

CASO PRÁCTICO: SOLICITUD DE CAMBIO DE CENTRO DE UN ALUMNO, SIN ACUERDO ENTRE PADRES DIVORCIADOS. EL PRINCIPIO DE INTERÉS SUPERIOR DEL MENOR.

CASE STUDY: REQUEST TO CHANGE A STUDENT'S SCHOOL, WITHOUT AGREEMENT BETWEEN DIVORCED PARENTS. THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD.

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Resumen

Se describe un caso en el que la directora de una escuela pública recibe una solicitud de matrícula para un niño de cuatro años por parte de la madre, quien proporciona un documento judicial que incluye medidas cautelares para proteger al niño de su padre. A pesar de que el padre se

opone al cambio de escuela, la directora decide proceder con la matrícula para proteger al menor, en detrimento de lo recogido en las instrucciones para casos de padres y madres separados/as y/o divorciados/as. El inspector de referencia insta a la directora que permita al padre presentar documentación en su defensa y que informe a la madre de su derecho a hacer lo mismo. Tras analizar la documentación proporcionada por ambas partes, el inspector concluye que la protección del menor debe primar sobre los derechos del padre en esta situación. Se hace hincapié en la importancia del principio del interés superior del menor en la toma de decisiones relacionadas con su bienestar, y se indica que esta decisión está en línea con la legislación vigente, que prioriza el interés superior del menor en todas las acciones y decisiones que lo afecten.

Palabras clave: *protección jurídica del menor, interés superior del menor, cambio de centro escolar, matriculación provisional, padres/madres separados o divorciados.*

Abstract

There is a case described in which the principal of a state school receives a request for enrolment of a four-year-old child from his mother, who provides a court document that includes precautionary measures to protect the child from his father. The principal allows the child's enrolment despite the father's objections, prioritizing the child's welfare over the father's rights, according to the principle of the best interests of the child and current legislation. The assigned inspector urges the principal to allow the father to present documentation in his defence and to inform the mother of her right to do the same. After analysing the documentation provided by both parents, the inspector concludes that the protection of the child should prevail over the rights of the father. Emphasis is placed on the importance of the principle of the best interests of the child as it relates to his welfare. This

decision is in accordance with current legislation, which prioritizes the best interests of the child.

Keywords: *child legal protection, best interests of the child, change of school, temporary enrolment, separated or divorced parents/mothers.*

I. INTRODUCTION

In the field of education, disagreements between divorced parents can pose sensitive dilemmas, especially when it comes to decisions affecting the welfare of their children. In this case study, there is a request for a change of school by the mother of a pupil, supported by judicial measures to protect the child from his father. Despite the father's opposition, the head teacher decides to proceed with the enrolment in order to safeguard the child, deviating from the established guidelines for divorced parents. This scenario raises a reflection on the principle of the best interests of the child and its weight in educational decisions. This case is analysed in detail, highlighting the importance of this principle in decision-making affecting children, as well as the relevance of following proper procedures to ensure their legal protection and emotional well-being.

The principle of the best interests of the child is a fundamental pillar of decision-making in educational contexts, as it seeks to protect and guarantee the overall well-being of children above all other interests, including those of parents or educational institutions. This principle involves considering the physical, emotional, social and educational needs of each child on an individual basis.

In the field of education, the best interests of the child principle can be reflected in a number of situations: 1) when an application for enrolment or change of school is made, especially in cases of divorced or separated parents, education authorities must assess which option provides the most suitable environment for the child's development and learning.

Consideration should be given to factors such as the educational quality of the school, proximity to home, social and emotional environment, and any protective or security measures that may be necessary; 2) in situations where disciplinary measures are required, the principle of the best interests of the child implies seeking educational approaches that promote reflection, learning and personal development of the student, avoiding as far as possible any form of punitive measures that may negatively affect the student's well-being; 3) in the case of students with special needs or complicated family situations, access to inclusive and equitable education that responds to their individual characteristics and promotes their full development must be guaranteed; 4) in situations where there is conflict between the interests of the adults involved (parents, teachers, administrators) and the welfare of the child, education authorities must always put the best interests of the child first. This may involve making decisions that protect the child from risk, abuse or neglect, even if this means contravening the wishes or interests of adults.

In short, the principle of the best interests of the child is an ethical and legal beacon that guides decisions in the field of education, ensuring that each child receives the attention and care necessary for their integral development and full personal fulfilment.

II. CASE STUDY

The headmistress of a public infant and primary school calls her reference inspector to inform him about a threatening phone call received from the father of a pupil recently enrolled in the 4-year-old class in infant education. In response to the inspector's request for further information, the headmistress provided background information and the situation up to that date.

According to the headmistress, the pupil's mother had recently applied for her son's enrolment at the school, providing among the

documentation requested an ORDER of preliminary proceedings in which, although it does not contain specifics on the exercise of parental authority in educational matters, *the application for a protection order requested by XXX (mother) is accepted* and the following precautionary measures are agreed *for the adequate protection of the victim: The prohibition of the defendant, XXX (father), from approaching the victim, XXX (student), at his home, school, and any other place frequented by him, at a distance of less than 200 metres, and the suspension of the joint guardianship and custody regime of the defendant with his minor son, as well as the visiting regime established with the child in a judicial decision.*

Faced with this fact, the headmistress does not hesitate to proceed with the enrolment of the pupil, on the understanding that in this way she is benefiting the child.

The parent contacts the headmistress by telephone and tells her that she has not acted correctly in accepting the pupil's enrolment without his consent. The father informs her that he still has parental authority over the pupil and that the regulations give him the right to object to the change of school, as he can make decisions in the educational sphere. He demands that the enrolment be cancelled and that his child be immediately reinstated in the XXX [school of origin] where he was previously enrolled, on the grounds that he has been transferred without any legal authorisation.

The headmistress requires advice from the referring inspector on how to proceed.

III. CASE DEVELOPMENT AND RESOLUTION

Having received the information from the head teacher, the inspector of reference considers it appropriate to check the information with the parties concerned.

The Instructions of the school management of the Department of Education, Universities and Research of the Basque Autonomous Community

on requesting information and a change of school centre in the case of separated or divorced parents or unmarried couples who have ended their cohabitation indicate the following:

- 1. In the case of separated or divorced parents or unmarried couples who have ended their cohabitation, when one of them applies for enrolment for the first time or for a change of school, the school head shall proceed, as regards whether or not the agreement of the other spouse is required, in the manner stipulated in the judgment or in the order of provisional measures on the exercise of parental authority in educational matters, the operative part of which must be provided with the application.*
- 2. If no educational decisions have been made, a copy of the application shall always be sent to the other parent, whether or not they have joint custody of the pupil, unless it is established that they have been expressly deprived of parental authority.*
- 3. This will include the indication that the application will be processed if, within 10 working days from the day following receipt of the information, the addressee parent does not present a document opposing the change of centre. If this is the case, the applicant shall be notified immediately that his or her application shall be processed after notification of the judicial decision authorising it.*

The inspector of reference indicated to the headmistress that, understanding that the procedure mentioned in the instructions had not been strictly followed, she should give the father the option of lodging a complaint with this Delegation of Education and thus be able to provide as much documentation as he deems appropriate (*judgement or in the order for provisional measures on the exercise of parental authority in educational matters*) to support his argument. Likewise, the headmistress should inform the mother of her right to provide as much information and documentation as she deems appropriate to justify the need to change the pupil's school.

The headmistress clarifies that she has acted in the best interests of the child in order to make the best decision for the welfare of the pupil.

Likewise, the headmistress proceeds in the manner indicated by the inspector of reference and gives both parties the option to present the documentation they deem appropriate.

The mother submits a Notification signed by Ms XXX, acting as representative and lawyer of Ms XXX, providing additional information and attaching the following:

- Preliminary proceedings ORDER XXX/202X dated XX of XXX of 202X.

The father submits a letter to the Territorial Delegation of Education requesting that his son XXX (pupil) "...be immediately reinstated in the school of XXX [centre of origin] in which he was previously enrolled..." alleging that "...he was moved without any legal authorisation...". Attached is the following:

- ORDER No. XX/202X of provisional measures, dated prior to the Preliminary proceedings ORDER delivered by the mother.

After analysing the information provided by the headmistress and the documentation provided by both parties, the inspector of reference draws **4 conclusions** which will be decisive in the decision-making process, and which will be the subject of a subsequent argument in the development of the inspection report:

1. Although the ORDER No. XX/202X of provisional measures provided by the father contains information in relation to the exercise of parental authority in educational matters: 1) **nothing is specified in relation to how to proceed in the event that only one of the parents requests a change of centre** and 2) **this ORDER is prior to the ORDER on preliminary proceedings provided by the mother.**
2. In the Preliminary Proceedings ORDER filed by the mother "*...the request for a protection order filed by XXX (mother) is granted...*" and the following precautionary measures are agreed "*...for the adequate protection of the*

victim...": ...the prohibition of the investigated, XXX (father), from approaching the victim, XXX (pupil), to his home, school, and any other place frequented by him, at a distance of less than 200 metres" and ...the suspension of the shared guardianship and custody regime of the investigated with his minor son, as well as the visiting regime established with the child in a judicial resolution". The inspector of reference makes use of the information available in the computer applications of the Department of Education in relation to the distance between the educational centres (the one of origin and the one of re-enrolment) and the father's home. **While the distance between the school requested by the mother and the father's home is more than 200 metres, this is not the case between the school of origin and the father's home.** In the event that the father's request is upheld, it would be difficult to ensure compliance with the precautionary measure prohibiting him from approaching the school agreed in the preliminary proceedings ORDER XXX/202X submitted by the mother.

3. **The main reason why the headmistress of the school has not strictly followed** the *Instructions of the school management of the Department of Education, Universities and Research of the Basque Autonomous Community on the request for information and change of school in the case of separated or divorced parents or unmarried partners who have ended their cohabitation* is to **safeguard the protection of the child.** The headmistress repeatedly indicates that she has considered this to be the best option for the pupil. This inspector considers that, de facto, **the headmistress was applying the principle of the best interests of the child as paramount.**
4. Having already formalised the enrolment, the **provisional nature of the measure is considered; the provisional nature accepts the imperative correction of whoever has better criteria and greater power to decide,** and therefore gives room for rectification in the event of having to be subsumed to the decision of a superior.

In view of the above, the inspector of reference considers that there are sufficient indicators that the protection and care of the child should take precedence over the right that the father may have to make decisions in the educational sphere (more specifically, the right to oppose the change of centre requested by the mother), at least as a provisional measure until a new injunction, order, ruling, judgement or resolution is issued in relation to the case.

Below is the inspection report which will give more details regarding the resolution of the case.

IV. REPORT

Received at the Territorial Delegation of Education of XXX the letter from the father of the pupil requesting the immediate reincorporation of his child to the [centre of origin], as well as the following documents provided to the centre of destination and with informed consent of transfer to this inspector of education:

- ORDER No. XX/202X of provisional measures (provided by the father), dated prior to the ORDER on preliminary proceedings delivered by the mother.
- Preliminary proceedings ORDER XXX/202X dated XX of XXX of 202X (provided by the mother).
- Notification signed by Ms XXX, acting as representative and lawyer of Ms XXX, providing additional information (provided by the mother).

The Territorial Delegate of Education of XXX requests an inspection report in order to respond to the request. The undersigned Inspector issues the following report:

1. FACTS¹

- 14/XX/202X: The headmistress of Infant and Primary School XXX notifies her inspector of reference that she has received an application for enrolment from Ms. XXX for her son XXX, for the X year old class in Infant Education. This is a request for a change of centre, as the pupil was previously enrolled in [centre of origin]. The mother notifies that, at present, the parents do not live together and provides a copy of a fragment of the Preliminary proceedings ORDER XXX/202X dated XX of XXX of 202X, where the facts and the operative part are stated.
- 14/XX/202X: This inspector, in a telephone conversation, informs the headmistress of the centre about how to proceed when an ORDER has not ruled on decisions in the educational sphere. The headmistress informs the inspector that, in view of the precautionary measures for the protection of the child contained in the documentation provided by the mother and in the best interests of the child, she has already enrolled the child. The inspector indicates that she should contact the father in order to inform him of the situation and give him the option of submitting the documentation he deems relevant.
- 15/XX/202X: Once the headmistress of the school informed Mr XXX, the pupil's father, he requested in writing that his son be immediately reinstated at [school of origin]. He submits a written request addressed to the Territorial Delegation of Education of XXX and attaches the ORDER No. XX/202X of provisional measures (dated prior to the Preliminary proceedings ORDER delivered by the mother).
- 16/0XX/202X: The director of the centre informs the mother of the situation and the latter provides her with a complete copy of Preliminary proceedings ORDER XXX/202X dated XX of XXX of 202X, as well as a

¹ Text at the beginning of the report: "The information contained in this report is for the exclusive use of the recipient body. This report and any annexes that may accompany it contain confidential and/or legally protected information that must not be used, distributed, reproduced, printed or copied, in whole or in part, except for the professional purposes for which it was prepared."

notification signed by Ms. XXX, who acts as representative and lawyer of Ms. XXX (mother), where additional information is provided.

- 16/XX/202X: In a telephone conversation between the inspector of reference and Mr. XXX (father), the latter indicated that he had no judgement or order subsequent to the one presented by the mother and reiterated his firm rejection of the change of centre, pointing out that the ORDER No. XX/202X of provisional measures (dated prior to the preliminary proceedings ORDER presented by the mother) has provisions regarding the educational sphere.

2. LEGISLATION APPLICABLE TO THE CASE

- Organic Law 8/2021, of 4 June, on the comprehensive protection of children and adolescents against violence.

"Article 4. General criteria.

1. *The general principles and criteria for the interpretation of the best interests of the child shall be applicable...*

1) *Formal assessment and determination of the best interests of the child in all decisions affecting a minor".*

"Article 12. Right to comprehensive care.

1. *The public authorities shall provide children and young victims of violence with comprehensive care, including protection, support, shelter and recovery measures".*

- Organic Law 1/1996 of 15 January 1996 on the Legal Protection of Minors, partially amending the Civil Code and the Civil Procedure Act. (and subsequent amendments 29/12/2007, 05/01/2011, 23 and 29/07/2015).

"Article 2. Best interests of the child.

1. Every minor has the right to have his or her best interests assessed and considered as paramount in all actions and decisions concerning them, in both the public and private spheres. In the application of this Act and other regulations that affect them, as well as in the measures concerning minors adopted by public or private institutions, the Courts, or legislative bodies, their best interests shall prevail over any other legitimate interest that may concur.

Limitations on the capacity to act of minors shall be interpreted restrictively and, in any case, always in the best interests of the minor.

"In the event that all competing legitimate interests cannot be respected, the best interests of the minor shall prevail over any other legitimate interests that may be involved".

- Law 3/2005, of 18 February, on Care and Protection of Children and Adolescents.²

"Article 4. Basic inspiring principle.

1. ...the best interests of children and adolescents and the protection of their rights in order to ensure their development must be the guiding principle of the decisions and actions taken and implemented by parents, guardians or custodians in their regard. They shall also be the guiding principle for all public actions directly related to them and, in particular, for all decisions adopted by the judicial or administrative authority or by the public or private institutions responsible for their care and protection.

In determining this interest, the needs and rights of the minor shall be taken into account in the first instance, their views and

² Regulation repealed, with effect from 29 August 2024, by derogatory provision 1. of Law 2/2024 of 15 February on Children and Adolescents of 15 February. [Ref. BOE-A-2024-4784](http://boe.es/BOE-A-2024-4784)

wishes expressed with sufficient judgement shall be taken into account and their individuality in the family and social context shall be considered.

2. The best interests of children and adolescents and the protection of their rights in order to guarantee their development must take precedence over any other competing legitimate interests.

- DECREE 201/2008, of 2 December, on the rights and duties of pupils in non-university schools in the Autonomous Community of the Basque Country.

Article 8. - *The right of minor pupils to protection by the school.*

Article 11. - *Right to personal integrity, identity and dignity.*

3. ARGUMENTS AND MOTIVATION

- The headmistress of Infant and Primary School XXX has kept the inspector informed at all times and has responded to his requests. Likewise, she has provisionally enrolled XXX (pupil) in Infant and Primary School XXX, in response to the request for a change of centre made by the mother, Ms. XXX, having agreed on the decision with the reference inspector and always placing the best interests of the child above the legitimate interests of both parents.
- While the applicant, Mr XXX (father), requests that his son XXX (pupil) "*...be immediately reinstated in the school of XXX [school of origin] where he was previously enrolled...*", alleging that "*...he was moved without any legal authorisation...*" in accordance with the provisions of ORDER No. XX/202X on provisional measures (dated prior to the Preliminary Proceedings ORDER submitted by the mother), Ms XXX, the pupil's mother, submits a

copy of a later Order, Preliminary Proceedings ORDER XXX/202X, dated XX XXX of 202X, in which "...a copy of the Order of Interim Proceedings XXX/202X, dated XX XXX of 202X, is granted...". and the following precautionary measures are agreed "...for the adequate protection of the victim...":

1. "...the prohibition of the defendant, XXX (father), from approaching the victim, XXX (pupil), at his home, school, and any other place frequented by him, at a distance of less than 200 metres".

2. "...the suspension of the joint guardianship and custody regime of the defendant with his minor son, as well as the visiting regime established with the child in a judicial decision".

- Although in the last Preliminary Proceedings ORDER XXX/202X provided by the mother and dated XX of XXX of 202X there is no ruling on the exercise of parental authority in educational matters, nor even, in a direct manner, on decisions in the educational sphere, there are 2 situations that have been considered when taking the relevant decisions:

1. Mr. XXX (father) indicates in his request that his address is located at C/ XXX No XX, (XXX), which coincides with the data collected in the applications of the Department of Education. In the event that the father's request is granted and taking into account the distance between the father's home and the Private Infant and Primary Education School [centre of origin], it would be difficult to guarantee the protection of the child and compliance with the precautionary measure prohibiting the child from approaching the school agreed in the Preliminary Proceedings ORDER XXX/202X provided by the mother and dated XX of XXX of 202X.

2. As a result of the precautionary suspension of the joint guardianship and custody regime of the investigated party with his minor son, as well as the visiting regime established with the minor in a judicial decision, agreed in the AUTO of preliminary proceedings XXX/202X provided by the mother, it is the latter who, at present, has the guardianship and custody regime of the pupil. It is for this reason that, acting in the best interests of the child, the pupil is provisionally enrolled in Infant and Primary School XXX, as it is closer to the home where the child currently resides.

- It should be noted, although it may not be relevant, that the application submitted on XX September 202X by Mr XXX (father) addressed to the Territorial Delegation of Education of XXX, is dated XX December 202X (3 months after the date of submission of the application). Likewise, the copy of the ORDER No. XX/202X of provisional measures provided by the father (dated prior to the preliminary proceedings ORDER submitted by the mother), is provided without any signature, despite the fact that there is space for the signatures of the JUDGE and the Lawyer for the Administration of Justice.

4. CONCLUSIONS

The Preliminary Proceedings ORDER XXX/202X provided by the mother and dated XX of XXX of 202X, as well as the respect for the measures of PROTECTION of the minor adopted therein, **accredit the suitability of the provisional enrolment in Infant and Primary School XXX.**

5. PROPOSALS

- **It is not appropriate to grant the request of Mr XXX (father)**, since, otherwise, there would not be sufficient guarantees of compliance with the precautionary measures agreed for the PROTECTION of the pupil XXX.
- In furtherance of the principle of the best interests of the child, **it is appropriate that the pupil XXX remain enrolled at Infant and Primary School XXX, unless and until a subsequent judgment or order expressly contradicts this decision.**

6. NATURE OF THE REPORT

In accordance with the provisions of article 13.2 of Decree 71/2021, of 23 February, which establishes the organic and functional structure of the Department of Education, it is the responsibility of the Technical Inspectorate of Education to inform the competent body in the field of Education prior to the decision taken by the latter. To this end, the present report is issued, which is optional in nature, in no way binding, and is subject to a better-founded criterion. It is up to the heads of the bodies to which the report is addressed to adopt the corresponding decision, either on the basis of the conclusions contained in this report or on the basis of any other that these bodies may deem appropriate.

V. CONCLUSIONS

In this practical case we have been able to analyse the principle of the best interests of the child in a case in which there is disagreement between the parents of an Infant Education pupil in the event of a change of school. Bearing in mind that the parents are divorced and that there are instructions that regulate the way to proceed in this type of situation, we came to the

conclusion that the best interests of the child must prevail over the rights of the parents in certain circumstances.

Throughout the analysis of the case and in the development of the inspection report, it has been demonstrated that the best interests of the child, recognised as a fundamental principle in international law and in many national legal systems, are of paramount importance in the protection and well-being of children and adolescents.

While parents have rights and responsibilities in relation to their children, these rights are not absolute and must be exercised in accordance with the best interests of the child. In situations where the interests of parents conflict with the welfare of the child, the principle of the best interests of the child should prevail, even over the preferences or decisions of the parents.

This approach does not seek to undermine the rights of parents, but rather to ensure that the physical, emotional and psychological well-being of children is adequately protected. As education inspectors and in the diligent exercise of our mandated functions, we must assess each situation on an individual basis and consider the best interests of the child as a determining criterion in decision-making. The best interests of the child is not only a morally imperative principle, but also a legally binding norm that must guide all actions and decisions affecting children and adolescents. This argument should not be taken to mean that the education inspector should take on a role that does not correspond to him or her as a lawyer or judge, but rather that the education inspector is an essential agent in ensuring compliance with this principle.

In this case, underlining the **provisional nature** of the enrolment in the new school would in any case have accepted an imperative correction from whoever had the better judgement and greater power to decide. It is worth mentioning here that, although this inspector would have been subsumed to any superior or judicial decision that might have been issued to that effect,

there has been no injunction, order, judgment or resolution in relation to the case, a year and a half having passed since the reply was issued to the interested party informing him that his application had been rejected. There will always remain the doubt as to whether it was the applicant himself who took the decision rejecting his application or, rather, it was someone with better criteria and greater authority who argued along the same lines as the undersigned inspector.

It should be borne in mind that, following the inspection report, the Territorial Delegate for Education issued a resolution which, along the same lines, transcribed as follows:

*Having examined XXX's request for his son XXX to be reintegrated into the school [centre of origin], where he was previously enrolled, in view of the change of centre requested by the mother to Infant and Primary School XXX, and in view of the report drawn up by the Education Inspectorate, this Delegation has resolved: **TO REJECT THE REQUEST***

on the following grounds:

a) The Preliminary Proceedings ORDER XXX/202X provided by the mother and dated XX of XXX of 202X, as well as the respect for the measures of PROTECTION of the minor adopted therein, accredit the suitability of the provisional enrolment in Infant and Primary School XXX.

b) It is not appropriate to grant XXX's request, since, otherwise, there would not be sufficient guarantees of compliance with the precautionary measures agreed for the PROTECTION of the pupil XXX.

c) Always acting in favour of the principle of the best interests of the child, it is appropriate that the pupil XXX remains enrolled at Infant and Primary School XXX, unless and until a subsequent judgment, order or order expressly contradicts this decision.

... An appeal may be lodged against this decision, which does not exhaust administrative channels, with the Regional Minister of Education within one month of the day following its notification.

I would like to conclude by clarifying that although *Law 3/2005, of 18 February, on Care and Protection of Children and Adolescents*, the autonomous regulation referred to in the resolution of the case, is repealed with effect from 29 August 2024, *Law 2/2024, of 15 February, on Children and Adolescents*, does not deviate from the argument of prioritising the best interests of children as a fundamental principle for the protection and defence of minors. The following excerpt is an example:

- Law 2/2024 of 15 February on Children and Adolescents.
 - "Article 24.** The right to the prevalence of the best interests of the minor.
 1. Every minor has the right to have their best interests assessed and considered as paramount in all actions and decisions concerning them, in both the public and private spheres.
 2. In the drafting and application of laws and other regulations affecting minors, as well as in the measures adopted by their parents, legal representatives or foster carers and guardians, and by public or private institutions, the courts or legislative bodies, the best interests of minors shall prevail over any other legitimate interest that may be involved".

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