

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

13 January 2023

**Case Document No. 1**

***Federação Nacional dos Professores (FENPROF) v. Portugal***  
Complaint No. 216/2022

**COMPLAINT**

**Registered at the Secretariat on 24 October 2022**

# **Complaint regarding breach of EU legislation on the right to the protection and promotion of the occupational safety and health of workers**

## **RECITAL**

The publication of Decree-Law No. 41/2022 of 17 June 2022 led to the dismantling of the sickness mobility scheme for teaching staff. From 2006 to 2022, this scheme allowed teachers with a disabling illness or dependent family members with a disabling illness to be posted to a school close to the place where the required medical care or support was provided, in conditions which safeguarded the rights and principles set out in international, EU and national law on the protection and promotion of the health and safety of workers at work.

As there is a breach of the right to human dignity and personal integrity, equality before the law, non-discrimination, fair and just working conditions and the protection of health and justice, all of which are set out in the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, the European Social Charter, Directive No. 2007/30/EC of the European Parliament and of the Council of 20 June 2007, Directive No. 2000/78/EC of the Council of 27 November 2000 and the Constitution of the Portuguese Republic, the protection and development of which must be included by the courts of signatory Member States to ensure compliance with and enforce the rights, freedoms and principles set out therein, this complaint will demonstrate how the programme of the XXIII Constitutional Government of the Portuguese Republic is detrimental to Portuguese teachers, their families and persons with disabling illnesses in terms of access to and the enjoyment of those fundamental rights.

### **THE RIGHT TO OCCUPATIONAL HEALTH AND SAFETY IN INTERNATIONAL LAW AND EU CONVENTIONS**

1. The Universal Declaration of Human Rights, as a charter of principles which establishes and defends inalienable fundamental rights and freedoms, highlights the dignity and value of the human person and respect for equal rights as a driving force for social progress and better living conditions.

2. The protection and development of these fundamental objectives are guaranteed in the European Convention on Human Rights, a document which affirms its strong commitment to the fundamental freedoms set out in the Universal Declaration, since the latter constitute the true basis of justice, while their *preservation is contingent essentially on a truly democratic political system on the one hand and a common understanding of and respect for human rights on the other.*

3. In accordance with the principle of subsidiarity applicable to the Member States of the Council of Europe, the latter take primary responsibility for ensuring the rights and freedoms defined in the above-mentioned Convention.

4. The Convention highlights the prohibition of discrimination as a general principle which ensures the promotion of full and effective equality of persons before the law and the right to equal protection by the law.

5. The Charter of Fundamental Rights of the European Union also shares the *indivisible and universal values of human dignity, freedom, equality and solidarity*, which are put into practice in accordance with the principles of democracy and the rule of law, placing the *individual at the heart of its activities.*

6. Of the rights, freedoms and principles recognised in this Charter, particularly outstanding is the **right to dignity of the human person**, an inviolable right which must be respected and protected (Art. 1); the right to the integrity of the person, in respect of their physical and mental integrity (Art. 3); the **right to equality before the law** (Art. 20); the **right to non-discrimination**; the **right to fair and just working conditions which respect their health, safety and dignity** (Art. 31); the **protection of health, the right of access to preventive health care, the right to benefit from medical treatment, and a high level of human health protection** (Art. 35).

7. Of the provisions set out above and the other provisions in the Charter of Fundamental Rights of the European Union, Member States must respect the rights, observe the principles and promote the application thereof (Art. 51), ensuring that nothing set out therein is interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions (Art. 53).

8. Continuing the analysis of the EU Conventions, particularly the case law of the employment courts, the European Social Charter defines the fundamental social rights of workers which Member States must guarantee, particularly the right of workers to fair working conditions, health and safety at work, the right to benefit from all measures which enable them to enjoy the highest attainable

standard of health and to participate in determining and improving their working conditions and the working environment.

9. Article 3, Part I, stipulates that *“All workers have the right to safe and healthy working conditions”*, with Article 3(1), Part II, specifying that the Member States undertake *“to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment.”*

10. It should be noted that Part III of the above-mentioned Charter, under the heading Undertakings, determines that this constitutes a declaration that establishes aims that must be pursued by all appropriate means, each Member State being required to develop specific policies which ensure the effective exercise of the rights and principles set out in the Charter.

11. The preamble to Directive No. 2007/30/EC of the European Parliament and of the Council of 20 June 2007 establishes the principle of the protection of the health and safety of workers in all aspects relating to work and determines that the improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

12. Its application must not justify any reduction in levels of protection already achieved in individual Member States, which must encourage improvements in working conditions which affect the occupational health and safety of the worker, establishing their progressive harmonisation as an objective.

13. To continue the analysis of this legal act, in order to achieve its substantive objective – *the implementation of measures intended to promote improvements in the safety and health of workers at work* – employers should focus on all aspects related to work.

14. One of the general responsibilities of employers is an obligation to take all measures necessary to protect the health and safety of workers, which includes the prevention of occupational risks and the creation of organised systems of work and adequate means for implementing them.

15. Employers must also strive to adapt all necessary measures to changes of circumstances and to improve existing conditions.

**16. This is a general obligation which is applicable to all Member States and which can be set aside only if national legislation provides for more favourable conditions – a situation arising out of**

**the wording of the law on sickness mobility provided for in Order no. 9004-A/2016 of 13 July 2016, which has now been revoked by Decree-Law No. 41/2022 of 17 June 2022.**

#### **TRANSPPOSITION OF EU LEGISLATION INTO THE PORTUGUESE LEGAL SYSTEM**

**17.** All workers have the fundamental right to implementation of the commitment made in the Constitution of the Portuguese Republic (CPR): *“the provision of work in clean, safe and healthy conditions”* (Article 59(1)(c)), arising out of *“the organisation of work in socially decent conditions facilitating the personal development of the individual and reconciling work and family life”* (Article 59(1)(b)).

**18.** That right must therefore be reinforced in particular in situations in which the worker suffers from a disabling illness, as this is the only way to ensure compliance with the universal right to the protection of health and the duty to defend and promote that right through the systematic improvement of living and working conditions. (see Article 64, CPR)

**19.** It should be noted, according to medical terminology, that disabling illnesses are characterised by serious anatomical or functional impairments that diminish or remove the ability to work.

**20.** This is a health condition which brings about a limitation in the functional and working capacity of the respective individual, who, due to health reasons and/or subsequent after-effects, is less able to engage in professional activity.

**21. In these terms, if the disabling illness is long-term in nature and involves multidimensional aspects and gradual development of symptoms exacerbated by limitations on options for medical treatment, this health condition must be considered in the context of the organisation and reconciliation of personal and working life so as to protect the right to the dignity and integrity of the human being and access to fair and just working conditions.**

**22.** Furthermore, one of the fundamental tasks of the State is to promote the welfare and well-being of citizens and real equality between Portuguese nationals, as well as to ensure the effectiveness of economic, social, cultural and environmental rights by transforming and modernising economic and social structures. Accordingly, the State, represented by the Ministry of Education, is legally bound to defend and ensure compliance with constitutional principles in relation to citizens' rights and guarantees.

**23.** However, assessment of the process of changing the sickness mobility scheme for teaching staff shows that that has not been achieved.

**24.** It can be seen from Decree-Law No. 41/2022 of 17 June 2022 that the Portuguese government has reduced the right to special protection against illness that it had been ensuring since 2006.

**25.** In the negotiation process for the revision of the sickness mobility scheme it was stated, in the opinion submitted by FENPROF, that: *“The protection of health is a human right, and as such it is a fundamental right which is enshrined in Article 64 of our Constitution and is reiterated in the framework law on health, approved by Law no. 95/2019 of 4 September 2019. In that context, the State is required ‘to ensure rational and efficient coverage of the whole country in terms of human resources and health units’ [CPR, Article 64(3)(b)], which, as is well known, does not happen. Moreover, by reference to Article 4(1)(e) and (i) of the LGTFP [Lei Geral de Trabalho em Funções Públicas - General Labour Law in Public Functions], the public employer is required to comply with the ‘General Principles’ and ‘General Obligations of the Employer’ in relation to the promotion of occupational health and safety, enshrined in Articles 5 and 15 of the Regime Jurídico da Promoção da Segurança e Saúde do Trabalho [Legal Scheme for the Promotion of Occupational Health and Safety] - Law no. 102/2009.”* (Doc. 1)

**26.** In addition: *“With a view to guaranteeing the above-mentioned legal and constitutional approach, sickness protection mechanisms exist for teaching staff who require clinical monitoring and/or treatments which are only available in particular places. Some of these teachers are unable to travel because of the disabling nature of their illness, while some are also unable to teach in schools, although they may be able to perform other activities which are important for their normal functioning.”*

**27.** What may be inferred from the preamble to Decree-Law No. 41/2022 of 17 June 2022 is a failure by the State, as an employer, to comply with its obligation to enforce the fundamental universal right of special protection, for any teaching staff or their families who suffer from a disabling illness, to obtain placement in a school cluster/school close to the family dwelling and to the medical care provider in order to ensure that professional duties are reconciled with the right to the monitoring and medical treatment necessary to minimise the negative impact of a disabling illness.

**28.** This failure, in disregarding the above-mentioned constitutional principles, entails non-compliance with the obligation to which public employers are bound under Article 16-A of the LGTFP, appended to Decree-Law No. 35/2014 of 20 June 2014: to comply, in public administration sectors, with the legal system for promoting occupational health and safety set out in Law no. 102/2009 of 10 September 2009.

**29.** Articles 5 and 15 of this scheme define the general principles and obligations required of employer organisations in seeking to recognise the worker's right to work in conditions which respect his or her health and safety, humanising work in safe and healthy conditions in line with a substantive timeframe which economic development must respond to and ensure.

**30. Within the range of principles, policies and rules that must be developed to prevent and assess the risks associated with the provision of labour, Law no. 102/2009 of 10 September 2009 requires employers to define programmes that promote and monitor employee health. This is an obligation which should be reflected and responded to as regards sickness mobility for teaching staff.**

### **CHRONOLOGY OF SICKNESS MOBILITY FOR TEACHING STAFF**

**31.** A sickness mobility mechanism for teaching staff was introduced with the publication of Decree-Law No. 20/2006 of 31 January 2006.

**32.** Article 44 of that law regulating the competitive procedure for the selection and recruitment of pre-school, basic and secondary education teaching staff defined the requirements career teaching staff had to meet to gain access to the secondment mechanism for special conditions, i.e.:

*“a) They have a disabling illness or have a dependent spouse, life partner, ascendant or descendant with a disabling illness, in accordance with Joint Order A-179/89-XI of 12 September 1989, published in Diário da República [Official Gazette], 2nd series, no. 219 of 22 September 1989;*

*b) They have an illness or disability which requires specific treatment and support, or one of the latter alone (which can be provided only outside the district of the educational or teaching establishment in which they work), or which impairs their mobility, requiring auxiliary means of movement;*

*c) They have a dependent spouse, life partner, ascendant or descendant with an illness or disability in the terms referred to in the previous paragraph which requires constant special support to be provided in a particular district.”*

**33.** Even prior to the above-mentioned Article 44, the preamble to that legislation provided for *“the introduction of the possibility of recourse to other mobility mechanisms for teachers with a permanent incapacity which has been demonstrated to require getting used to the school or adaptation of the workplace.”*

34. The publication of Decree-Law no. 132/2012 of 27 June 2012 brought about the repeal of Decree-Law no. 20/2006 of 31 January 2006.

35. The effect of that repeal was to remove the mechanism for secondment under specific conditions from competition procedures for teaching staff.

36. In 2013, Order no. 7960/2013 of 19 June 2013 was published, establishing “*rules and procedures for the mobility of career teachers in the catchment area of the public network of mainland Portugal and the Autonomous Regions who have a disabling illness or have a dependent spouse or person with whom they live in a civil partnership, descendant or ascendant subject to the same conditions*”.

37. With this mobility scheme, which no longer took the form of a competitive procedure, teachers were only required to prove the disabling nature of the illness and to append all the documents required to ensure sickness mobility in the respective cluster/school.

38. In 2014, however, the publication of Order no. 6969/2014 of 28 May 2014 introduced a requirement which limited travel for teachers with a disabling illness: sickness mobility became possible only “*for school clusters or a non-cluster school **situated in a municipality other than that in which they are employed or placed***”, a rule which was retained with Order no. 4773/2015 of 8 May 2015. (our emphasis)

39. Political challenges to this limitation led to its reversal with publication of Order no. 9004-A/2016 of 13 July 2016, which reinstated the original drafting of the fundamental condition for sickness mobility: “*the transfer is made to a school cluster or a non-cluster school other than that in which they are employed or placed, bearing in mind the proximity of the place where the medical care required is provided or of the district of the family dwelling.*”

40. Going beyond the changes brought about to the sickness mobility scheme (from Decree-Law No. 20/2006 of 31 January 2006 to Order no. 9004-A/2016 of 13 July 2016), it is fundamental to confirm the essence of the system: recognition, by the Ministry of Education, of the **need to protect and support teachers who are ill, whether the teacher themselves or their spouse, or the person with whom they live in a civil partnership, descendants or ascendants who are their dependants.**

41. If attention is focused on the text that preceded the scheme now established by Decree-Law No. 41/2022 of 17 June 2022, it can be seen that at that time Order no. 9004-A/2016 of 13 July 2016 identified the need to define rules, which were described in Part I, under the heading *General Provisions*, i.e.:



*“1 - Career teachers in school clusters or non-cluster schools and the staff of the catchment area in the public network of mainland Portugal and the Autonomous Regions of the Azores and Madeira may apply for sickness mobility, in accordance with Article 68(a) of the ECD, provided they have a disabling illness in accordance with Joint Order no. A-179/89-XI of 12 September 1989, published in Diário da República, 2nd series, no. 219 of 22 September 1989, or they have a dependent spouse, person with whom they live in a civil partnership, child or equivalent, or parent or direct relative in the ascending line under the same conditions.*

*2 – The teachers referred to in the previous paragraph may only apply for sickness mobility under the following conditions:*

*a) the transfer is necessary to ensure provision of the medical care required by the person themselves or for support in other cases;*

*b) the transfer is made to a school cluster or non-cluster school other than that in which they are employed or placed, bearing in mind the proximity of the place where the medical care they need is provided, or in the district of the family dwelling.*

*3 - The provisions in b) of the previous paragraph shall not apply to staff teachers in the catchment area who are on the sickness mobility scheme and who intend to indicate the same school cluster or a non-cluster school.*

*4 - The mobility of teachers under this Order shall not give rise to insufficiency or non-existence of teaching provided by teachers in the teacher’s school cluster or non-cluster school.*

*5 - Notwithstanding the provisions of the previous paragraph, a teaching component is provided when mobility is based on the illness of the spouse, the person with whom they live in a civil partnership, a child or equivalent, or a parent or relative in the first degree of the ascending line, or whenever the situation of their own illness so allows.”*

**42. In these terms, Order no. 9004-A/2016 of 13 July 2016 consolidated a sickness mobility scheme which in fact guaranteed teachers and their family members who have a severe and disabling illness, full enjoyment of the right to the protection of health and the right to work in proper and adequate conditions while respecting their physical and mental integrity, as provided for and enshrined in the constitutional tradition and in the national and international case law of labour courts.**

**THE SEVERE LIMITATIONS INTRODUCED BY DECREE-LAW No. 41/2022 OF 17 JUNE 2022**

43. The publication of Decree-Law No. 41/2022 of 17 June 2022 brought about the revocation of the order referred to in the previous point and the introduction of conditions, criteria and mechanisms which we believe **severely limit the right to special protection of teachers with a severe disabling illness, thereby undermining the protection of occupational health and safety.**

44. For better understanding of the effects of the current sickness mobility scheme, the opening of the preamble is significant: *“The Programme of the XXIII Constitutional Government seeks to guarantee that state schools have, on a sustainable basis, **sufficient numbers of teachers of the quality required to pursue their mission.**”* (our emphasis)

45. It goes on to state that: *“The mobility scheme provided for in Decree-Law No. 132/2012 of 27 June 2012, as currently drafted, applicable to early childhood teachers and teachers in school clusters, non-cluster schools and education districts who seek to perform teaching duties on a temporary basis in another school cluster or non-cluster school, requires teachers to remain in post there for up to four years, unlike the situation with most workers employed in public functions. Bearing in mind the respective placement mechanisms, such a scheme does not make it possible to offer a solution for teachers who, on the grounds of their own health or that of family members, need to be moved to a school cluster or a non-cluster school located close to the place where the medical care or support that must be provided to dependent family members is provided.”*

46. What can be concluded from this initial focus is i) the presentation of the new sickness mobility scheme as a mechanism which helps to manage and distribute teaching staff among schools according to their human resources needs, and ii) the *overlooking* by the authorities of the fact that the sickness mobility scheme was already included in previous legislation regulating teaching staff recruitment and selection.

47. With respect to the second conclusion above, the initial reference to Decree-Law No. 132/2012 of 27 June 2012 (regulating the recruitment process and mobility of elementary and secondary education teaching staff and specialist trainers and staff) foreshadows the intention to align the sickness mobility scheme with a teacher recruitment, ranking, selection and placement system with characteristics similar to the system of competitions for teaching staff, as will be demonstrated below.

48. The absence from the above-mentioned legislation of placement criteria for teachers who need to be guaranteed protection and support against illness transforms that specific placement – which is specially designed to ensure rights and guarantees of protection for workers who are suffering from a severe and disabling illness – into a mechanism that seeks to respond to administrative and functional needs to *“(…) **introduce criteria that make it possible** for the school*

*cluster or a non-cluster school to assess the reception capacity and to guarantee more balanced, efficient and rational management and use of teaching staff, thereby ensuring that teachers are provided in schools and mitigating the shortage of teachers in some areas and schools which could arise out of the absence of defined criteria.”* (our emphasis)

49. The introduction of this functional dimension, however, undermines the primary purpose of the legislation in technical and functional terms: “(...) **the need to continue to ensure protection and support against illness (...), when it is abundantly clear that they must be transferred to a school cluster or non-cluster school located close to the place where medical care or support is to be provided (...).**” (our emphasis)

50. This is because the *reception capacity provided for* in Article 7 of Decree-Law No. 41/2022 of 17 June 2022 introduces a limiting criterion which will therefore necessarily entail restrictions.

51. Such restrictions take the form of a limited number of places available in clusters and schools to host teachers who are seeking sickness mobility, and will have the direct consequence of excluding teachers who, in applying for the limited number of posts available, run the risk of failing to secure a post not because of their condition but because of purely administrative obstacles.

52. This contradicts the substantive purpose described in the preamble to Decree-Law No. 41/2022 of 17 June 2022 of establishing a teacher placement system which **seeks to ensure protection and support against illness for teachers and their family members.**

53. This is therefore a symptom of the conversion of a system that should solely and exclusively recognise the need to protect and support teachers when either they or their spouse or the person they live with in a civil partnership or their descendants or ascendants who are their dependants are ill, into a system which is full of administrative criteria for placing such teachers.

54. In justifying the need for a specific sickness mobility scheme by linking on the same basis diametrically opposed principles and proposals such as “(...) *promotion of the balance between the need to provide medical care or support to teachers or their family members and the best use of human resources to help to guarantee that state schools have the teachers required to carry out their mission*”, a clash arises between the right of the teacher or their family member with a disabling illness to special protection against such illness and the teacher’s functional duty to fulfil their professional obligations.

55. From the analysis of the preamble to Decree-Law No. 41/2022 of 17 June 2022 and the legal provisions initially set out, we believe that the new version of sickness mobility threatens the right to safety and health of workers, the provision of work in fair and equitable conditions, the right to the dignity and integrity of the human being and the right to equality and non-discrimination by:

- i. Defining requirements and criteria which represent a setback in the right to work in decent conditions which are adapted to the health condition of the worker and which respect their dignity and physical and mental integrity;
- ii. Breaching national and EU legal provisions regarding the fundamental right of workers to health protection and the provision of labour in safe, healthy and decent conditions;
- iii. Converting applications for sickness mobility into a competitive procedure by establishing criteria for the admission, regulation and selection of teachers which necessarily create situations of exclusion and non-placement;
- iv. In situations of exclusion and non-placement, breaching the fundamental right to equality and non-discrimination of persons who are equal before the law and who have a severe and disabling illness.

56. These terms can be verified by specific examination of Decree-Law No. 41/2022 of 17 June 2022, beginning with the provision in Article 5, under the heading, *Conditions for mobility*.

57. Article 5 sets out a general criterion which applies to all career teachers (group, school and education district staff (PAS)) and a specific restriction applicable only to teachers who are cluster staff (CS) and school staff (SS).

58. With regard to a general condition for mobility, the following is defined in 1(b) of the above-mentioned Article 5:

***“The transfer is made to a school cluster or a non-cluster school which is situated within a radius of 50 km, as the crow flies, from the seat of the district in which the medical care provider or family dwelling is located.”*** (Our emphasis and underlining)

59. Paragraph 2 of the same Article, however, adds a limiting condition to the general condition for mobility, which applies only to cluster and school staff:

***“Without prejudice to the provisions of the previous paragraph, staff teachers in school clusters or non-cluster schools may only apply for sickness mobility to school clusters or a non-cluster school whose headquarters is over 20 km away, as the crow flies, from the seat of the district in which the school cluster or non-cluster school is located.”*** (Our emphasis and underlining)

60. This restriction introduces factors of inequality and discrimination among career teachers (CS, SS and PAS) by – within the general condition for teacher sickness mobility (possibility of applying to all clusters and schools within a geographical area with a diameter of 100 km, as the crow flies, from the seat of the district in which the medical care provider or family dwelling is located) – preventing cluster (CS) and school staff (SS) teachers from applying for clusters or schools which are located less

than 20 km away, as the crow flies, from the seat of the district in which each cluster or school of appointment is located.

**61.** This rule imposes an exclusion area with a diameter of 40 km, which means that CS and SS teachers are denied the right to apply to all clusters and schools situated within a 100-km geographical area centred on the seat of the municipality where the medical care provider or family dwelling are located.

**62.** What is more, this specific requirement may in various circumstances be a determining factor of exclusion by preventing applications for sickness mobility if the teacher wishes to be assigned to a cluster or school which is less than 20 km away, as the crow flies, from the seat of the district in which the school of appointment is located.

**63.** This limitation not only restricts the right to sickness mobility but is also discriminatory and disadvantageous in the light of the failure to restrict mobility for PAS teachers – a situation with no procedural or substantive grounds for that same less favourable treatment.

**64.** It should be noted that CS, SS and PAS are career teachers, i.e., employees who have an indefinite public employment contract but whose place of employment differs: the first two involve the teaching staff of an educational or teaching establishment in a geographical area, i.e. without being appointed to a cluster or school setting, but available for assignment to any cluster or school in the catchment area in which they are employed.

**65.** Continuing the analysis of the new sickness mobility scheme, Article 7 defines rules for the involvement of destination schools, i.e., the way in which school clusters should determine their reception capacity.

**66.** To that effect, the director of the cluster, having consulted the teaching council, defines and reports to the Direção-Geral da Administração Escolar [Directorate General of School Administration] (DGAE) the number of teachers to be accepted per recruitment group, prioritising recruitment groups in which it is possible to award at least six hours of teaching time with a class or group of pupils during the period of teaching a subject or a non-disciplinary curricular area.

**67.** This reception capacity should correspond to at least 10% of the overall numbers of teaching staff in the cluster or non-cluster destination school.

**68.** However, the apparent reasonableness of this condition clashes with other existing frameworks in terms of service distribution and the availability of timetables for receiving teachers from outside the cluster/destination schools.

69. For the purposes of determining reception capacity, on 30 June 2022 the DGAE published the Information Note on the Sickness Mobility of Teachers - Determination of Reception Capacity. (Doc. 2)

70. The following is set out in point 2 of the above-mentioned Information Note:

***“2.1 Sickness mobility may not give rise to insufficiency or non-existence of the teaching component for teachers in the school cluster or non-cluster destination school.***

***2.2. Sickness mobility may not give rise to insufficiency or non-existence of the teaching component for staff teachers in catchment areas placed under the 2021/2022 internal mobility competitive procedure as provided for in Article 28 of Decree-Law 132/2012 of 27 June 2012, as currently worded, since compliance with the provision in paragraph 4 of the above-mentioned Article is required, bearing in mind the pedagogical continuity rule.”*** (our emphasis)

71. In practice, what is at issue here is the following: before examining the reception capacity for the purposes of placing teachers who are seeking sickness mobility, each cluster must comply with the legal requirements in force in terms of service distribution, by firstly allocating at least six teaching hours to all teachers employed permanently in these clusters and subsequently to all career teachers placed there on grounds of internal mobility, reserve recruitment and/or administrative placements obtained as a result of appeal decisions.

72. Teaching service distribution, however, may not give rise to the existence of more than one incomplete timetable per recruitment group.

73. That is to say, in application of the existing regulations for teaching service distribution (Ministerial Decree no. 10-B/2018 of 6 July 2018, DGAE Information Note ‘Competition for Early Childhood Teachers and Basic and Secondary Education Teachers: School Year 2022-2023. Teaching Component (ICL) – 1st Stage, 12/07/2022’), the capacity may be determined only after the ordinary procedure of distributing teaching service among teachers employed and teachers transitionally placed in clusters and schools.

74. This gives rise to yet another administrative obstacle in offering timetables per recruitment group and in the number of places to be made available for teachers who are seeking sickness mobility.

75. This ultimately reduces the involvement of destination schools to a minimum, firstly because they fail to achieve the minimum requirement of awarding 10% of posts to teachers who are seeking sickness mobility, and secondly because this limits the supply by recruitment group of those posts to

residual needs which arise out of the distribution of the teaching services previously provided in the cluster.

**76.** In short, it can be seen that, in general, a small number of posts are open for teachers seeking sickness mobility, and the distribution of those posts by recruitment group is uneven. This situation is exacerbated by the absence of regulations requiring a minimum number of posts to be made available per recruitment group.

**77.** Furthermore, Article 8(1) of Decree-Law No. 41/2022 of 17 June 2022 determines the placement criteria, ordered as follows:

***a) degree of incapacity, evidenced by a multipurpose medical certificate of incapacity relating to the teacher or their family members which formed the grounds for the sickness mobility application;***

***b) age of the teacher;***

***c) preferences expressed, in decreasing order of priority.***

**78.** With respect to the degree of incapacity, there is a preference for teachers or family members with a greater degree of incapacity, while in terms of age, older teachers are preferred.

**79.** It should be noted that the preferred definition of the degree of incapacity, evidenced by a multipurpose medical certificate, as the most favourable criterion for obtaining a post is disadvantageous to teachers who fulfil the mobility requirement provided for in Article 4 of the above-mentioned law – i.e., being carriers of a disabling illness in accordance with Joint Order no. A-179/89-XI of 22 September 1989.

**80.** In addition, in Order no. 7716-A/2022 of 21 June 2022, which regulates the sickness mobility procedure provided for in Decree-Law No. 41/2022 of 17 June 2022, paragraph 3 identifies the documents that must be used to support the procedure, while the multipurpose medical certificate of incapacity is only submitted electronically if it exists. In other words, it is not a mandatory submission document.

**81.** However, and in terms of assigning teachers, this is a priority criterion that favours persons who have such a certificate and is detrimental to those who do not.

**82.** This involves direct discrimination between teachers with a disabling illness.

**83.** With respect to the criterion of preference for older teachers, this is a new situation of discrimination between teachers since it defines age, in this case, older age, as a characteristic of greater value among teachers with a disabling illness.

84. Yet again, the overarching requirement for admission to the health-based mobility scheme is that the teacher must be a carrier of a disabling illness in accordance with the order issued for that very purpose.

85. Thus if the condition referred to above is a fundamental requirement for admission to this procedure, setting greater age of applicant teachers as a professional criterion entails unjustified discrimination between teachers.

86. Despite its omission from Decree-Law No. 41/2022 of 17 June 2022, it should be noted that teachers with a disabling illness who obtain a placement through the sickness mobility scheme are allotted teaching work as ordinarily provided for. This is substantially contrary to the protection provided for in the previous legislation, Order no. 9004-A/2016 of 13 July 2016.

87. Part I(5) of the above Order, now revoked, reads as follows: “5 — *Notwithstanding the provisions of the previous paragraph, a teaching component is provided when mobility is based on the illness of the spouse, the person with whom they live in a civil partnership, a child or equivalent, or a parent or similar relative in the first degree of the ascending direct line, or whenever their own illness so allows.*” (our emphasis).

88. The above shows that the award of the teaching component depends on the health condition of the teacher, the drafting of the law clearly demonstrating that it applies only if the illness of the teacher so allows.

89. Therefore, when it is not possible to ensure performance of the teaching service in ordinary terms on account of the disabling nature of the illness, the teacher is exempted from performing the service inherent in the teaching component, i.e.: “(...) *all work with the cohort or group of pupils during the teaching period of a subject or a non-disciplinary curricular area.*” (Article 78(2) of the Teachers’ Charter).

90. However, although the new sickness mobility scheme does not include a specific rule on the award of the teaching component, there is no doubt that its publication i) gives rise to the repeal of the general provision provided for above and, with that, ii) introduces a condition for entitlement to the teaching component, irrespective of the disabling nature of the teacher’s illness.

91. This interpretation arises out of the analysis of Article 7(1) of Decree-Law No. 41/2022 of 17 June 2022, in which, for the purposes of determining the capacity of teachers who are covered by the sickness mobility scheme, “(...) *the Director of the cluster (...) defines and reports to the Directorate General of School Administration (DGAE) the number of teachers to be accepted per recruitment group, prioritising recruitment groups in which it is possible to award at least six hours*



***of teaching time, with a class or group of pupils during the period of teaching a subject or a non-disciplinary curricular area.***” (our emphasis)

92. In form and in substance, the foregoing resembles the general principles that regulate the conditions and organisation of teaching staff work (Chapter X of the Teachers’ Charter) and the general rules for teaching service distribution (Chapter II of Ministerial Decree no. 10-B/2018 of 6 July 2018).

93. This suggests that teachers who obtain a placement through the sickness mobility scheme are awarded teaching work under the conditions provided for by law, irrespective of whether their health condition allows them to carry out such teaching work or not.

**94. In these terms, Decree-Law No. 41/2022 of 17 June 2022 introduces a range of conditions, criteria and mechanisms which severely limit the right to special protection of teachers with a serious disabling illness, undermining the protection of occupational health and safety, contrary to the rights, freedoms and fundamental principles laid down in national and international labour legislation and in the Constitution of the Portuguese Republic.**

#### **POLITICAL IRRESPONSIBILITY IN THE CASE-BY-CASE CONSIDERATION OF TEACHERS PREVENTED FROM TAKING OR NOT GRANTED SICKNESS MOBILITY**

95. It is clear that, until Decree-Law No. 41/2022 of 17 June 2022 was published, the Portuguese legal system had more favourable legislation in terms of special health protection for teachers with a disabling illness.

96. The political option underpinning this legal change serves in particular to address the lack of interest of successive Portuguese governments in anticipating and planning solutions to resolve the shortage of teachers in the public education system.

97. In a statement to the media, the Ministry of Education pointed out that it is the opinion of the Centro de Competências Jurídicas do Estado (JurisApp) [Legal Centre of the Council of Ministers] that *“the case-by-case consideration of applications which do not fall within Decree-Law 41/2022 of 17 June 2022 is not lawful”*. (Doc. 3)

98. The effect of that statement is to totally prevent teachers who are unable to apply for and teachers who have been admitted to, but not placed through, the sickness mobility scheme from re-establishing their right to access the scheme, despite satisfying the fundamental requirement: being

carriers of a disabling illness, or having a dependent family member with such an illness, in accordance with Joint Order no. A-179/89-XI of 22 September 1989.

**99.** In the 2021/2022 academic year, according to figures provided by the Ministry of Education, of the almost 10 000 teachers who applied for sickness mobility, 8 818 had their applications granted. In the current teaching year (2022/2023), in response to the new sickness mobility scheme set out in Decree-Law 41/2022 of 17 June 2022, a total of 7 547 teachers applied for the scheme.

**100.** This reduction in the number of applicants reflects the immediate impact the new sickness mobility rules had on teachers in clusters and schools: prevention from applying for clusters and schools the distance of which, as the crow flies, is less than 20 km from the seat of the municipality where each cluster/school is located.

**101.** Of the then 7 547 applicants admitted to the sickness mobility scheme, 4 268 teachers obtained a placement, corresponding to almost 56% of the candidates. The remainder did not obtain a placement because, under the new rules laid down, there were no vacancies for their recruitment group in clusters /schools for which they expressed a preference or because the reception capacity of such clusters/schools was insufficient.

**102.** Many of the teachers referred to in paragraphs 100 and 101 above sent statements to the Ministry of Education, the Secretary of State for Education and the Directorate General of School Administration setting out their situation, the supervisory board publicly confirming on a number of occasions that it would examine their statements.

**103. That instrument, which has now failed, was the only mechanism that would allow a teacher who was prevented from applying or who did not obtain a placement to reverse a situation limiting their rights to protection against an occupational illness, such rights being enshrined in the European Social Charter, EU legislation, the Constitution of the Portuguese Republic and subsequent national labour legislation.**

#### **SITUATIONS OF DISCRIMINATION**

**104.** Besides verifying the nonconformity which Decree-Law No. 41/2022 of 17 June 2022 brings about by failing to comply with EU obligations governing worker safety and health, it is also crucial to analyse situations of direct discrimination which the access and placement criteria set out therein introduce in relation to sickness mobility for teaching staff. This is essentially because it was considered necessary to take legal action to ensure compliance with the legislative provisions

provided for with respect to equality and non-discrimination in national legislation and EU directives, i.e. Council Directive 2000/78/EC of 27 November 2000.

**105.** However, it is worth noting the way in which the Regional Government of the Azores, which was consulted in the legislative procedure of the Republic and which also legislates in the respective autonomous region in this context, makes provision for rules which guarantee special health protection for teachers with a disabling illness.

**106.** Observing the provisions in Article 21(4) of Regional Legislative Decree no. 10/2021/A of 19 April 2021 (system of recruitment and selection of pre-school and basic, secondary and artistic education teaching staff for performing duties in the public network of the education system of the Autonomous Region of the Azores):

*“4 — In determining the ranking of candidates, account shall be taken of the following order of priorities, without prejudice to the provision in Article 10 of this Regulation in relation to professional grading:*

*a) **They have a disabling illness, in the terms of an order to be approved by the member of the Regional Government responsible for health;***

*b) **They have an illness or disability which requires treatment and specific support, or only one of the latter, which can be ensured only outside the location of the educational or teaching establishment in which they work, or which hinders their movement, requiring auxiliary means of movement;***

*c) **They have a dependent spouse, ascendant or descendant who suffer illness or disability in the terms referred to in point b), which requires constant special support to be provided in a particular district;***

*d) They are pregnant;*

*e) They have dependent children aged up to 12 months;*

*f) They are already members of the school staff with a permanent appointment;*

*g) They are professionally trained and have obtained a placement on the staff of the school through the internal procedure for recruitment from the following 1 September, with a permanent appointment, or are placed on an island list to which they are objecting;*

*h) They are professionally trained and have, by means of the external recruitment procedure, obtained a placement on the staff of the school or are already on the staff of an island and intend to obtain a placement in a school on another island;*

*i) They have obtained, through the external recruitment procedure, a placement on the staff of the island from the following 1 September;*

*j) They are professionally trained and seek to obtain a placement in a recruitment group other than that of which they are members and for which they have a professional qualification.” (our emphasis)*

**107.** The above demonstrates the particular attention and priority given to teachers with a disabling illness, another illness or a disability who have to travel to an educational establishment close to the location where they receive medical treatment or other necessary care and support.

**108.** The legal equivalent of this competitive procedure – an internal allocation process – is found in the internal mobility scheme provided for in Article 28 of Decree-Law No. 132/2012 of 27 June 2012.

**109.** This comparative exercise demonstrates the different and contrasting way in which teachers in mainland Portugal and the Autonomous Region of the Azores are subject to systems with distinct legal provisions in relation to the same health condition – disabling illness and/or disability: in mainland Portugal, in the absence of the particular concept of sickness mobility in the teaching staff recruitment and selection system (Decree-Law No. 132/2012 of 27 June 2012), the Portuguese government has opted to publish a law which does no more than introduce discriminatory and limiting conditions and criteria for access and placement; in the Autonomous Region of the Azores the government, through the competition legislation, guarantees special protection against the health condition by prioritising the placement of teachers in an educational or teaching establishment close to the place where they receive medical care.

**110. In short, the former involves legislation which, rather than protecting the right to work in conditions that respect hygiene, safety and public health and allowing work to be reconciled with family life, in harmony with fundamental rights and freedoms that guarantee that all workers can carry out their work in safe, healthy and fair conditions that respect their dignity and integrity, undermines those very principles for functional and economic reasons, severely affecting and weakening a minority group of public administration employees – around 5% of the total number of public sector teachers in the non-tertiary public sector.**

**In view of the above, you are asked, within the scope of the powers conferred upon you, to take the measures you deem most appropriate to ensure that the system of teacher sickness mobility again conforms with the fundamental rights and freedoms provided for in the Universal**

**Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, the European Social Charter, Directive No. 2007/30/EC of the European Parliament and of the Council of 20 June 2007 and Directive No. 2000/78/EC of the Council of 27 November 2000, with full respect for the value of work carried out in safe, decent and fair conditions.**

Lisbon, 21 October 2022

The National Secretariat

Three documents attached:

Doc.1 – FENPROF opinion on sickness mobility, 20 May 2022;

Doc.2 – Information note from the Directorate-General of School Administration on teacher mobility for health reasons, determination of capacity, 30 June 2022.

Doc. 3 – Note to the media from the Ministry of Education of 23 September 2022, providing information on the Opinion of the Centro de Competências Jurídicas do Estado [Legal Centre of the Council of Ministers] on the legality of analysis and decisions taken regarding sickness mobility applications, issued outside the procedure followed by the Directorate General for School Administration, in relation to the system approved by Decree-Law no. 41/2022 of 17 June 2022.