



Vienna, 13 January 2023

In relation to the "CALL FOR CONTRIBUTIONS: THE RIGHT TO EDUCATION, ADVANCES AND CHALLENGES" of the "Special Rapporteur on the right to education", the Austrian Ombudsman Board (AOB) would like to contribute the following statement:

According to Article 148a, Federal Constitutional Law, anyone can lodge a complaint with the AOB against any alleged maladministration by Austrian public administration, provided that they are affected by such maladministration and in so far as they do not or no longer have recourse to legal remedy. The AOB can initiate an investigative proceeding in response to a concrete and comprehensible complaint in order to determine whether there actually is a case of maladministration in public administration (and the complaint is thus justified). In addition, the AOB can initiate *ex-officio* investigative proceedings in case it suspects a case of maladministration within public administration.

When the AOB initiates an investigative proceeding, it approaches the authority in question or its most senior executive, confronts them with the complaint and requests a statement. If an error becomes apparent, the AOB can also recommend remedial measures.

In the course of its investigative activities, the AOB certainly also takes the right to education into account. This contribution presents selected issues recently dealt with by the AOB in this field.

a) School attendance outside the school district

In Austria, compulsory schools are divided into school districts. Therefore, every child (only) has a legal entitlement to admission to the compulsory school located in the district of their place of residence. This system serves the purpose of resource management and forward-looking resource planning in order to effectively enable the right to admission to a compulsory school and thus the fulfilment of compulsory education.

However, in times of increased mobility and growing possibilities of specialisation also in compulsory schools, the district system sometimes seems too rigid, especially from the 5th grade in the Austrian school system onwards. Parents often work outside their place of residence and for practical reasons prefer to send their children to a school located in the same district as their workplace. In addition, possibilities of specialisation go hand in hand with the fact that, for example, the secondary school located at the place of residence has a focus on sports, while a child has a talent for music and is therefore more interested in a school in the neighbouring district with a focus on music.

In such circumstances, the district system can prevent schooling that is tailored to the child's talents or interests, since school attendance outside the district requires that the home municipality agrees to pay a guest school contribution to the receiving municipality. This entails a twofold burden for the home municipality: on the one hand, it must secure a place for the child in question (and bear the associated costs for non-district school attendance), and on the other hand, it must also pay a school maintenance contribution to the host municipality. This is not easy to implement in times of financial constraints on public budgets. A formal legal entitlement to admission to a school outside their own school district only exists in special cases, for example if the special educational needs cannot be met at the school in their own district.

Nevertheless, in the past, the AOB has successfully advocated for children to be able to go to the school that suited their interests and talents, even if it was outside their own district. These efforts of course included children with disabilities. Sometimes the special educational needs of these children appeared to be formally met at the school in their own district. However, a school outside their district met the individual needs much better. Also in such cases, the AOB was repeatedly able to convince the municipalities involved to accept additional financial expenses in order to guarantee the best possible school career for children who face special challenges in life.

b) Lack of places in academic secondary school

The end of compulsory schooling does not mean the end of the search for a place in a school that is as well suited as possible to the individual abilities of the respective child. Many people attach

importance to a good general education as a tool for later life and as a basis for further (intellectually oriented) vocational training, and therefore choose an academic secondary school. Difficulties can arise in some places due to a lack of available spots.

In Austrian law, on the one hand, there is no formal legal entitlement to a place in academic secondary schools. On the other hand, according to the Federal Constitution, a diversified school system should be provided, especially in secondary school. In addition, according to Art. 28 (1) lit. b UN-CRC, States Parties shall "[e]ncourage the development of different forms of secondary education, including academic and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need". The lack of places in academic secondary schools contradicts these objectives. In the spirit of equal opportunities, which also explicitly represents an objective of Art. 28 (1) UN-CRC, the AOB therefore advocates for the provision of a place in academic secondary school for all children who show interest in it and have the corresponding abilities.

In recent times, the AOB - in addition to the admirable commitment of the parents concerned - has repeatedly been able to contribute to convincing those responsible of the necessity to increase the amount of places available.

c) Chronically ill children and children with disabilities

aa) The chronically ill child in the school system

In Austria, about 200,000 chronically ill children with conditions such as asthma, allergies, diabetes, rheumatism, etc. attend school. Most of them are not suffering from permanent limitations. Children suffering from diabetes, for example, can usually go to school without any problems. They only have to inject insulin at certain times, and may also have to eat food in class every now and then. The same applies to children with asthma or epilepsy, if they are not suffering from an acute seizure. These children need understanding for their situation rather than help.

Unfortunately, this is not always the case, not even on the part of professional educators. Related to this, the AOB sometimes receives shocking reports. For example, a child suffering from diabetes was given a strict warning because it had eaten something during a lesson, which is against the rules. This was of course not an act of disrespect, but simply the child's need to quickly have the medically required amount of food.

Where more complex medical assistance is actually required, appropriate framework conditions must be created in schools in order to enable affected children to participate in regular school activities in the spirit of inclusion.

In 2015, in order to promote the concerns of chronically ill children, the AOB was involved as co-organiser of an event in Parliament called "The chronically ill child in the school system". The aim of the event was to discuss medical and legal aspects and possible solutions for all those affected. Teachers occasionally refrain from providing assistance due to legal concerns. The aim was to create a legal basis that would also provide security for the teachers. Another goal was to raise awareness among teachers and provide information via experts present at the event. These included in particular executives from school administrations and staff representatives.

This initiative soon started to bear fruit: with the Education Reform Act 2017, certain medical activities performed by teachers are now clearly recognised as performance of official duties. If errors occur, it is not primarily the teacher who is liable, but the state as employer on the basis of liability of public bodies. This has advantages for all parties involved: Injured parties are no longer exposed to the risk of insolvency of the injuring party, and the latter can only be sued by the employer in case of qualified fault by way of recourse.

In 2019, the AOB hosted the conference "The chronically ill child in the school system - current developments and challenges". The conference was a follow-up to the above-mentioned parliamentary event and took stock of the progress made since then. Further possibilities for improvement were also discussed. For example, the possibility of providing teachers with some kind of first-aid training was considered, so that they could carry out simple medical tasks to assist affected children if necessary. For more complex medical issues, however, these "first aiders" would reach their limits. Following the example of the UK, the introduction of a "school-nurse system" seemed obvious, i.e. the establishment of nurses with paediatric knowledge in schools. This idea has been implemented since then. For example, the City of Vienna started a corresponding pilot project at six educational institutions (compulsory schools and kindergartens) in the summer term of 2022.

Of course, the AOB not only deals with the support of chronically ill children on the aforementioned general strategic level. The AOB also mainly deals with individual complaints and works towards viable solutions in individual cases.

bb) Right to an 11th and 12th year of education for children with disabilities

The AOB repeatedly receives complaints from parents of children with special educational needs (often due to severe disabilities) who would like to place their children in school care (compulsory schools) for longer than the legally prescribed minimum number of years of education (nine), sometimes even for longer than the legally prescribed maximum number (twelve years). Parents see this as a way to ensure better educational opportunities for their children and are often encouraged to do so by experts. In the past, the AOB has always intervened to support them within the scope of its (constitutional) legal possibilities.

For example, the AOB has recently criticised the practice in Vienna, where applications for extended school attendance in the voluntary 11th and 12th year of education are only approved on the condition that there are still enough spots available. Instead, the AOB advocated for the allocation of places solely on the basis of educational aspects. However, this would require greater staff resources, which are apparently not (yet) available. As a first step in the right direction, after the intervention of the AOB, parents are at least given preliminary information at the beginning of the school year regarding the possibility of further school attendance in the following year. Binding commitments, however, are so far only made at the end of the school year.

For quite some time now, the AOB has been advocating for the abolition of the rigid legal maximum limits for compulsory school attendance and supported the idea of determining the duration of school attendance solely according to educational standards. Unfortunately, this plea has gone unheard so far.

Recently, a citizens' initiative on this issue was presented to the Austrian Parliament (title: "Right to education for ALL children - right to an 11th and 12th year of education for children with disabilities"). On this occasion, the AOB asked the Minister of Education, Martin Polaschek, for a statement as to whether his department would draft a bill taking into account the concerns raised in the initiative. A reply from the Federal Minister was still pending at the time when this contribution was written.

cc) Right to inclusion

With Art. 24 UN-CRPD, the States Parties to this Convention, including Austria, have committed themselves to providing an "inclusive education system" for persons with disabilities. However, the Austrian legal system does not provide for an individual legal entitlement to "inclusive" education. Therefore, the AOB approached the Minister of Education, Martin Polaschek, and suggested that a legislative initiative be launched to close this gap in legislation.

The AOB acknowledges that the compulsory schooling law in its current version already provides for a procedure that paves the way for inclusive education in regular classes and gives weight to the parents' wishes in this regard. However, this path to inclusive education is subject to discretion and resources by the authorities.

The law should therefore be amended so that parents or other guardians explicitly have a legal right to inclusive education. In the view of the AOB, it would also be worth considering enshrining the principle of "in case of doubt in favour of inclusion".

This suggestion does not, of course, imply a demand for the abolition of institutions specifically intended for people with disabilities, such as the Federal Institute for the Blind, the Federal Institute for Education of the Deaf or other well-established centres for special educational needs. If parents prefer to have their children educated in schools for special educational needs - after appropriate information and counselling - regardless of the right to inclusion, this should continue to be possible. The same applies if it is determined from a professional point of view in an individual case that the fulfilment of the parents' wish for inclusive education would clearly contradict the principle of the best possible support for the child.

A statement by the Federal Minister was still pending at the time when this contribution was written.

d) Schooling during the COVID-19 pandemic

Finally, the negative impact of the COVID-19 pandemic on the exercise of the right to education should not go unmentioned. In Austria, very strict measures were taken in schools to combat the pandemic. The Austrian Constitutional Court largely considered these measures to be in conformity with the constitution, although they by no means proved to be without alternative in an international comparison. As a result, the AOB, which (among other things) bases its investigative activities on the jurisprudence of the Constitutional Court, essentially only had room for investigating the correct implementation of the measures. The complaints received by the AOB regarding the measures to combat the pandemic led to record numbers of submissions on the subject of schools compared to the annual average before the pandemic. By far the majority of complaints described the measures against COVID-19 taken up by schools as unjustified or at least disproportionate.

The measures limited the effective opportunity for pupils to acquire education. In particular, the prolonged distance learning affected the quality of teaching. The masks made social interaction, which is important in the educational process, more difficult. Conflicts between supporters of the

measures or those who had to implement the measures, e.g. teachers, and opponents of the measures, some of whom showed challenging behaviour, impeded the school partnership. Those responsible for school administration, but also the teachers on site, often did not know how to de-escalate the situation and sometimes even aggravated the conflicts.

The AOB endeavoured to contribute to the appropriate and proportionate implementation of measures to control the pandemic taken up by schools and to defuse conflicts. It pointed out possibilities for making measures as practical as possible and appealed for mutual understanding with regard to the nervous tension often felt by all those involved due to the pandemic.

Nevertheless, the AOB had to learn that a pupil who was critical of the measures was exposed as a "conspiracy theorist" by the teacher of religious education during lessons, and even received unjustified grades in this subject. Unjustified reports were made to the youth welfare authorities against parents who were critical of the measures and were thus considered dangerous, which led to unpleasant consequences and even social stigmatisation. School staff critical of the measures were subjected to disciplinary measures including dismissal simply for expressing opinions, which must be permissible in a state under the rule of law.

But even parents or pupils who agreed with the measures and tried to implement them to the best of their knowledge and belief sometimes suffered disadvantages. For example, a pupil missed an important exam and necessary support classes because a PCR test he had punctually handed in was not evaluated on time. Yet, this pupil was willing to take an antigen test at school and had moreover been vaccinated twice, thus - according to the understanding at the time - had been "fully immunised".

The AOB hopes that the tensions that occurred within the school partnership in the course of the COVID-19 pandemic can gradually be overcome.