

Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 1391/2002/JMA

Special Report

Case 1391/2002/JMA - Opened on 16/09/2002 - Recommendation on 27/02/2004 - Special report on 16/09/2002 - Decision on 07/06/2005

(made in accordance with Article 3 (7) of the Statute of the European Ombudsman [1])

Summary

The complaint concerns the failure of the European Schools to cater for the special educational needs of the complainant's daughter. Since the European Schools could not meet those special needs, the complainant was compelled to take her daughter to an alternative education system, the costs of which were not entirely covered by the Commission. Instead, the institution required the complainant to make a financial contribution to the cost of her daughter's special education.

Following his inquiry into the case, the Ombudsman took the view that the integration of children with special educational needs (SEN children) into the ordinary education system remains a general policy goal, albeit without a mandatory character. In the absence of a binding legal provision, the Ombudsman did not find that the fact that the complainant's daughter could not be educated in one of the European Schools constituted maladministration.

The Ombudsman nevertheless found that the financial aspects of the situation constituted an unjustified discrimination, and made a draft recommendation that the Commission should take the necessary steps to ensure that parents of SEN children who are excluded from the European Schools because of their degree of disability should not be required to contribute to the educational costs of their children.

The Commission's detailed opinion as well as the additional information sent by its services do



not accept unequivocally the draft recommendation. Nor do these documents indicate that the Commission appears willing to reverse its current policy on charging officials for the education of their SEN children. After fully examining the Commission's arguments, the Ombudsman considers it appropriate to make a Special Report on the matter to the European Parliament and to include a recommendation therein.

In the course of the inquiry into complaint **1 391/2002/JMA**, the Ombudsman received a significant number of additional complaints which involved similar facts and raised identical allegations. The Ombudsman also informed the Commission of these complaints. The Ombudsman therefore considers that the analysis in this Special Report and the recommendation also apply to these complaints, which are listed in an annex to this report.

The complaint

On 25 July 2002, a Community official whose daughter is mentally handicapped complained to the Ombudsman. According to the complainant, the relevant facts are, in summary, as follows:

In September 1997, the complainant's daughter joined the European School Brussels II centre in the Woluwe area. Following the advice of her teachers, she had to follow speech and occupational therapy. In the school years 1998-99 and 1999-2000, she received assistance under the European School's special programme for children with special educational needs (henceforth SEN children). In June 2000, the European School decided, acting on the advice of its SEN children's committee, that it could no longer provide for the special educational needs of the complainant's daughter. Despite the complainant's requests to allow her daughter to continue her education at the European School, its Board of Directors considered that the child had to go to a different school, which could cater for her special educational needs. In September 2000, the complainant's daughter joined the Special Education Unit of the International School of Brussels.

As regards the academic year 2000-2001, the total annual cost of this special education amounted to EUR 28 550 (EUR 26 800 for School fees and EUR 1 750 for transportation costs). On 19 April 2002, the Commission's DG Administration decided that the complainant should be required to pay 5% of these costs (i.e. EUR 1 447 24), to be deducted from her salary.

According to the complainant, the European Schools have failed in their responsibility to provide a suitable educational programme for SEN children of officials. She referred to the Statute of the European Schools which provides that the role of these institutions should be to promote the education of children of the staff of the European Communities in order to ensure the proper functioning of the European Institutions. The complainant notes that nowhere in the texts is it mentioned that some disabled children can be excluded because of their disabilities. The Commission is partly responsible for the situation, because it has a seat on the Board of Governors of the European Schools and is in charge of the implementation of the school's budget.



The complainant considers that the requirement to make a financial contribution to her daughter's education is discriminatory, since parents with SEN children in the European Schools are not required to make such a contribution. The complainant also argues that the Commission, as her employer, failed to carry out its duty to ensure a free education for her child.

In summary, the complainant puts forward the following allegations:

- (i) The European Schools have failed to provide suitable education programmes for all EU officials' children who have special educational needs.
- (ii) The Commission's decision requiring her to make a financial contribution for the education of her daughter is discriminatory.
- (iii) The Commission should make clear in all published information concerning the European Schools that some SEN children can be excluded.

THE INQUIRY

The Commission's opinion

In its opinion of 6 January 2003, the Commission addressed each of the allegations made by the complainant:

Education for SEN children to be provided by the European Schools

Under the Convention of 17 June 1994 establishing the European Schools, the Schools are not Community bodies but integrated establishments in an educational system common to all Member States, under the authority of the Board of Governors. The European Community contributes towards the operating expenses of these Schools and is a Member of the Board of Governors.

The European Schools, unlike most national education systems which have special centres for disabled children, only comprise ordinary educational establishments. Despite this limitation imposed by the Boards of Governors, the European Schools are sympathetic towards the difficulties faced by SEN children. Since 1987, they have striven to ensure that these children are integrated. For this purpose, certain structures have been put in place such as remedial courses and guidance centres.

Since 1989, each school has included an "advisory group" composed of a teaching team, which assesses the extent to which the specific needs of each child can be catered for in the normal classroom environment of the school. The advisory group submits its report to the Head, who consults the two competent inspectors before deciding whether or not to admit a SEN child to the school. When a child is not admitted, the parents may appeal to the chair of the learning support committee, the final decision resting with the representative of the Board of Governors.



As a result of the Commission's intervention, the section of the Schools' budget devoted to SEN children has doubled from 1996, and rose to EUR 1 400 000 in 2002.

As regards the particular case of the complainant's daughter, the advisory group for SEN children of the European School Brussels II decided in June 1998 to provide her with special support courses. This support was renewed in June 1999. In June 2000, the SEN advisory group reached the conclusion that the child was unable to benefit from the education offered by the European Schools. On 6 June 2000, the school advised her parents that she should be placed in an educational centre more appropriate for her specific needs.

Upon the complainant's requests to have the decision reconsidered, the Commission lodged a formal complaint with the Board. It was concluded that the ordinary education system of the European Schools could not satisfy the needs of all SEN children.

According to the information provided by the European School Brussels II (Woluwe), the case of the complainant's daughter was reviewed in accordance with the rules governing the European Schools. The Commission considered that the policy of the European Schools concerning the integration of disabled children was not discriminatory and that its centre in Woluwe (European Schools Brussels II) had done everything that it could in accordance with existing policy and procedures.

Discriminatory nature of financial contributions to be made by parents of certain SEN children

The Commission explained that in its role as employer, it supplies financial support for the parents of SEN children by providing two forms of assistance:

- Statutory assistance, as in the case of family allowances. An official can be granted double the normal dependent child allowance if his or her child is disabled. Officials receiving the double allowance are automatically granted tax relief, and medical expenses arising from a disability are reimbursed at the rate of 100%.

- Additional contribution made towards the costs arising from a disability, by means of budget line A-4103 ("supplementary aid for the disabled"). The Commission noted that the distribution of this type of aid is governed by Article 5a of the provisional guidelines for implementing budget line A-4103 adopted in 1999 by the Heads of Administration.

If an official applies for assistance under budget line A-4103, Article 5a of the provisional guidelines stipulates that he/she must make a contribution depending on taxable family income as laid down in Annex II to the provisional guidelines. In the case of the complainant, the financial contribution came to 5% of the expenses incurred.

Supplementary aid for the disabled is intended to provide extra assistance for the costs incurred because of a disability. It should not be confused with arrangements constituting an alternative to the education system existing in the European Schools.



Information provided by the Commission to parents with SEN children

The Commission services are in contact with the European Schools with a view to deciding what measures should be taken to integrate SEN children. The Commission will continue its efforts to make the representatives of the European Schools aware of the need to provide parents of SEN children with information. It will also ensure that such details are included in the information given to new officials and other servants both before they take up their posts in the Commission and when they start work.

The complainant's observations

In her observations, the complainant considered that if the European Schools are unable to cater for some SEN children, their budget should entirely finance the education of those children in an alternative centre. In her view, the European Schools ought to negotiate agreements with local/international schools to provide an appropriate education for all SEN children, as is the case in most Member States.

The "statutory allowance" or doubled child allowance provided by the Commission has to be deducted from the amount which the complainant is required to pay for the education of her daughter. That deduction does not apply when the child is admitted to the European Schools. On the basis of the Commission's statistics, the complainant pointed out that the European Schools' average expenditure for a SEN child is EUR 11 111, whereas average expenditure for a SEN child on the A-4103 budget line is EUR 9 315.

In order to correct this disparity, the complainant suggested that the European Schools should cover all educational costs of SEN children who have to be transferred to an alternative establishment.

In the complainant's view, the Commission, in its role as Guardian of the Treaties, should ensure implementation of Community legislation on combating all types of discrimination on the sole grounds of disability. She argued that the actions of the European Schools are in breach of Article 14 of the Charter of Fundamental Rights of the European Union which guarantees the right to education. Accordingly, the complainant considered that the European Schools have failed in their responsibility to provide a suitable education for SEN children of EU officials.

The Ombudsman's efforts to achieve a friendly solution

After a careful evaluation of the opinion and observations, the Ombudsman did not consider that the Commission had responded adequately to the complaint. Article 3 (5) of the Statute of the Ombudsman [2] directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complaint. The Ombudsman's provisional conclusion was that, by requesting a contribution from the complainant to the educational costs of her SEN child who had been excluded from the



European Schools because of her degree of disability, the Commission did not ensure respect for the principle of equal treatment.

By letter dated 9 July 2003, the Ombudsman therefore proposed that the Commission should take the necessary steps to ensure that the complainant was not required to contribute to the educational costs of her child.

In its reply of 22 October 2003, the Commission explained that a working party reporting to the inter-institutional Committee for the preparation of social measures (CPAS) should be proposing to the Heads of Administration certain changes involving the current guidelines on additional help for disabled people. Among other things, it will be suggesting that the topped-up part of dependent child allowances no longer be deducted from the costs incurred. If approved, the new scheme was to enter into force on 1 January 2004.

The Commission argued that a complete exemption of the complainant from any contribution to the educational costs of her child -as the Ombudsman had proposed- would only be justified if the present regime could be viewed as discriminatory. In the Commission's view, this was not the case because parents of children who cannot attend a European School, in particular for pedagogical reasons, must also look for alternative schools, subject to charges which are only partly reimbursed or sometimes not reimbursed at all. Thus the requirement for parents to contribute to the costs of their children's education is not necessarily linked to disability. The Commission, therefore, took the view that the additional financial contribution should be regarded as non-discriminatory.

The institution pointed out that if disabled children are excluded from the European Schools, it is not because of their disability, but because the severity of their disability is beyond the schools' ability to cope with them. As a result, some of these children will have to be directed towards other structures. Since the cost of such structures is much higher, having regard to the existing budgetary limits, a limited contribution is required of parents, based on the family's financial situation. The financial assistance associated with the costs of a private school and granted to the complainant's disabled child is made up of a statutory element (double dependent child allowance plus lump-sum and non-standard education allowances) and a non-statutory element ("supplementary aid for the disabled"; budget line A-4103). Parents are required to make a contribution to these costs as part of the non-statutory element (i.e. additional assistance for persons with disabilities). In the case of the complainant, the Commission restated that this amount is 5% of the total cost. According to the Commission's estimates, the total annual cost amounted to EUR 32 700, of which EUR 32 456 were borne by the institution. However, as outlined earlier, the Commission announced its intention to further decrease the financial burden for the complainant.

The Ombudsman forwarded the Commission's reply to the proposal for a friendly solution to the complainant. In her reply, she restated the facts of the case, and underlined that the obligation to contribute to her daughter's education was linked to the fact that she is a disabled child. The complainant argued that the Commission's references to future initiatives are irrelevant, since the case before the Ombudsman concerns the situation and circumstances of her daughter for



whose education she has been asked to contribute since the year 2000. In contrast to the figures referred to by the Commission, the complainant noted that her contribution amounts to EUR 5 638, namely 15% of the total costs. The complainant contested the Commission's argument that the additional financial contribution she was required to make was non-discriminatory. In her view, the question of whether children have to leave the European School for a variety of reasons is immaterial. The situation in this case concerns a child who was refused an education because of her disability, and thus was asked to pay for part of her education. The discrimination occurs purely because of her disability. The complainant argued that the fact that the Commission abides by the letter of existing guidelines or rules cannot suffice to justify the situation, since the applicable guidelines or rules may themselves be discriminatory.

The complainant also expressed her astonishment that the Commission should, in the year of the disabled, feel the need to defend the European Schools' exclusionist policy and practice, rather than take action in support of its own policies regarding discrimination. In her view, the Commission has been guilty of a complete neglect of its responsibilities to its staff and their dependants in this regard.

The draft recommendation

By decision dated 27 February 2004, the Ombudsman addressed a draft recommendation to the European Commission in accordance with Article 3 (6) of the Statute of the Ombudsman. The basis of the draft recommendation was, in summary, as follows:

1 The complainant alleges that the Commission's decision requiring her to make a financial contribution for the education of her daughter is discriminatory. The complainant argues that parents with children with special educational needs (SEN children) who are admitted to the European Schools should not be required to contribute to the cost of their children's education.

2 The Commission argues that the scheme applied by the European Schools for SEN children is not discriminatory. It considers that parents of children who cannot attend a European School for, in particular, pedagogical reasons, must also look for alternative schools, subject to charges which are only partly reimbursed or sometimes not reimbursed at all. Thus the requirement for parents to contribute to the costs of their children's education is not necessarily linked to disability.

The Commission also states that, in its role as employer, it supplies financial support for the parents of disabled children. It grants both statutory assistance by means of double the normal dependent child allowance, as well as additional contributions made towards the costs arising from a disability. In the latter case, this aid is governed by the provisional guidelines for implementing budget line A-4103, adopted in 1999 by the Heads of Administration. If potential beneficiaries apply for assistance under budget line A-4103, Article 5a of the provisional guidelines stipulates that the official must make a contribution depending on taxable family income as laid down in Annex II.



3 The Ombudsman notes that, in line with the decisions of the European Schools' Board of Governors, it appears that the children of staff in the service of Community institutions for a minimum period of one year have the right to be admitted to the European Schools. These pupils are exempt from school fees [3] . Hence, EU officials who have the possibility to send their children to the European Schools, including those with SEN children whose needs can be met by the European Schools, do not have to make any contribution to the costs of their education.

In contrast, the Commission does not cover the full educational costs of SEN children who are excluded from the European Schools because of their degree of disability.

4 The Ombudsman points out that the principle of non discrimination and equal treatment is a fundamental principle of Community law. As laid down in Article 21 of the Charter of Fundamental Rights of the European Union [4] and in Article 13 of the EC Treaty [5] , any type of discrimination based, among others, on grounds of disability is prohibited.

5 On the basis of the available information, the Ombudsman considers that the different financial treatment which the Commission gives to officials with SEN children who are excluded from the European Schools is based solely on grounds of disability and is therefore discriminatory. The fact that the difference of treatment affects only some parents of SEN children does not alter its character as discrimination.

Furthermore, the fact that some children of EU officials are excluded from the European Schools for reasons other than disability is immaterial. The evidence available to the Ombudsman from his inquiry is that the exclusion of certain children from the European Schools for pedagogical reasons is not based on grounds explicitly prohibited by Community law. The factual and legal circumstances of such children are therefore not comparable to those of SEN children who are excluded from the European Schools because of their degree of disability.

6 The Ombudsman concludes, therefore, that the different financial treatment provided by the Commission to officials with SEN children who are excluded from the European Schools because of their degree of disability is discriminatory and consequently constitutes an instance of maladministration.

The Ombudsman therefore made the following draft recommendation:

The Commission should take the necessary steps to ensure that parents of SEN children who are excluded from the European Schools because of their degree of disability are not required to contribute to the educational costs of their children.

As regards the aspect of the complaint which concerned the alleged failure of the European Schools to provide suitable education programmes for all SEN children of EU officials, the Ombudsman noted that the development of policies for the inclusion of SEN children into mainstream schools appears to be a prominent trend, as illustrated by one of the recent reports



published by the European Agency for Development in Special Needs Education [6] . Existing practices among Member States, however, show a great deal of variety. Whilst some EU Member States such as Spain, Greece, Italy, Portugal, and Sweden have set out a fully integrated educational system which caters for all needs of SEN children, other European countries still retain a multi-track approach which combines separate mainstream and special needs education systems [7] . In view of the existing legal and practical situation in the EU, it appeared that the integration of SEN children into the ordinary education system still remains a general policy goal, without a mandatory character. The Ombudsman pointed out that he was not aware of any binding legal provision requiring the Commission or the European Schools to set up a unified system. In the absence of any such legal provision, the Ombudsman could not conclude that the Commission had failed to act properly by not ensuring that the European Schools provide education programmes for all SEN children of EU officials. The Ombudsman therefore concluded that there appeared to be no maladministration as regards this aspect of the case. The Ombudsman recalled, however, that the Commission had given an undertaking in its Communication of 12 May 2000 to make all necessary efforts to ensure that the European Schools integrate all pupils with disabilities into its mainstream classes.

In connection to the complainant's allegation that the Commission failed to make clear in all published information concerning the European Schools that some SEN children can be excluded, the Ombudsman took note of the Commission's assurance that all necessary steps would be undertaken to provide officials with SEN children with appropriate information on the means of assistance at their disposal, and the conditions attached to them. He therefore concluded that no further inquiry in relation to this aspect of the case seemed to be necessary.

Additional complaints sent to the Ombudsman

In the course of the inquiry, and once the Ombudsman had already sent his draft recommendation to the Commission, he received a significant number of additional complaints which involved similar facts and raised identical allegations. A list of these complaints is annexed to this report.

The Commission was informed of these complaints and asked to submit an opinion on them. The institution chose to jointly reply to all of them through its own detailed opinion in case 1391/2002/JMA.

The European Commission's detailed opinion

After a number of requests for the deferral of the deadline to reply to the draft recommendation, the Commission submitted its detailed opinion on 18 August 2004. The Commission stated that its detailed opinion replied both to the Ombudsman's draft recommendation and to the individual complaints concerning the same problem which the Ombudsman had subsequently received.

In summary, the Commission's detailed opinion made the following points:

As regards the financial contributions to be paid by EU officials with SEN children excluded from



the European Schools, the Commission referred to the amendments to the Staff Regulations which entered into force on 1 May 2004, which include a new Article 1d. This provision prohibits any form of discrimination based, among other, on grounds of disability. Paragraph 4 of that article, however, allows the appointing authority to take the necessary measures to enable a person with a disability to take on a position as an official if those initiatives do not impose a disproportionate burden. The principle of proportionality which governs relations between the appointing authority and the person who could potentially be appointed as an official should also be taken into account *mutatis mutandis* in relation to the obligations of the appointing authority towards the disabled child of an official.

Furthermore, the Commission noted that Article 3 of Annex VII of the Staff Regulations (concerning the education allowance) now makes a distinction between the parents of children who attend schools which do not charge fees (such as the European Schools) and the parents of children who attend fee-paying schools. Only the parents of children enrolled at a fee-paying school now benefit from an education allowance. This new provision enables all children who want to or have to enter a private/special school to receive a flat-rate payment which will be gradually increased.

The Commission argued that the exclusion of disabled children from the European Schools is not a matter of principle but results from the fact that the integration of disabled children into the school environment goes beyond the material resources available. Since Article 1e of the amended Staff Regulations introduces the obligation to give officials access to measures of a social nature, it is possible that, under this provision, steps could be taken to reinforce measures which benefit the children of officials who find themselves in situations of the kind described in the complaint.

The Commission noted that the scheme in place allows for the dependent child allowance to be doubled when the child concerned suffered from a handicap which imposes a heavy financial burden on the official (Article 67(3)). In addition, the allowance could be maintained, irrespective of age, if the child has a serious illness or invalidity which prevents him/her from earning a livelihood. A supplementary allowance for disabled persons could also be granted, which, subject to the limits imposed by the budget, covers the bulk of the school fees which are not reimbursed, leaving the beneficiary to make a personal contribution (between 5% and 35%) calculated on the basis of the taxable income of the family concerned. As regards the complainant, the institution pointed out that these additional allowances covered 99% of all costs she incurred for the education of her daughter. The institution therefore considered that the existing measures are appropriate and sufficient to offset the costs imposed on the parents by their children's disabilities.

The Commission once again stressed that it is not under a legal obligation to reimburse the total costs arising from a disability, solely because the principle of non-discrimination has been invoked. In the area covered by the Staff Regulations, this principle is subject to limitations, in particular, of a financial nature such as those mentioned above. Moreover, the institution noted that its expenditure to cover the costs of educating disabled children at private schools usually goes far beyond the average expenditure with respect to children who attend the European



Schools.

As regards the possibility of financing measures of a social nature, as referred to in Article 1e of the amended Staff Regulations, the Commission indicated that this provision does not guarantee that costs relating to a disabled child should be covered in all cases. As budgetary resources are limited, the Commission does not have the possibility to cover all costs. It noted that the number of applications received has been constantly increasing. Since 2003, the appropriations earmarked under the budget have not been sufficient to cover existing applications. In 2003, an additional EUR 420 000 were allocated to the budget heading concerned. The budget thus increased from EUR 750 000 in 2003 to EUR 1.1 million in 2004, representing an exceptional increase of 40%. Since then, five new applications have been submitted.

As social policy aimed at disabled people is a priority, the Commission expressed its willingness to propose a "multi-annual programme" to the budgetary authority in order to give maximum possible budgetary security to this type of measure. The idea may be put forward in the proposals which the Commission will submit to the budgetary authority for the 2006 preliminary draft budget, on the basis of Article 1e of the Staff Regulations. The institution expressed its intention to mention the Ombudsman's position in this matter when its proposals are prepared and submitted to the budgetary authority. The Commission also noted that, if the Ombudsman were to approach the budgetary authority directly, this could help ensure that a policy is introduced concerning the reimbursement in full of costs incurred by the parents of disabled children.

If its proposals were to be accepted by the budgetary authority, the Commission agreed to make a full reimbursement of costs arising from a disability, even though it underlined that no obligation exists to reimburse this type of costs. Otherwise, the institution would have to make the necessary adjustments, and set out a number of criteria and priorities.

The Commission therefore concluded by stating that the measures undertaken are appropriate and sufficient to offset the effects of these children's disabilities. The institution stated its intention to take the necessary steps to obtain the essential support from the budgetary authority, so that children who demonstrably need to enter a special school can receive the greatest possible financial support.

The complainant's observations on the Commission's detailed opinion

In her observations on the Commission's detailed opinion, the complainant repeated the allegations which she had already put forward. She considered that the Commission continued to hide behind their existing policies as regards discrimination. In her view, the proposals and suggestions supported by the institution are far from providing the compulsory free education which her daughter is entitled to receive.

The complainant contested the figures presented by the Commission. She argued that, despite the good intentions announced by the Commission through a new set of policies, the plain fact



appears to be that investment per SEN child had decreased from EUR 47 500 in 1995 to EUR 12 362 in 2003/2004. In relation to her personal expenditures for the education of her daughter, the complainant pointed out that, since 2000, she had spent EUR 19 205.

The European Commission's additional information

On 22 December 2004, the Commission's newly appointed Director General for Personnel and Administration, Mr Claude Chène, wrote to the Ombudsman, in connection with the development of a new social policy for Commission officials.

The Director General restated the ideas set out in the Commission's detailed opinion and underlined both, his personal commitment and that of Mr Kallas, Vice-President of the Commission responsible for Administration, in favour of EU officials with SEN children. He announced that the Commission's multiannual social policy programme will include a section in support of SEN children, which will be submitted to the Commission in mid-2005. Details of the programme and the special section should be made known at that time.

The Director General also noted his readiness to increase as much as possible the amount to be reimbursed to parents of SEN children, although it remains to be seen how and when full reimbursements could be granted. The financial impact of those future initiatives is still unknown, although it is foreseen that the current budgetary allocation for social policy will not be able to cover those needs, and therefore that a significant increase in the level of resources ought to be envisaged.

In view of future potential budget limitations, the Director General acknowledged that he was not in position to make a firm commitment, but underlined his personal willingness and that of Vice-President Kallas to support officials with SEN children to the largest extent possible.

The Ombudsman's evaluation of the Commission's detailed opinion

The Ombudsman's draft recommendation was intended to guarantee that the Commission would not discriminate financially against officials with SEN children who are excluded from the European School because of their degree of disability. The Ombudsman regrets that the Commission's detailed opinion does not allow for the conclusion to be reached that this objective has been achieved.

The Ombudsman recalls that the Commission has argued that, on the basis of the new Staff Regulations, it can take into account financial considerations when carrying out measures aimed at combating discrimination on grounds of disability.

The Ombudsman notes that, as enshrined in the Charter of Fundamental Rights of the European Union and in the EC Treaty, the principle of non-discrimination and equal treatment, and the prohibition of any type of discrimination based, among others, on grounds of disability, constitute nowadays the foundations of the EU legal order. In the Ombudsman's view, the nature and significance of the rights granted to disabled people as a result of these legal



principles makes it necessary to scrutinize carefully any potential limitation on their application which, accordingly, ought to be narrowly interpreted. The Ombudsman, therefore, is not convinced by the Commission's interpretation of the Staff Regulations whereby its power to limit the introduction of new measures because of their financial impact, which is laid down in Article 1d.4 concerning the accommodation of new disabled officials, should also apply to any other measure involving people with disabilities, such as those regarding the education of SEN children of EU officials. It appears that Article 1d.1 of the Staff Regulations unequivocally sets out a general principle prohibiting any discrimination based on disability [8] . Since the appointment of a new official is subject, however, to the condition that he/she is fit to perform his/her duties, Article 1d.4 of the Staff Regulations defines how this restriction is to be interpreted if the person to be appointed suffers from a disability [9] . Accordingly, it is to be understood that a disabled person should be able to perform the essential functions of the job if reasonable accommodation can be made available by the employer, provided that such measures do not impose a disproportionate burden. This provision is clear and precise, and it is confined to the recruitment of officials. There is no reason therefore to infer that it should be applied across the board to any other situation concerning the treatment of officials in connection with a situation of disability.

The Ombudsman notes that the Commission has repeatedly referred to the existence of financial and budgetary limitations which appear to prevent it from covering the full educational costs of SEN children excluded from the European Schools. The Ombudsman finds it most striking, however, that, in the course of his inquiry, the institution has made no effort to produce any estimate which may have illustrated the size of those limitations, such as the number of officials affected by the situation or the costs that a change of policy may entail.

The Ombudsman appreciates the positive remarks made in the letter from the Director General for Personnel and Administration, Mr Claude Chène, concerning his personal willingness and that of Vice-President Kallas to support officials with SEN children to the largest extent possible. The Ombudsman also welcomes the new measures announced in the Commission's detailed opinion in favour of the disabled children of officials, in particular those to be developed under a multiannual social policy programme. Regrettably, details of that initiative and its scope are still not known. While acknowledging that those measures should improve the situation, the Ombudsman is mindful of the fact that they do not appear to eliminate unambiguously any discrimination against officials with SEN children who are excluded from the European School because of their degree of disability.

The Ombudsman acknowledges the Commission's invitation to approach the budgetary authority in order to ensure that a policy is introduced concerning the reimbursement in full of costs incurred by the parents of disabled children. The Ombudsman takes the view, however, that it is not for him to intervene directly in this type of budgetary procedures. Instead, the Ombudsman considers it more appropriate to submit, in exercising his powers, a special report on this matter to the European Parliament, as a means of drawing this issue to the attention of the Parliament, not only in its role as an institution charged with the responsibility of scrutinising the actions of the Commission but also as part of the Community budgetary authority.



The Ombudsman's recommendation

In view of the above, the Ombudsman re-states his draft recommendation as a recommendation to the Commission as follows:

The Commission should take the necessary steps to ensure that parents of SEN children who are excluded from the European Schools because of their degree of disability are not required to contribute to the educational costs of their children.

The Ombudsman considers that his recommendation should also apply to the additional complaints which he has received in the course of his inquiry involving similar facts and identical allegations.

The European Parliament could consider adopting the recommendation as a resolution.

Strasbourg,

P. Nikiforos DIAMANDOUROS

Annex

Additional complaints received by the European Ombudsman concerning alleged discrimination against SEN children of EU officials by the European Commission:

Complaints 447/2004/JMA (13 February 2004); 457/2004/JMA (6 February 2004); 500/2004/JMA (19 February 2004); 501/2004/JMA (20 February 2004); 522/2004/JMA (23 February 2004); 523/2004/JMA (20 February 2004); 593/2004/JMA (27 February 2004); 596/2004/JMA (27 February 2004); 597/2004/JMA (29 February 2004); 598/2004/JMA (26 February 2004); 599/2004/JMA (1st March 2004); 891/2004/JMA (23 March 2004); 892/2004/JMA (23 March 2004); 893/2004/JMA (23 March 2004); 894/2004/JMA (23 March 2004); 895/2004/JMA (23 March 2004); 896/2004/JMA (20 February 2004); 897/2004/JMA (23 March 2004); 898/2004/JMA (23 March 2004); 899/2004/JMA (23 March 2004) and 1535/2004/JMA (25 May 2004).

[1] Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/15



[2] Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

[3] Decision of the Board of Governors of the European School of 27-28 October 1992 (http://www.eursec.org/SE/htmlEn/IndexEn_home.html).

[4] Article 21 (1) Charter of Fundamental Rights of the European Union (OJ C 364, 18.12.2000, p. 1): *"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."*

[5] Article 13 EC Treaty: *"[...] the Council [...] may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

[6] See European Agency for Development in Special Needs Education, *"Special Needs Education in Europe"*, January 2003 (Electronic version of the report available on the European Agency's website: www.european-agency.org [Link]).

[7] Supra, *Special Needs Report*, point 1.1, p. 7.

[8] *"In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited."*

[9] *"A person with a disability meets the conditions laid down in Article 28(e) if he can perform the essential functions of the job when reasonable accommodation is made. "Reasonable accommodation", in relation to the essential functions of the job, shall mean appropriate measures, where needed, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer."* Article 28 (e) of the Staff Regulations states that an official may be appointed only on condition that he is physically fit to perform his duties.