that the decision of the Class Council was adopted with only one point of difference (7 against 6) and that the Class Council convened in June only included one teacher who did not know all of the children and their schooling personally, although the director was present.

Finally, concerning the third plea, the applicants identify by name the teachers alleged to have made what were deemed to be negative comments about their son.

6.

In their rejoinder, answering the judge-rapporteur's questions, the European Schools finally admit that no '*scribe/speech to text*' was present during the applicant's son's examinations and that this absence was due to an administrative error on the part of the School.

They explain that on 7 October 2022, namely at the start of S5 for the pupil, the applicants had requested that special arrangements be made for the Baccalaureate and that the School had responded positively by email on 14 February 2023. The assistance of a '*scribe/Speech-to-text*' and a '*Reader/Text-to-speech*' did indeed feature among the measures granted to the pupil.

However, due to an error in an email of 15 June 2023, indicating Mr [REDACTED] as '*assistant*', the latter was not considered as being in charge of the task of scribe in the end of year examinations. This explains why, in the June examinations, the pupil did not benefit from the aid of a '*scribe/Speech-to-text*'.

The Schools emphasise, however, that neither the applicants nor the pupil drew the School's attention to this matter at the time of the examinations, even though the applicants had been informed of the special support measures on 12 June 2023.

Furthermore, during his examinations, the pupil had regularly been received by the Deputy Director of the secondary cycle. On this occasion, neither the question of the absence of a scribe nor other difficulties were mentioned by the pupil.

Finally, without casting doubt on their responsibility for the failure to actually provide the special support measure consisting of the assistance of a scribe, the Schools dispute the notion that this can be considered a procedural irregularity or a new fact within the meaning of Article 62 of the General Rules.

Concerning the third plea, the Schools recall that in a letter dated 19 November 2022 the applicants referred specifically to three teachers, whose comments they relayed. The teachers in question, however, refute any insulting or disrespectful meaning that might be inferred from the contents of the applicants' letter of 19 November 2022. It is however not disputed that, during the meetings held between these teachers and the applicants following the autumn assessment report of 11 November 2022, the teachers expressed their concerns about the pupil's risk of failing, which was already visible at this stage. In doing so, the teachers in question merely shared their concerns with the applicants based on their pedagogical assessment.

7.

Concerning court fees, the European Schools have requested that the applicants be ordered to pay 750 euros by way of compensation for the procedure.

The applicants are not claiming legal fees.

Assessment of the Complaints Board

On the admissibility of the appeal,

8.

The appeal is admissible, both *ratione temporis* and *ratione materiae*

Regarding the merits,

9.

The questions of merit raised by this case should be assessed with regard to Article 62 of the General Rules of the European Schools, defining the conditions for appeals against decisions on repeating a year.

In the terms of this provision:

'1. Pupils' legal representatives shall have no right of appeal against Class Council decisions except in cases of procedural irregularity or recognition of new facts by the Secretary-General, on the basis of a file provided by the school and the pupil's legal representatives.

Procedural irregularity means any infringement of a rule of law pertaining to the procedure to be followed for promotion to the year above, such that if it had not been committed, the Class Council's decision would have been different.

Failure to provide assistance in the form of the pupil's integration into the Educational Support programme shall not constitute a procedural irregularity, unless it can be demonstrated that the pupil or his/her legal representatives sought such assistance and that it was improperly refused by the school.

It shall be the schools' responsibility to make practical organisational arrangements for examinations and the said arrangements cannot be regarded as a procedural irregularity.

New fact means any element which might not have been brought to the Class Council's attention because it was unknown to all – teachers, parents, pupil – at the time of its deliberation and which might have influenced the purport of its decision.

A fact of which the parents were aware but which was not brought to the Class Council's attention cannot be described as a new element as meant by this provision.

The Class Council shall have sole discretionary power in respect of assessments of pupils' abilities, the award of a mark for an examination, test or a piece of work done during the school year and assessment of the particular circumstances referred to in Article 61. B-5. Appeals may not be lodged against these assessments.

(...)'.

10.

The Board feels that in this case there has indeed been a procedural irregularity concerning the procedure to be followed for promotion to the year above which, had it not been committed, could have led to a different decision by the Class Council.

In fact, the file shows that the applicants had requested educational support for their son and that this support had been granted by the Central Office from S5 and included, inter alia, a 'scribe/speech to text'.

The Schools have admitted however that, following an error attributable to their internal organisation, the pupil was unable to benefit from the aid of a 'scribe/Speech to text' during the examinations of June 2023. This is confirmed elsewhere by the fact that the examination is written in the pupil's own hand.

According to the Schools, this error does not constitute a procedural irregularity within the meaning of Article 62 of the General Rules as they did not infringe a rule of law pertaining to the procedure to be followed for promotion to the year above, or any rule concerning educational support.

However, this formal approach cannot be followed.

When educational support is granted by the Schools, this means that it is necessary, or at least very important, for the success of the pupil concerned in their examinations. In this regard, the effective provision of educational support should be considered to constitute part of the procedures to be followed for promotion of the pupil concerned to the year above.

The absence of such support must have had some influence on the pupil's results in the examinations, and therefore also on the decision of the Class Council.

Similarly, the fact that the pupil did not draw attention, before or during the examinations, to the absence of the '*scribe/speech to text*' cannot be relevant to excluding a procedural irregularity. Once the Schools have granted such teaching support, it is their responsibility to ensure that it is effectively provided.

One must therefore conclude that the procedure followed by the Schools is marred by an irregularity affecting the legality of the decision to repeat a year, justifying its annulment.

However, it should be remembered that the annulment of this decision in no way implies the pupil's automatic progression of the pupil into the year above; the Schools have sole competence for decisions concerning pedagogical issues, not this Board.

This conclusion renders any analysis of the second and third pleas of the appeal superfluous, as the irregularity stated is sufficient, alone, to annul the decision not to promote the pupil.

On the legal and other costs,

11.

Article 27 of the Rules of Procedure states 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 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.

In the absence of numbered conclusions on the part of the applicants concerning the expenses, it should be decided that each party cover its own expenses.

FOR THESE REASONS, the Complaints Board of the European Schools

D E C I D E S

Article 1: The decision of the Class Council of 3 July 2023 not to promote the pupil and the decision of the Deputy Secretary-General of the European Schools of 8 August 2023 are annulled.

Article 2: Each party will cover its own expenses.

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

E. Menéndez Rexach

P. Rietjens

P. Manzini

Brussels, 5 December 2023

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On behalf of the Registry,
Nathalie Peigneur