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## **The Right to a Trial When Applying for Public Funds for Educational Tasks in the Light of the Evolution of the Case Law of Administrative Courts**

### **ABSTRACT**

In the modern history of the Polish administrative court system, an important legal issue that still needs to be clearly resolved is the jurisdiction of courts over acts and actions taken by the public administration other than administrative decisions or rulings. This issue arises in the area of the process of applying for public funds for the performance of educational tasks by public and non-public units of the system of education (with regard to the so-called education subsidies provided from the budgets of local and regional government units), as well as in the area of receiving from the state budget the educational part of the general subvention by local and regional government units themselves. The dispute concerning the jurisdiction over the determination and transfer of education subsidies, which started with the dispute over the legal nature (civil or administrative law) of the relationship arising from the education subsidy, continued for more than 20 years and was only brought to an end by the 2016 amendment to the Act on the system of education.

In contrast, the analogous dispute concerning jurisdiction of courts in cases involving the determination of the value and transfer of the educational part of the general subvention to local government units actually remains unresolved to this day. This paper presents an analysis of the evolution of the case law of administrative courts in the cases mentioned above. The primary purpose of this analysis was to formulate conclusions *de lege ferenda*, the consideration of which would lead to the real and effective exercise of their rights (including the constitutional right to a trial) by the bodies that run public or non-public units of the system of education, as well as by local government units.

**Key words:** right to a trial, court jurisdiction, education subsidy, education part of the general subvention, right to a subsidy and a subvention

## 1. Introduction

The issue of educational subsidies and subventions in the financial system of the Polish local government units has an extremely interesting dimension in the historical context. In the period of the inter-war Poland, subsidy and subvention revenues transferred from the state budget to the local self-governments constituted a small part of their income (2–9%), which was due to the limited financial capacity of the state budget.<sup>1</sup> Such a low ratio of the share of subventions and subsidies in the total income of the pre-war local governments is quite remarkable in comparison with the corresponding contemporary ratio, which is about 50% of the total budget income of the local government units.<sup>2</sup> In the area of the financing of educational tasks, as in modern times, in the Second Polish Republic “municipalities were responsible for the provision of school infrastructure, while the central authorities took on the payment of the teaching posts. Subsidies for the construction or renovation of schools could also be obtained from the central government.”<sup>3</sup> Just as on the revenue side, the subsidy income of the local governments in the Second Polish Republic was of little significance, so also on the expenditure side – the so-called benefits and allowances expenditure accounted for a small percentage of total

<sup>1</sup> R. Ciałkowski, *Gospodarka budżetowa organów lokalnych w Polsce (1918–1990)*, Katowice 1991, pp. 23–24.

<sup>2</sup> Sprawozdanie z działalności regionalnych izb obrachunkowych i wykonania budżetu przez jednostki samorządu terytorialnego w 2022 r., Warszawa 2023, p. 160; <https://rio.gov.pl/153/24/sprawozdanie-krrio-za-2022-rok.html>, (10.10.2023).

<sup>3</sup> Edukacja w II Rzeczypospolitej; <https://niepodlegla.gov.pl/o-niepodleglej/edukacja-w-ii-rzeczypospolite>, (10.10.2023).

local government expenditure. It is also significant that these expenses were shown in the local government budgets as allowances and benefits, e.g. allowances for fire brigades, benefits for social institutions (fire brigades, Polish navy and others), benefits for educational institutions (private vocational school, agricultural courses).<sup>4</sup> Due to the nature of the financial system of the local governments in the Second Polish Republic, there were therefore no legal disputes between the state and the local government in the financing of educational tasks or between the local government and a non-public school in the transfer of so-called allowances to educational institutions during this period, as these (unlike today) were of an optional nature.

Nowadays, the problem of applying for public funds for the performance of educational tasks has a multidimensional character, and its origins go back to the period of the transformation of Poland's system of government. In the 1990s, a number of provisions were introduced into the Polish legislation allowing non-state entities (including individuals) to carry out publicly funded tasks. These were primarily the provisions of the public procurement law, but also the provisions that regulated the granting of subsidies from the state or the local and regional government budgets. The latter group of regulations, referred to in Poland as the subsidy law (which, given the unique Polish terminology, should be distinguished from the subvention law<sup>5</sup>) is currently characterized by a great diversity of subjects and objects, as well as by the fact that some of these regulations stipulate the obligation to provide a subsidy from public funds to non-public entities. The obligation to provide subsidies was introduced specifically for educational tasks, which is expressed in the fact that non-public units of the education system (non-public kindergartens, schools, and establishments<sup>6</sup>) have the so-called right to educational subsidies, which arises *ex lege*. What is more, it is characteristic that the granting of subsidies to non-public entities for the performance of public tasks takes place not only at the central level (from the state budget), but also at the local level (from the budget of the local and regional government units). The phenomenon of subsidies provided from local and regional government budgets for tasks carried out by non-public entities

4 A.W. Zawadzki, *Finanse samorządu terytorialnego w latach 1918-1939*, Warszawa 1971, pp. 61-73; A. Bogusławski, *Oświata i kultura w wydatkach samorządów powiatowych*, „Samorząd” 1931/42, p. 687.

5 For more information on the terminology used in the subvention law and the subsidy law, see: A. Ostrowska, *Samorządowe prawo dotacyjne. Dotacje jako wydatki jednostek samorządu terytorialnego*, Warszawa 2018, pp. 23-33.

6 The term “non-public units of the education system” used herein means public and nonpublic schools, establishments, and kindergartens to which subsidies are provided from the budget of a local government unit (hereinafter: LGU) pursuant to the Act of October 27, 2017 on the funding of educational tasks (consolidated text: the Journal of Laws of 2022, item 2082, as amended), hereinafter referred to as AFET.

(including non-public units of the education system), should certainly be considered an important manifestation of the decentralization of public finances – this is, in a way, the second stage of this decentralization – assuming that the first stage occurred in 1990 for the benefit of local governments. In this regard, Poland appears to be implementing a broad decentralization of power and public finances for the benefit of local governments and their local communities.

However, in relation to the transfer of public funds for the performance of educational tasks, the issue has arisen of the legal nature of the relationship occurring in this regard, and consequently the issue of jurisdiction of courts over the acts and actions was taken over by the public administration (other than administrative decisions or rulings). These matters include the activities related to the determination of the value and the transfer of the so-called educational subsidies to public and non-public units of the education system, as well as the activities related to the determination of the value and the transfer of the education part of the general subvention for the local government units.

The legislature established the administrative-law nature of these actions by amending the provisions of Articles 80 and 90 of the Act on the education system, effective as of January 1, 2017. The new regulations clearly stipulated that the granting of an educational subsidy constitutes an activity within the scope of the public administration and is therefore subject to review by administrative courts. Currently, such provisions are contained in Article 47 of the Act of October 27, 2017 on the funding of educational tasks. This was an extremely important and much-anticipated amendment, as the dispute over the jurisdiction in cases involving the determination of the value and the transfer of education subsidies had continued for more than 20 years, which in many cases led to the deprivation of the entities running public and non-public units of the system of education (kindergartens, schools, and establishments) of their constitutional right to a trial. Therefore, these bodies were deprived of the statutory right to carry out publicly funded tasks, which is established in Article 43 of the Act on public finance, or this right was significantly restricted. It is advisable to carry out research in this area, all the more because some decisions of the Supreme Administrative Court seem to have returned to the position held before the above-mentioned amendment.

The purpose of this paper is to analyze the evolution of the case law of administrative courts in cases that involve the determination of the value and the transfer of public funds for the performance of educational tasks (referred to as educational subsidies), as well as in cases that involve the determination and the transfer of the education part of the general subvention to LGUs. This analysis will be carried out in the light of the constitutional right to a trial and the statutory right to carry out publicly funded tasks. The final result of this analysis will be to formulate conclusions *de lege ferenda*, the consideration of which

would lead to the real and effective exercise of the above rights by the bodies that run public or non-public units of the education system, as well as by LGUs themselves. This study uses the dogmatic-legal method and, most importantly, the empirical method, since the analysis covers the rulings of administrative courts issued over the past 25 years, the rulings relating to the subject under study, and the case law of the Constitutional Tribunal and the Supreme Court.

## 2. Standards of protection of the beneficiaries of public funds earmarked for education

In addition to allowing non-public entities to carry out public tasks, a number of guarantee and protection regulations were adopted in this regard during the period of the political transformation in Poland. For example, the Act of November 26, 1998 on public finance, which was enacted in that period,<sup>7</sup> included the principle that *the right to carry out publicly funded tasks is vested in all entities, unless separate statutes provide otherwise*. This principle arises from the principles of protection of free competition and subsidiarity on which the European Union's legal system is based. This principle, referred to as the principle of universal right to carry out publicly funded tasks and considered to be one of the basic principles of management of public funds,<sup>8</sup> is now expressed in similar words in Article 43 of the Act of August 27, 2009 on public finance.<sup>9</sup> It is important to point out the generality and universality of this principle, which means that it applies to both obligatory subsidies (i.e., educational subsidies) and optional subsidies, most of which are commissioning subsidies (i.e., targeted subsidies for tasks commissioned to public benefit organizations). However, this principle plays a special role in the case of commissioning subsidies, which is reflected in the judgments of administrative courts issued in cases involving targeted subsidies from the budgets of LGUs. This case law, for example, clearly points out that limiting the group of beneficiaries of subsidies in local resolutions on granting subsidies for the environmental protection tasks (in relation to the statutory list of such beneficiaries) constitutes a violation of the requirement set forth in Article 43 of the APF.<sup>10</sup> In addition, when considering the issue of granting subsidies for the performance of sports-related tasks, the

<sup>7</sup> Article 22 (1) of the act of November 26, 1998 on public finance (consolidated text the Journal of Laws of 2003, no. 15, item 148, as amended); this law was in force until January 1, 2006.

<sup>8</sup> J.M. Salachna (ed.), *Budżet samorządowy i wieloletnia prognoza finansowa – projektowanie, wykonywanie, sprawozdawczość*, Gdańsk 2014, p. 259.

<sup>9</sup> Consolidated text: the Journal of Laws 2022, item 1634, as amended; hereinafter referred to as APF.

<sup>10</sup> See for example: The Judgment of the Voivodeship Administrative Court in Warsaw of April 15, 2021, file no. VIII SA/Wa 240/21.

Voivodeship (Provincial) Administrative Court in Cracow indicated that the discretion to request documents and information not specified in the resolution from a potential beneficiary of a subsidy may also lead to a violation of Article 43 of the APF.<sup>11</sup> Moreover, in one of its judgments, the Supreme Administrative Court stressed that the principle of universality of access to the performance of publicly funded tasks may be restricted only by a separate law.<sup>12</sup> Also, the literature indicates that the principle in question should apply only to the tasks funded by way of allocation of public funds (e.g., by granting a subsidy), and not by way of payment for tasks that have already been carried out (reimbursement of expenses).<sup>13</sup>

In the case of educational subsidies, the principle of the universal right to carry out publicly funded tasks (expressed in Article 43 of the APF) provides, in a way, a systemic basis for the location of non-public units of the education system as obligatory beneficiaries of educational subsidies provided from the budgets of LGUs. This is because the right to a subsidy (the right to receive funds for the performance of an educational task) arises directly from the Act on funding of educational tasks, which also sets additional protective standards for the beneficiaries of these subsidies. However, in the practice of local government, these norms are quite often violated by the body providing the subsidy (the executive body of the LGU), while their protective function must be pointed out by an administrative court. This was the case, among others, in the judgment of the Supreme Administrative Court (SAC) of June 24, 2022,<sup>14</sup> in which the SAC rightly pointed out that in the absence of a legal and factual possibility to provide to the body providing a subsidy information on the number of children by September 30 of the year preceding the year in which subsidy was to be provided (e.g., due to a later entry of the establishment in the register of non-public institutions), the body providing the subsidy should take into account the provision of Article 33 (4) of the AFET, which allows it to provide a subsidy despite the failure to meet this obligation to provide information. As the SAC rightly pointed out, although Article 33 (4) of the AFET grants to the body providing the subsidy the right to choose whether there is a case justifying the granting of the subsidy (by using the phrase: “may agree to waive the deadline”), this does not relieve that body – in the process of reaching a decision – from

<sup>11</sup> The Judgment of the Voivodeship Administrative Court in Cracow of March 9, 2021, file no. I SA/Kr 696/20.

<sup>12</sup> The Judgment of the Supreme Administrative Court of July 12, 2018, file no. I GSK 2313/18.

<sup>13</sup> See: R. Trykozko, *Ustawa o finansach publicznych. Komentarz dla jednostek samorządu terytorialnego*, Warszawa 2007, p. 138.

<sup>14</sup> I GSK 1592/21; Also, see: The Judgment of the Voivodeship Administrative Court in Wrocław of January 17, 2019, file no. III SA/Wr 571/18 and the Judgment of the Supreme Administrative Court of June 19, 2019, I GSK 613/19; <https://orzeczenia.nsa.gov.pl>, accessed on October 20, 2022.

taking into account the totality of the factual circumstances that could support a decision favorable to the party.

The above-mentioned judgment of the SAC, which was favorable of a beneficiary of an educational subsidy, is an example of the practical application of the right to a trial expressed in Article 45 (1) of the Constitution of the Republic of Poland,<sup>15</sup> which provides that *“everyone shall have the right to a fair and public hearing of his or her case without undue delay by a competent, independent, impartial, and independent court.”* It should be stated that this is another protective provision for the non-public units of the system of education in the process of application for (claiming of) educational subsidies. However, in the more than 25 years long history of subsidizing the non-public units of the system of education in Poland, these units’ constitutional right to a trial has not always been fully respected, as expressed in the fact that the legislature did not indicate the jurisdiction of courts in such cases. Before discussing the evolution of the jurisprudence of courts in this regard (which will be done later in the paper), it would be appropriate to outline the essence of the constitutional right to a trial, including the specific elements of that right that are relevant to that evolution.

### **3. The constitutional right to a trial in the process of application for public funds for educational tasks**

Considering the process of application for public funds for the performance of educational tasks, the constitutional right to a trial, as expressed in Article 45 (1) of the Constitution, includes three most essential elements that concern:

1. the broad definition of the subject of that right (“everyone”);
2. the broad definition of the object of that right (“hearing of his or her case”); and
3. the indication of a feature of the court that is adjudicating the case (“competent court”).

The first element relates to the designation of the subject of the right to a trial by using the phrase “everyone shall have the right.” According to the case law of the Constitutional Tribunal, the subject of the constitutional right to a trial is “everyone,” i.e. every individual, as well as legal persons under private law,<sup>16</sup> organizational units to which a statute grants legal capacity, and other

<sup>15</sup> The Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997 no. 78, item 483, as amended), hereinafter referred to as Constitution of the Republic of Poland.

<sup>16</sup> The Judgment of the Constitutional Tribunal of June 9, 1998, file no. K 28/97, OTK 1998, no. 4, item 50; The Judgment of the Constitutional Tribunal of October 30, 2012, file no. SK 20/11, OTK-A 2012, no. 9, item. 110.



organizational units operating in the sphere of private law, if the legislature has granted them the ability to acquire rights fit to obtain judicial protection.<sup>17</sup> The above-mentioned general definition of the scope of the subjective right to a trial is important in the case of the assertion of the right to an educational subsidy, which under the AFET has been granted to entities with different legal status and character. This is because they are both non-public kindergartens, schools, and establishments, and legal persons that are not units of local government and natural persons running public kindergartens, schools, and establishments.

As for the second aforementioned element of the right to a trial, it should be noted that the object of that right has also been defined broadly by the legislature. The general definition of the term “case” as used in Article 45 (1) of the Constitution is also uniformly and consistently indicated by the Constitutional Tribunal<sup>18</sup> and by the doctrine of the constitutional law. The literature emphasizes the lack of restriction of the term “case” to specific areas of legal relations. As P. Sarnecki points out, the lack of specification in the above constitutional provision of the situations in which an individual could involve the court in his or her case implies the presumption that such an involvement is allowed in any situation, according to his or her free judgment. Therefore, in the article in question, the term “case” includes both “disputes” in which a court “settlement” (adjudication) takes place and “seeking legal protection” where such protection is possibly “provided.”<sup>19</sup> It is also noted that – in contrast with Article 6 (1) of the ECHR<sup>20</sup> – the protection arising from Article 45 (1) of the Constitution of the Republic of Poland is not limited to the adjudication concerning rights of a civil nature and the attribution of criminal liability.<sup>21</sup> The above broad understanding of the term “case” as applied to the constitutional right to a trial means that all cases related to public funds transferred for the performance of educational tasks, including cases related to the so-called educational subsidy relationship, are subject to judicial protection.

The third above-mentioned element of the constitutional right to a trial related to the funding of educational is treated differently in practice. In the case of public funding of educational tasks, both in the educational subvention

<sup>17</sup> P. Sarnecki, [in:] L. Garlicki, M. Zubik, eds., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, 2nd ed., Warszawa 2016, Art. 45.

<sup>18</sup> The Judgments of the Constitutional Tribunal of: June 9, 1998, file no. K 28/97, OTK 1998, no. 4, item 50; November 8, 2001, file no. P 6/01, OTK 2001, no. 8, item 248; October 18, 2011, file no. SK 39/09, OTK-A 2011, no. 8, item 84; June 29, 2010, file no. P 28/09, OTK-A 2010, no. 5, item. 52

<sup>19</sup> P. Sarnecki, op. cit. Also, see: The Judgment of the Constitutional Tribunal of November 6, 2012, file no. K 21/11.

<sup>20</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, held in Rome on November 4, 1950 (the Journal of Laws 1993 no. 61, item 284, as amended).

<sup>21</sup> M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1-86*, Warszawa 2016.



relation (occurring between the state as the transferor of the education part of the general subvention and the LGU as the recipient of that education part) and in the educational subsidy relation, there are still doubts about the jurisdiction of courts (civil or administrative) over the resolution of cases related to the application for (claiming of) these funds by units entitled to receive them.

However, as the Constitutional Tribunal has pointed out: “the right to have a case heard by a court means, among other things, that the competence of courts should be formed in such a way that there is always some court that has jurisdiction to hear a case involving the freedoms and rights of an individual. (...) It is therefore necessary to specify in the applicable legislation which court has jurisdiction to hear the case. In light of the above, the legislation defining the court’s jurisdiction does not so much establish order, but rather serves as a guarantee. Of course, such a formation of the nature of this legislation arises from the constitutional right to be tried by a court of competent jurisdiction. We must not overlook the fact that the right to be tried by a court of competent jurisdiction is supposed to be a guarantee of proper adjudication of a case and a fair ruling. (...) The judicial review of a given category of cases should be entrusted to the court that is best equipped to adjudicate it – whether by virtue of its specialization or its place in the structure of the system of justice. (...) The Constitution mandates that the jurisdiction of individual courts be shaped in such a way that the type of cases they handle is appropriate to the procedure used.”<sup>22</sup>

The principle of citizens’ access to a court to enable them to defend their interests before an independent body guided exclusively by the law in force in the state is one of the fundamental tenets of a democratic law-abiding state.<sup>23</sup> The right to a trial consists, in particular, of the right of access to a court (the right to start a procedure), the right to an appropriate form of the procedure (in accordance with the requirements of fairness and openness), and the right to a court judgment (the right to obtain a binding decision).<sup>24</sup> The literature further indicates that the constitutionally guaranteed right of a citizen to a trial also means the right to a properly staffed and impartial court,<sup>25</sup> that is, in general, the right to a court of competent jurisdiction, which is particularly applicable in the area discussed herein, i.e. the application for public funds for the performance of educational tasks.

<sup>22</sup> See: The Judgment of the CT of October 17, 2000, file no. SK 5/99, OTK ZU no. 7/2000, item 254; and the Ruling of the CT of July 6, 2004, file no. Ts 59/03, OTK ZU no. 3/B/2004, item 176.

<sup>23</sup> The Ruling of the CT of April 8, 1997, file ref. K 14/96, OTK ZU No. 2/1997, item 16.

<sup>24</sup> The Judgment of the Constitutional Tribunal of June 9, 1998, file ref. K 28/97, OTK ZU no. 4/1998, item 50.

<sup>25</sup> J. Kosonoga, *Nienależyta obsada sądu jako przesłanka uchylecia orzeczenia*, “Białostockie Studia Prawnicze,” vol. 23, no. 1, p. 64; see also: A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego*, Łódź 2006, pp. 124ff.

#### 4. The evolution of the dispute concerning the jurisdiction of courts over the educational subvention and subsidy funds

In the area of funding of educational tasks, due to the aforementioned decentralization of the performance of these tasks, we can distinguish categories of legal relations:

1. a subvention legal relationship: the state – a unit of the local government and
2. a subsidy legal relationship: a unit of the local government – a non-public unit of the system of education.

In both of these categories of relations, there are doubts about the jurisdiction of courts to resolve cases related to the rights of the beneficiaries of the above-mentioned funds (whether subvention or subsidy). Whether in the literature or in case law, there is a dispute over the legal nature of the subvention relationship between the state and the local government, and consequently – a dispute over the jurisdiction of courts in this regard. There are two different positions expressed in this regard in the case law of the Supreme Administrative and the Supreme Court. The main theses of them are summarized below.

Public-law/administrative-law nature of the subvention relationship – jurisdiction of administrative courts
Both the determination of the value of the various parts of a subvention and their transfer take the form of material and technical actions. In fact, the value of a subvention is determined in a kind of automatic way, being derived at first from the state budget statute for individual years, and independently also as a consequence of the determination of all the premises shaping the size of its individual components, which are defined in detail by the provisions of the statute. Thus, since the “transfer of a subvention” does not require the issuance of a decision or ruling, and at the same time it is indisputably an action carried out by the public administration, it must be considered to be an act relating to the assertion of an entitlement arising from the provisions of law. (...) Although the case law broadly admits the judicial path, it does so only with regard to cases where the plaintiff bases his or her claim on legal events that may be the source of civil-law relations. On the other hand, a subvention is not a private-law receivable included in the property of a local government, but an instrument for the implementation of the distribution of budget funds, which is clear even from the systematics of the Act on commune-level local government. Therefore, legal events in this regard cannot be the source of civil-law relations. (Resolution of a panel of 7 judges of the Supreme Administrative Court in Warsaw of July 2, 2001, FPS 1/01.)

**The civil-law nature of the subvention relationship –  
the jurisdiction of common courts of law**

Since the legislature, in the provisions of Article 27 of the Act of November 26, 1998 on public finances (Journal of Laws no. 155, item 1014, as amended), which is a special law, maintained the previous regulation stipulating that if a commune has a claim against the State Treasury for payment of an amount representing the subvention allocated to it, placed in the state budget on its expenditure side, then the provisions of the Code of Civil Procedure should be applied to the case concerning the fulfillment of such a claim of the commune. A case involving a claim by a commune against the State Treasury for payment of an amount representing the subsidy allocated to it, placed in the state budget on its expenditure side, is a civil case in the formal sense, for the adjudication of which the legislator established the courts referred to in Article 2 (1) of the Code of Civil Procedure. (Ruling of the Supreme Court of August 11, 1999, I CKN 414/99.

The essence of the dispute over the legal nature of the subvention relationship between the state and an LGU is also illustrated by the course of the court proceedings in the case cited above, considered by the Supreme Court when issuing ruling no. I CKN 414/99, which, despite being issued quite far in the past, is useful with reference to the contemporary state of the legislation. A commune sought from the State Treasury the payment of an amount constituting the subsidy needed for the maintenance of elementary schools in 1996, before a civil court. The commune based its claim on, among other things, the then-current status of the general subvention for LGUs as an exception to the principle of the non-claim nature of expenses included in the Budget Act (Article 13 (2) of the Act of January 5, 1991 – Budget Law<sup>26</sup>). The commune argued that the Minister of Finance (MS) should provide it with funds that would allow it to maintain elementary schools, since the running of elementary schools was communes' own, so the respondent (MF) did not distribute subsidies at its own discretion and thus did not exercise authoritative powers, which would only be justified in the case of commissioned tasks. However, the civil courts of the two instances that considered this lawsuit for payment decided otherwise and issued rulings rejecting the commune's claim on the grounds of inadmissibility of judicial proceedings. Both the court of the first instance and the Court of Appeals in Warsaw stated in their rulings that "the case for payment of an amount constituting the difference between the amount of expenses incurred

<sup>26</sup> The Journal of Laws 1993 no. 72, item 344, as amended. The currently effective Article 51 of the APF no longer contains the aforementioned exception to the principle of the non-claim nature of expenditures included in the budget act, which does not mean that the general subvention for LGUs has lost its nature of a claim. If an LGU does not receive a general subvention, the legal basis for claiming it is Article 167 (2) of the Constitution of the Republic of Poland, in conjunction with Article 3 (1)(2) and Article 7 of the Act of November 13, 2003 on the revenues of local government units (consolidated text: the Journal of Laws 2021, item 1672, as amended).

by the commune and the subvention transferred to it is not a civil case, since the relationship between the State Treasury and the commune is not a civil-law relationship of equal subjects, and the Minister of Finance, in distributing the subvention, exercises authoritative powers. According to the Court of Appeals, the legal relationship between the State and the commune, regarding the transfer of the educational subvention, is an administrative-law relationship, and only in this procedure can claims regarding the amount of the subvention be asserted. Therefore, since the claim filed in the case is not a civil-law claim, judicial proceedings in this case are ruled out.” However, the Supreme Court issued a different ruling in this case and adopted a clear position on the civil-law nature of the subvention relationship.

It follows from the reasoning of the Supreme Court presented above that the position confirming the civil-law nature of the subvention relationship between the state and an LGU could be based primarily on the then-applicable exclusion of the general subvention to an LGU from the principle of the non-claim nature of expenditures included in the budget act. However, this exemption is not provided for in the current APF, which supports the acceptance of the position expressed in the above resolution of a panel of 7 judges of the SAC in Warsaw of July 2, 2001 (FPS 1/01) on the administrative-law nature of this relationship and the jurisdiction of administrative courts to resolve disputes in this regard.<sup>27</sup>

The guarantee to an LGU of the protection of the competent court in cases concerning the transfer of the educational part of the general subvention from the state budget is important insofar, as the right to compensate the general subvention does not apply to that part. This is because, in accordance with Article 37 (4) of the Act on the revenue of LGUs,<sup>28</sup> if false data has been submitted to the database of the educational information system (EIS) referred to in the Act of April 15, 2011 on the educational information system,<sup>29</sup> and the local or regional government unit has received the education part of the general subvention in an amount lower than the amount due, the unit is not entitled to an increase in the education part of the general subvention referred to in Article 33 (1) (2) of the ARLGU. The above-mentioned rule applies in a kind of automatic way, regardless of the reasons for which the LRGU submitted false data to the EIS database. For example, improper qualification by the school of several students with certificates stating their need for special education, which does not correspond to the content of the certificate, results in the calculation of a too low part of the general subvention concerning education for the year by

<sup>27</sup> Similarly: P. Pest, *Konstrukcja prawna subwencji ogólnej w polskich regulacjach prawnych dochodów jednostek samorządu terytorialnego*, Wrocław 2018, p. 26.

<sup>28</sup> The Act of November 13, 2003 on the revenues of the local government units (consolidated text: The Journal of Laws of 2021, item 1672, as amended), hereinafter referred to as ARLGU.

<sup>29</sup> Consolidated text: the Journal of Laws 2022, item 868.

assigning a lower weight (P2) instead of a higher weight (P5) to those students. As pointed out by the Voivodeship Administrative Court in Warsaw, the provisions of Article 37 (4) of the ARLGU apply to this case. "Therefore, when determining the the part of the general subvention concerning education due to a local government unit, adjustments to the data resulting in an increase in this part of the subvention may not be taken into account."<sup>30</sup>

Similar doubts about the court jurisdiction arise with regard to the other legal relationship mentioned earlier, particularly when a non-public unit of the system of education asserts its rights under this relationship. In terms of subsidies provided from the budget of an LGU (including educational subsidies) there is a dual legal regime concerning the legal remedies for the parties to the subsidy relationship. This is because in a situation where the body granting the subsidy (the executive body of an LGU) issues a decision on the return of the subsidy on the basis of Articles 251-252 of the APF, there is no doubt (in light of Articles 60-61 of the APF) that the appropriate appeal procedure is the administrative-law one, i.e. an appeal to the local government appeals board (LGAB), and then the administrative court procedure – a complaint against the LGAB's decision to a Voivodeship Administrative Court.<sup>31</sup> The aforementioned administrative procedure for seeking repayment of subsidies applies even if a subsidy agreement is concluded (which, according to Article 250 of the APF, is mandatory when granting provided subsidy). However, if objections regarding the amount of the subsidy provided are raised by the other party to the subsidy relationship, i.e. the beneficiary of the subsidy (e.g., a non-public school or establishment), the law does not indicate legal remedies and the type of court procedure for them, and the attempts of the beneficiaries of subsidies to complain about subsidy-related actions carried out by the body granting the subsidy to an administrative court quite often end in decisions dismissing the complaints for the lack of justified grounds (Article 184 of the Act on proceedings before administrative courts<sup>32</sup>)

<sup>30</sup> See: The Judgment of the Voivodeship Administrative Court in Warsaw of November 5, 2019, V SA/Wa 1844/18; <https://orzeczenia.nsa.gov.pl>, (20.10.2022).

<sup>31</sup> The Complaints against the decisions of the LGAB in cases that involve decisions concerning the repayment of educational subsidies (issued by the executive body of an LGU, e.g., due to the receipt of an excessive amount) are often considered by a voivodeship administrative court, as a result of which the court determines the correctness of the calculation of the subsidy by either accepting or dismissing the complaint. See, for example, judgments dismissing the complaint: Judgment of the Voivodeship Administrative Court in Cracow of February 19, 2013, I SA/Kr 1955/12; the judgment of the Voivodeship Administrative Court in Białystok of February 13, 2013, I SA/Bk 6/13; and judgment of the Voivodeship Administrative Court in Gdańsk of August 6, 2013, I SA/Gd 617/13; as well as the judgment recognizing the complaint and overturning the appealed decision: The Judgment of the Voivodeship Administrative Court in Lublin of February 27, 2013, I SA/Lu 968/12; <https://orzeczenia.nsa.gov.pl>, (20.10.2022).

<sup>32</sup> The Act of August 30, 2002 – Law on proceedings before administrative courts (consolidated text: the Journal of Laws of 2022, item 329, as amended), hereinafter referred to as APBAC.

or dismissing them on the grounds that the cases are not within the jurisdiction of the administrative courts (Article 58 (1)(1) of the APBAC).<sup>33</sup> Thus, in the case of non-educational subsidies, beneficiaries of subsidies paid from the budget of LGUs most often include a provision in the agreement that designates a common court as competent to resolve disputes arising in connection with the performance of the agreement and file lawsuits for payment against the LGUs providing the subsidies.

The dispute over the jurisdiction of courts (civil or administrative) in subsidy-related matters has become particularly noticeable in cases that involve the determination of the correct amount and payment of educational subsidies claimed by their beneficiaries (non-public units of the system of education). The doubts formulated in the case law of the Supreme Court and the Supreme Administrative Court in this regard may be a little surprising, since, after all, the nature of these subsidies is “subjective” (although the Act on the system of education itself does not use the adjective “subjective” and the current AFET does not use it either), and the subsidies are provided solely on the basis of detailed substantive and procedural statutory provisions and of the local resolution on subsidies, which means that an agreement, according to the wording of Article 250 of the APF, should not and cannot be concluded. However, between 2007 and 2015, civil courts dealt with lawsuits filed by non-public units of the system of education against the local governments for the payment of outstanding amounts of subsidies, assuming the judgment of the Supreme Court of January 3, 2007 as the determinant.<sup>34</sup> With this judgment, the Supreme Court changed the previous public-law (“pro-administrative”) line of jurisprudence, which made references to analogous cases and assumed that a lawsuit for payment or supplementation of a subsidy due to non-public schools or establishments (or even a lawsuit for compensation for non-payment or underpayment) is *a limine* that is inadmissible due to the public-law nature of the norms regulating the financial transfers between the State Treasury or LGUs.

However, in the aforementioned 2007 judgment, the Supreme Court stated that the then-applicable provisions of Articles 80 and 90 of the Act on the system of education<sup>35</sup> “provide a sufficient legal basis for a claim for a subsidy due to a

<sup>33</sup> See: The Ruling of the Voivodeship Administrative Court in Warsaw of January 12, 2012, V SA/Wa 2235/11, and, in the same case, Ruling of the SAC of April 11, 2012, II GSK 562/12; <https://orzeczenia.nsa.gov.pl>, (20.10.2022).

<sup>34</sup> The Judgment of the Supreme Court of January 3, 2007, IV CSK 312/06; [https://www.sn.pl/orzecznictwo/sitepages/baza\\_orzeczen.aspx](https://www.sn.pl/orzecznictwo/sitepages/baza_orzeczen.aspx), (21.10.2022).

<sup>35</sup> The Act of September 7, 1991 on the education system (consolidated text: the Journal of Laws of 2021, item 1915, as amended), hereafter referred to as AES. Adequate provisions were introduced in Articles 15-39 of the AFET.

school or kindergarten not run by a local government. (...) The aforementioned provisions clearly and unconditionally define: who is the debtor (the relevant LGU), and who is the creditor (the person running a school or other educational establishment), as well as in what is the amount of the payment and what are the conditions of the subsidy payment” This new position of civil courts on this matter (which accepts the lawsuits of units of the education system that are not run by a local government) has also influenced the case law of administrative courts. Most voivodeship administrative courts dismissed or rejected complaints filed by non-public units of the system of education against the calculation and awarding of educational subsidies,<sup>36</sup> the indirect reason for which was (and still is) the failure of the legislature to regulate the legal form of the calculation and transfer of educational subsidies.

Despite the lack of regulation of the above-mentioned form of transfer of educational subsidies and the lack of grounds for concluding a subsidy agreement, the dispute in the case law as to the legal nature of the calculation, transfer, and awarding of educational subsidies continued for more than 20 years and was resolved only by the amendment of the Act on the system of education adopted in 2016. At that time, new paragraphs (par. 11) were added to Articles 80 and 90 of the AES, which clearly stated that the awarding of an educational subsidy constitutes an act of public administration, as referred to in Article 3 (2) (4) of the APBAC, and is thus subject to review by administrative courts. At present, this norm is contained in Article 47 of the AFET.

## **5. The analysis and evaluation of Article 47 of the Act on the financing of educational tasks in the context of the implementation of the right to a trial**

Pursuant to Article 47 of the AFET, actions taken by the authority providing a subsidy, referred to in Articles 15-21, Article 25, Article 26, Articles 28-32, and Articles 40-41a of the AFET, for the purpose of determination of the amount

<sup>36</sup> See: The Ruling of the Voivodeship Administrative Court in Warsaw of January 12, 2012, V SA/Wa 2235/11; The Ruling of the SAC of April 11, 2012, II GSK 562/12. However, in the case law of administrative courts at the time, it was possible to identify rulings that considered a complaint against the calculation and awarding of an educational subsidy and declared it ineffective; see for example: The Judgment of the Voivodeship Administrative Court in Białystok of November 9, 2007, I SA/Bk 456/07; the judgment of the SAC of March 24, 2009, II GSK 284/08; the judgment of the Voivodeship Administrative Court in Cracow of March 13, 2012, III SA/Kr 183/11; the judgment of the Voivodeship Administrative Court in Poznań of September 29, 2011, I SA/Po 392/11; the judgment of the Voivodeship Administrative Court in Gdańsk of June 5, 2013, I SA/Gd 330/13; the rulings of the NSA: of January 14, 2009, II GPS 7/08, ONSAiWSA 2009/3, item 51; of March 27, 2013, II GSK 321/13, II GSK 322/13; and of February 25, 2014, II GSK 304/14.



or transfer of the subsidies referred to in Articles 15-21, Article 25, Article 26, Articles 28-32, and Articles 40-41a of that Act, constitute acts of public administration referred to in Article 3 (2)(4) of the APBAC.

Certainly, the above-mentioned determination by the legislature in 2016 of the administrative-law nature of the determination of the amount or the transfer of educational subsidies, as well as the clear submission of these activities to the jurisprudence of administrative courts, has resulted in the stabilization of the legal situation of non-public units of the system of education. Thus, it also made their constitutional right to a trial by a competent court more realistic. The normative-obligatory nature of educational subsidies is an argument in support of the “pro-administrative” line of the existing jurisprudence in this area, although it has some negative qualities for the beneficiaries of these subsidies, e.g., due to the lack of concrete information in judgments issued by administrative courts on the amounts of subsidies owed to the beneficiaries, which makes it much more difficult to enforce the payment of such amounts by the relevant LGUs. This is because administrative courts only carry out cassation proceedings on the legality of an act or action of public administration bodies. On the other hand, however, the administrative procedure is considered far better “adapted” (adequate) to protect the rights of individuals than a trial before a common court, as it provides the individual with a certain basic “package of guarantees.” Once the administrative procedure has been exhausted, one can seek protection in courts by initiating proceedings before a two-instance administrative court. In addition, both administrative proceedings and administrative court proceedings are far less costly and are usually completed much more quickly than proceedings before a court of law.<sup>37</sup>

Since 2016, administrative courts have considered cases involving complaints by non-public units of the system of education regarding the actions of executive bodies of LGUs on the determination of the amount or transfer of educational subsidies and have determined the effectiveness or ineffectiveness of these actions. However, one of the recent judgments of the SAC of June 30, 2020<sup>38</sup> revealed a certain loophole in the above provision of Article 47 of the AFET. In that judgment, the SAC stated that since Article 47 of the AFET does not mention Article 34 (1) of the AFET, the activity consisting of the mere payment of subsidy money does not fall within the jurisdiction of administrative courts. “In the Court’s opinion, an action in the form of payment of a too small amount of a subsidy, made on the basis of Article 34 (1) of the AFET, does not fall within the scope of any of the regulations listed in Article 47 of the AFET.” It should

37 J. Wyporska-Frankiewicz, *Publicznoprawne formy działania administracji o charakterze dwustronnym*, Warszawa 2009, pp. 317-326.

38 I GSK 629/20.

be noted, however, that Article 34 (1) of the AFET only stipulates the principle of timely and monthly payment of a part of the educational subsidy (which is an annual subsidy). According to this provision, educational subsidies are transferred to the bank account of a non-public unit of the education system in 12 parts by the last day of each month, except that the parts for January and December are transferred by January 20 and December 15 of the budget year, respectively. Thus, it should be concluded that the above judgment of the SAC was issued to the detriment of the complainant (a non-public unit of the education system) solely due to the erroneous indication in the complaint of the provision of the AFET defining the objective scope of the activity of “determination of the amount or transfer of an educational subsidy.” The subsidizing authority in this case determines the value of the subsidy not on the basis of Article 34 (1) of the AFET, but on the basis of the relevant so-called subsidy title specified in Articles 15-21, 25, 26, 28-32, and 40-41a of the AFET. However, also in this case, the SAC should have classified the act of paying the subsidy as an “act of transferring an educational subsidy,” as provided for in Article 47 of the AFET, and should have upheld the complaint.

## **6. The Protection of the right to receive funds for additional educational tasks related to the refugee crisis**

Special circumstances related to the right to apply for public funds for educational tasks arose in the current year (2022) in connection with the refugee crisis caused by Russia’s invasion of Ukraine. The doubts in this regard concern the funding of the education of Ukrainian students and children in Polish schools and kindergartens, particularly non-public ones, and involve two basic issues, namely:

1. whether the educational subsidy due for a student from Ukraine receiving education in a non-public unit of the system of education is the same as the subsidy for a Polish student; and
2. whether a non-public unit of the system of education is entitled to receive additional funds for Ukrainian students from the increased reserve of the educational part of the general subvention and from the Assistance Fund, and if so, in what legal form those funds should be transferred to that unit.

With regard to the first one of the above questions, it should be stated that in the AFET, the legislature does not differentiate the right to a subsidy due per student depending on his or her nationality. Consequently, the educational subsidy for a student from Ukraine is transferred and accounted for on the same terms as for children who are Polish citizens, since the provisions of the above-mentioned act do not introduce separate rules for accounting for subsidies for students of Polish

schools of other nationalities, including those who are the citizens of Ukraine. An analogous position regarding this issue was expressed by the Ministry of Education and Science in a clarification dated April 27, 2022, by stating that “For students and pupils coming from Ukraine - as for other pupils in kindergartens and students in schools and educational institutions run by persons other than local government units – subsidies should be provided as before on the basis of the Act of October 27, 2017 on the funding educational tasks.”<sup>39</sup> Accordingly, for students who are citizens of Ukraine, whose stay in the territory of the Republic of Poland is recognized as legal under Article 2 (1) of the Act of March 13, 2022 on assistance to citizens of Ukraine in connection with the armed conflict in the territory of that state,<sup>40</sup> all types of schools are entitled to a subsidy, with the exception of elementary schools for adults, general secondary schools for adults, level 2 vocational schools, and post-secondary schools run by legal entities that are not units of the local government and by natural persons, which exception is established in Article 50a of the Assistance Act.

In addition, the Assistance Act, in Article 50 (1) provided for two additional sources of “support to units of the local government for the implementation of additional educational tasks related to the education, upbringing, and care of children and students who are citizens of Ukraine, whose residence in the territory of the Republic of Poland is recognized as legal under Article 2 (1) of the above-mentioned act.” These sources are funds from the increase in the reserve of the educational part of the general subvention and funds from the Assistance Fund. As indicated by the Ministry of Education and Science in the above-mentioned clarifications, “the detailed scope of the tasks funded with the money received is to be decided by the individual local governments,” whereby the scope of these tasks should meet the purpose of the transfer and the spending of the money in question, as indicated by the legislature. At the same time, the Ministry of Finance indicated that the funds transferred to non-public units of the system of education should be accounted for “in the amount of the subsidy transferred to the school/establishment operated by an entity other than the local government from the budget of the LGU,” i.e. based on the method of accounting for subsidies specified locally in the resolution of the decision-making body adopted pursuant to Article 38 of the AFET. In addition, money from the Assistance Fund should be used for “all expenses related to the operation of schools/educational establishments that remain in connection with additional educational tasks concerning children from Ukraine. (...) The distribution of

<sup>39</sup> Source: <https://www.gov.pl/web/edukacja-i-nauka/wyjasnienia-dotyczace-srodkow-z-funduszu-pomocy-dla-jednostek-samorzadu-terytorialnego-na-dodatkowe-zadania-oswiatowe>, (14.10. 2022).

<sup>40</sup> The Journal of Laws 2022, item 583, as amended, hereinafter referred to as the Assistance Act.

the money to educational units is also not important, but rather the use of the money within a local government unit.”<sup>41</sup>

Once again, however, the legislature did not specify the legal form of the transfer of the above-mentioned earmarked funds to non-public units of the education system, as well as the right to apply for these funds, which is protected by administrative courts. Taking into account the case law to date, which, based on the statutory definition of a subsidy given in Article 126 of the APF, granted the right to receive a subsidy only in a situation where the legal provision used the term “subsidy,”<sup>42</sup> also in this case it should be assumed that an LGU may not grant a targeted subsidy to a non-public unit of the education system for the implementation of the above-mentioned additional educational tasks. However, the new paragraph concerning spending from the state budget or the budget of an LGU, introduced as a result of the refugee crisis, namely § 234 stating that “Earmarked subsidy for an entity outside the public finance sector for funding or subsidizing current tasks related to assistance to citizens of Ukraine,” as well as the interpretative position of the doctrine in this regard,<sup>43</sup> indicate that the form of an earmarked would be legally permissible in this case.

## 7. Conclusions and comments *de lege ferenda*

The analysis of the issues related to applying for public funds for the implementation of educational tasks, carried out in this paper, indicates that the most important issue in this area is the jurisdiction of the courts in cases related to the generally named process of application for and claiming for those funds. It should be emphasized, however, that the primary reason for the existence of doubts about the jurisdiction of courts in cases arising in the course of the process of subsidizing non-public units of the system of education is the fact that the provisions of the aforementioned AFET do not specify the legal form (decision, order, agreement, or act of the executive body of the LGU) of the calculation of the rate per student, and then of the determination of the amount and transfer of the educational subsidy from the budget of the LGU to the beneficiaries. Thus, the current state of the law suggests that the process of granting educational subsidies rules out, in a way, the administrative path, since the statutory provisions do provide for its beginning (the submission

<sup>41</sup> Source: <https://www.gov.pl/web/finanse/wyjasnienia-dotyczace-srodkow-z-funduszu-pomocy-dla-jednostek-samorzadu-terytorialnego-na-dodatkowe-zadania-oswiatowe>, (14.10.2022).

<sup>42</sup> See for example: the Judgment of the SAC of November 24, 2016, II GSK 954/15; the judgment of the Voivodeship Administrative Court in Białystok of April 16, 2014, I SA/Bk 110/14.

<sup>43</sup> A. Ostrowska, *Samorządowe...*, pp. 62-67.

by a non-governmental unit educational unit of information on the number of students, called by the legislature an application for a subsidy), but do not provide for the form in which it should end (the way of settling the matter, i.e. the form of the determination of the amount and the transfer of the subsidy to the beneficiary).

Although there are rulings of the SAC recognizing that actions taken by an administrative body prior to the conclusion of an agreement for financial support from public funds (e.g., a tender procedure) are administrative actions<sup>44</sup>, no statute providing for the granting of a subsidy (support, subsidy, etc.) from the budgets of LGUs explicitly regulates this issue. Thus, an important recommendation *de lege ferenda* to the legislature is the statutory clarification of the legal form of the determination of the amount and the transfer of educational subsidies to non-public units of the system of education. In the case of these subsidies, the above recommendation is of particular importance, since the entitlement to receive subsidies arises *ex lege*, while a subsidy agreement is not and cannot be concluded in this case.

The above-mentioned statement is also important due to the fact that the obligation set forth in the AFET to subsidize non-public schools, kindergartens, and establishments from the budgets of communes and districts is established in the constitution. Article 70 (3) of the Constitution provides that: *“Parents have the freedom to choose schools other than public schools for their children. Citizens and institutions have the right to establish elementary, secondary, and higher education schools and educational institutions. The conditions for the establishment and operation of non-public schools and the participation of public authorities in their financing, as well as the principles of pedagogical supervision of schools and educational institutions, shall be specified in a statute.”* The statute in question is the AFET, which establishes the group of public kindergartens, schools, and educational establishments run by legal persons other than units of the local government, as well as non-public ones with the rights of public schools, which are granted the right to receive subsidies from the budgets of the relevant units of the local government.

<sup>44</sup> See for example: The Judgment of the SAC of September 9, 2005, II GSK 116/05. Another important ruling on the rights of entities applying for public funds (made in favor of NGOs participating in an open tender for the performance of a public task) is the judgment of the CT of December 15, 2020, SK 12/20; <https://otkzu.trybunal.gov.pl/2021/A/2>, accessed on October 20, 2022. In this judgment, the Constitutional Tribunal stated that: “Article 3 (2) (4) of the Act of August 30, 2002 – Law on proceedings before administrative courts (the Journal of Laws of 2019, item 2325), understood in such a way that it does not cover decisions of public authorities in open tender procedures for the implementation of public tasks, organized in accordance with the provisions of the Act of April 24, 2003 on public benefit activity and volunteerism (the Journal of Laws of 2020, item 1057), is inconsistent with Article 45 (1) of the Constitution of the Republic of Poland.”

Similarly, with regard to the right of LGUs to the educational part of the general subvention, the recommendation *de lege ferenda* also concerns the indication by the legislator of the jurisdiction of courts in the assertion by LGUs of their right to receive the subvention. However, due to the inherent equality of the parties to the subvention relationship (which is based on the provisions of the Constitution of the Republic of Poland), this lack of jurisdiction of courts in relation to claims involving the subvention does not have such negative consequences as in the case of non-public units of the system of education.

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### SUMMARY

#### **The Right to a Trial When Applying for Public Funds for Educational Tasks in the Light of the Evolution of the Case Law of Administrative Courts**

The paper presents an analysis of the evolution of the case law of administrative courts in cases involving the determination of the amount and the transfer, from budgets of units of local governments, of educational subsidies to non-public units of the system of education (non-public kindergartens, schools, and establishments) and in cases concerning the educational part of the general subvention received by units of the local and regional government from the state budget. The range of cases indicated above demonstrates an important legal issue that is still in need of a clear resolution, which is the jurisdiction of courts over acts and actions taken by the public administration other than administrative decisions or rulings. The dispute concerning the jurisdiction over the determination and transfer of subsidies to education, which started with dispute over the legal nature (civil or administrative law) of the relationship arising from the subsidies to education, continued in Poland for more than 20 years and was only brought to an end by the 2016 amendment to the Act on the system of education. In contrast, the analogous dispute concerning jurisdiction of courts in cases involving the determination of the value and transfer of the educational part of the general subvention to local government units actually remains unresolved to this day. Given the above, the analysis of the case law presented in the paper was carried out in the light of the constitutional right to a trial and the statutory right to carry out publicly funded tasks. The analysis resulted in formulating a conclusion *de lege ferenda*, the consideration of which would lead to the real and effective exercise of the above rights by the bodies that run public or non-public units of the education system, as well as by local government units themselves.