



INTERPARENTS

MEMO

TO: Board of Governors' representatives

CC: APEEE Presidents

FROM: INTERPARENTS LEGAL WG

Date: February 2021

Subjects: reflections on the effectiveness of the Judicial remedies for the pupils of the European Schools

European Baccalaureate session 2020 has been strongly affected by the COVID-19 pandemic. In the Board of Governors meeting held in April 2020 extraordinary measures were taken to accommodate the cancelation of the written and oral BAC examinations scheduled for June. The application of those extraordinary measures, including the application of a statistical moderation formula resulting in a drop of the final BAC marks to all students, have forced InterParents representatives to reflect on the nature and the effectiveness of the current judicial remedies for pupils of the European schools. The right to an effective remedy is one of the rights and general principle of the European Union (Article 47 of the EU Charter of Fundamental Rights). But the pandemic emergency has made clear the necessity to rethink the extent to which the judicial review system of the Convention defining the Statute of the European schools is still effective. It also challenges legal certainty as regards the choice of law applicable in certain areas of law and the validity and enforceability to the European schools of the national rules in these areas. *A fortiori*, if we consider that the European Schools system has evolved over a period of more than sixty years and the opportunity for major reform presented itself quite rarely.

As we know, parents of a pupil (or a pupil aged 18 and older) enrolled in one of the European schools who wish to challenge a decision taken by one of the organs of the European Schools (Secretary-General, Central Enrolment Authority, Director of a school, Class Council, Discipline Council, Examining Board of the Baccalaureate, etc.) can lodge a contentious appeal before the Complaints Board of the

European schools. The Complaints Board was set up by Article 27 of the Convention defining the Statute of the European Schools and is composed of independent judges. The Complaints Board has sole jurisdiction as the first and final instance in any dispute concerning the application of the above Convention and of the regulatory texts which govern the European Schools system.

Recent Complaints Board decisions¹, made public in October 2020, give rise to serious concerns as to the effectiveness, comprehensiveness and modernization of the system of judicial review foreseen in 1994 in the Convention defining the Statute of the European Schools.

The background to these judgments was the Board of Governors' decision² allowing for statistical moderation of 2019/2020 Baccalaureate candidates' grades. This meant the pupils' grades could be downgraded in a way wholly unrelated to their own academic performance, and with potential detrimental effect to their admission to the university of first choice. Therefore, a record number of appeals concerning the Baccalaureate session 2020 were lodged before the Complaints Board of the European Schools.

These appeals have now been adjudicated, and all appeals have been dismissed. The judgments, given in first and last resort must be respected as such.

However, they cause for great concern to parents, the APEEEs and InterParents, as they should to anyone who considers that the rule of law and fundamental rights, as enshrined in Article 2 of the Treaty on the European Union, apply also to the European Schools and its governance. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting legislative acts and regulations; legal certainty, prohibition of arbitrariness of the executive powers; **effective judicial review including respect for fundamental rights**. These rights must be respected by the EU when applying policies and programmes, by the EU institutions and by each of the Member States.

The ruling by the Complaints Board contains a number of serious legal concerns yet there is no appeal possible, this in itself potentially depriving pupils and parents of the right of an effective remedy and a fair trial³. A fair system of judicial remedies at the "European Schools" should as a minimum standard foresee that decisions taken by the Complaints Board could at least be appealed to an own internal

¹ Noted already in 2014 in Opinion of Advocate General Mengozzi in joined Cases C-464/13 and C-465/13 , ECLI:EU:C:2014:2169, Para 62 to 64

² Even if it is recognised that the principle of effective judicial protection does not afford a right of access to a second level of jurisdiction but only to a court or tribunal, ECJ, joined Cases C-464/13 and C-465/13, ECLI:EU:C:2015:163, para 73

³ Annual report of the Ombudsman 2003, p. 183

Appeals Chamber. This proves, once more, a serious shortcoming in the governance of the European Schools⁴.

Retroactive application of the Moderation Decision to the detriment of the pupils concerned:

The Board of Governors' decision on moderation was applied before the persons concerned were informed, by a decision made public only on 25 June 2020, i.e. three days after the proclamation of the Baccalaureate results. In other words, that decision applied retroactively. The Complaints Board found this circumstance did not affect the validity of the decision to adopt the revised Baccalaureate rules, including the moderation principle. The judges recalled on a situation of force majeure due to Covid pandemic and the fact that the Convention defining the Statute of the European Schools does not contain any provision on the publication of decisions of general application adopted by the Board of Governors. However, in legal terms the application of the *ex tunc*-effect (retroactive effect) generates a conflict with the fundamental principle of legal certainty, protecting the legitimate expectations of pupils and parents regarding the continuity as well as the legality of the European schools' rules and decision-making process. Retroactivity presents serious fairness and legality concerns and InterParents would have expected the Complaints Board to clearly disfavoured this approach.

Substantial violation of a legal rule does not, according to the Complaints Board, vitiate the decision: The Complaints Board also held that the substantial violation of a legal rule – pupils and parents had invoked among other the EU Charter of Fundamental Rights and general principles of EU law – could not in itself suffice to set aside the revised Baccalaureate rules on moderation. It is only if such a violation of a legal rule also fits in with the Complaints Board's very narrow and formalistic conception of procedural irregularity that it could be used in the implementation – by the Complaints Board - of provisions like the EU Charter of Fundamental Rights or general principles of EU law. The right to an effective remedy, which is an important aspect of this question, is guaranteed in Article 47 of this Charter.

Yet it can be doubted whether this narrow interpretation is sustainable. As the Commission acknowledged, the principles laid down in the Charter of fundamental rights "*apply in full to the European schools and are binding upon them*". It be mentioned that the Ombudsman has also consistently taken the view that the Commission, to which the Charter applies without any doubt, has a certain responsibility for their operation because it is represented in the Board of Governors and contributes largely to their

⁴ Annual report of the Ombudsman 2003, p. 185 and 187

financing, and that includes the Commission's responsibility includes *"the promotion of good administration by the European Schools"*.

Furthermore, the European Commission as party to the Convention of the European Schools is bound in its actions by the Charter and thus has a responsibility to work towards the Charter principles being fully adhered to by the European Schools.

The Complaints Boards interprets notion of pedagogical decision in such a wide way as to effectively remove a substantial number of cases from the scope of judicial review: The Complaints Board considered that the Board of Governors' revised 2019/2020 Baccalaureate decision constituted a decision of pedagogical nature which could not be subject to legal review, except on - arguably the narrowly defined - procedural irregularity grounds. The Complaints Board made this finding in spite of the fact that the moderation procedure put in place did not involve any assessment of the pupils' academic performance but amended marks awarded to pupils on the basis of their actual performance on the basis of a statistical correction method, which failed to be properly motivated or explained in advance.

Pupils and parents are very concerned by this narrow interpretation, which finds no fault in applying a decision not yet taken or applying it retroactively. But, even if we would consider the decision on moderation of a pedagogical nature, the procedural irregularity in taking that decision constituting the breach of a fundamental right, must rise to an effective remedy.

What is especially worrying is the fact that the safeguard of pupils' rights would appear much less assured by the ad hoc institutional system put in place with the European Schools, than in most national educational systems. While parents understand the complexities of running the European Schools system, there can be no justification to afford pupils of those schools' lesser judicial protection than pupils of national schools.

CONCLUSIONS

Article 6 of the 1994 Convention already states that European Schools are to be afforded the same rights and obligations as public schools in each of the host countries, subject to the specific provisions of the Convention. Faced with case-law which explicitly states that the Complaints Board has- jurisdiction only when the illegality invoked can result solely from a procedural irregularity (ie any infringement of a rule of law relating to the procedure provided for by the texts governing the European Baccalaureate), and not from an infringement, fundamentally, of a rule of law, parents will have no alternative but to

resort to the national education and administrative justice systems, in accordance with that provision. However, this could result in great disparities of judicial remedies from one national legal order to another.

The above judgments confirm us the need to revise the current judicial review procedure and to give more power to the Complaints Board to review the regulatory acts of the European schools' governing bodies to determine whether they conform to EU rules and principles and the fundamental rights.