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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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AN APPLICATION BY ELLA HEFFERON (A MINOR) ACTING BY DAVID PATRICK HEFFERON, HER FATHER AND NEXT FRIEND FOR JUDICIAL REVIEW

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John Larkin KC with Sinead Kyle BL (instructed by Worthingtons Solicitors) for the Applicant
Paul McLaughlin KC with Fiona Fee BL (instructed by the Education Authority Solicitors) for the Respondent

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QUINLIVAN J

Introduction

[1] The applicant in this case is a pupil at Our Lady and St Patrick's College, Knock. She is now 18 years old and was 17 at the time of the events which have given rise to these proceedings. She suffers from Chronic Fatigue Syndrome/Myalgic Encephalomyelitis (commonly known as ME). The impact of the condition is such that she has had a Statement of Special Educational Needs ("Statement") since starting at Our Lady and St Patrick's College, Knock.

[2] Through her father and next friend, the applicant brought challenges to decisions of the Education Authority relating to her special educational needs, on foot of which leave was granted by Lord Justice Treacy in August of 2021. The applicant's challenges in respect of which leave was granted were as follows:

(i) Delay on the part of the Education Authority in issuing the amended Statement following a decision of the Special Educational Needs and Disability Tribunal ("the Tribunal") of 29 March 2021.

(ii) The decision of the Education Authority to consult with Our Lady and St Patrick's College about the applicant's Statement without parental consent.

(iii) A complaint of breaches of article 2, protocol 1 and article 8 ECHR.

[3] At the time leave was granted an amended Statement had not issued. After the grant of leave an amended Statement was issued by the Education Authority for the applicant. The applicant challenged the content of that Statement on the basis that it failed to comply with the order of the Tribunal in material respects. The respondent's position was that whilst the challenge to the content of the Statement was not covered by the grant of leave, they were content to deal with the issue rather than requiring further proceedings to be issued and I proceeded on that basis.

[4] On hearing the case I formed the view that a determination as to whether the contents of the Statement complied with the order of the Tribunal, as it related to access arrangements, was an issue requiring urgent determination. The applicant was due to sit mock examinations in January 2022 and the issue of the extent of her entitlement to access arrangements was in issue.

[5] Consequently, I gave my decision on that issue in December 2021 shortly after the hearing, so that the parties were aware of and could address the decision in time for the examinations in January 2022. I reserved on all other grounds of challenge and I now hand down judgment in relation to the remaining grounds of challenge.

[6] I should record for completeness that, prior to my handing down my decision, the applicant, through her father, sought to file additional evidence. There was an exchange of email correspondence about that issue and ultimately it was the parties agreed position that: the applicant was not making an application to file additional evidence; and, that neither party required the court to have regard to the additional materials which had been lodged with the court, albeit the respondent did not object to the materials being considered if the court was so minded. I can confirm that, in my view, if additional evidence was to be filed that would have required leave of the court. Ultimately the applicant decided not to pursue the issue. I had not read the additional materials and formed the view that it would not, as no party was seeking to adduce further evidence, be appropriate to do so. I have not read or considered the additional material and its contents have consequently not impacted upon this judgment in any way.

The Issues

[7] The applicant having succeeded in her application that the amended Statement did not comply with the Tribunal order, the remaining issues relate primarily to delay on the part of the respondent in producing the Statement and also the impugned consultation process with Our Lady and St Patrick's College. In the circumstances it is appropriate to acknowledge that, in oral submissions, the respondent in the case candidly accepted that the procedure which unfolded after the Tribunal order did not fit with the legislation. It was accepted, on the respondent's behalf, that time periods were not observed and further that the form of consultation which occurred was not as prescribed in the legislation. The

respondent maintains however that what occurred was an extensive and substantively meaningful process which complied with the clear purpose of the legislation and that, at all times, the respondent was seeking to produce a Statement which was in accordance with the Tribunal order, whilst taking account of parental representations and the ability of the two schools consulted to meet the applicant's needs.

[8] Given the fact that the applicant was successful in challenging the content of the Statement and given the concessions which were made in the course of the proceedings, it might be argued that the remaining grounds of challenge on the part of the applicant are largely academic. I appreciate however that the applicant has concerns that delay in the production of the Statement may have prejudiced her and further that the consultation with Our Lady and St Patrick's College may also have occasioned prejudice. Having heard the parties on the issues at a time when they could not have been regarded as academic and having indicated I would rule on these matters, it is appropriate to give judgment on all issues.

Factual Background

[9] During an annual assessment of students' statements of special educational needs, the Education Authority issued an amended Statement in respect of the applicant on 9 December 2019. That amended Statement named Our Lady and St Patrick's College as the applicant's school.

[10] The applicant's parents brought a challenge to the amended Statement by means of an appeal to the Tribunal. During the hearing before the Tribunal it was made clear that the applicant's parents wished the Tribunal to name Rathmore Grammar School ("Rathmore") as the applicant's school.

[11] The Tribunal issued a decision on 29 March 2021, upholding the applicant's parents' appeal in part. I have in my earlier judgment considered the meaning of the substantive part of the order and how that informed the contents of the Statement and I don't repeat that detail here. Addressing the issue of the applicant's parents' preference of school the Tribunal stated as follows:

> "Once the statement has been finalised Rathmore Grammar should be approached to see if it feels it could offer Ella a place commensurate with her needs. This should be done as a matter of urgency."

[12] The expression of parental preference for a particular school triggered an obligation on the Education Authority to issue an Amendment Notice which sets out the proposed Statement but which does not name a school. The procedure is designed to facilitate consultation with the proposed school in light of its limited statutory right of objection.

[13] On 23 April 2021 the Education Authority issued correspondence to Rathmore, stating that an Amendment Notice was attached. The attached document was entitled 'Statement as Amended by Order of the Special Educational Needs and Disability Tribunal dated 29 March 2021.' The correspondence stated that if there was no response from Rathmore within 15 days then Rathmore would be named in the applicant's Statement. It should be observed that the applicant and her parents are aggrieved at the failure of the Education Authority to produce a Statement naming Rathmore after the 15 day period had elapsed.

[14] The respondent accepts that the document sent to Rathmore ought to have been entitled 'Amendment Notice' and it was not. It makes the case that, save for the issue of title, the content was otherwise regular. I will refer to this as "the 23 April 2021 document" for present purposes.

[15] On 30 April 2021 a further copy of the 23 April 2021 document was sent to Rathmore.

[16] The applicant has identified 4 May 2021 as the date upon which an Amendment Notice ought to have been served on the applicant's parents. There is an express requirement that an Amendment Notice be served on the parents and a timescale within which that should be done, which is discussed further below. I don't understand it to be in issue that an Amendment Notice was not served on the applicant's parents within the prescribed timescale.

[17] On 11 May 2021, the applicant issued pre-action correspondence in relation to the failure to serve an Amendment Notice on the applicant's parents. On 15 May 2021 the document which had been issued to Rathmore was received by the parents under cover of a "With Compliments" slip, I understand it had issued on 13 May 2021.

[18] On 17 May 2021 the Education Authority replied to the pre-action correspondence and in that response confirmed that no response had been received from Rathmore by that date.

[19] On 28 May 2021 the applicant issued further pre-action correspondence giving notice of an intention to judicially review the contents of the 23 April 2021 document, contending that it was not compliant with the Tribunal's order and also asking that the Education Authority identify Rathmore as the appropriate placement for the applicant.

[20] On the same date Rathmore responded to the consultation process which had been initiated by the respondent. In their response they stated that they were unable to offer the applicant a place in Rathmore. They stated that two of the four subjects she had identified for AS Level were over-subscribed and further that they would be unable to provide the additional hours of personal specialised teaching requested. They stated that the "impact on internal resources would be significantly stretched."

[21] On 4 June 2021 Rathmore provided additional information. They indicated that whilst there might be some scope for flexibility in terms of subject choice "the greater sticking point is the requirement for additional specialist teaching provision of five hours per week. The school does not have the available teaching capacity to provide five hours of specialist teaching in Ella's chosen subjects."

[22] On 7 June 2021 the respondent replied formally to the applicant's pre-action correspondence. In that correspondence the applicant's parents were notified that Rathmore had been unable to make the necessary provision for the applicant in light of the applicant's chosen AS level subjects and specifically that Rathmore was unable to provide for five hours of additional one-to-one specialist teaching of the applicant, to be delivered by the applicant's AS Level class teachers. In this correspondence the respondent also sought clarification from the applicant's parents as to the arrangements which had been agreed with CCEA for her to sit her GCSE examinations. It appears that this information was never provided to the Education Authority by the parents but was later obtained from Our Lady and St Patrick's College.

[23] Separately, the applicant initiated judicial review proceedings against the Tribunal's order of 29 March 2021, the respondent was a Notice Party to those proceedings. The respondent highlights the tension between the challenge to the Education Authority for non-compliance with the Tribunal's decision and the challenge to the Tribunal's decision, as a factor which the respondent maintains informed the delay in the issue of a Statement.

[24] In addition to consultation with Rathmore, the Education Authority also undertook informal consultation with Our Lady and St. Patrick's College. The Education Authority maintains that they undertook this consultation in order to ascertain whether Our Lady and St. Patrick's College could make the educational provision required in a manner which accorded with the parents' wishes. That the consultation occurred at all is an issue of contention, it is the applicant's case that this consultation should not have occurred and that it was unlawful for the Education Authority to engage in this consultation.

[25] On 28 June 2021 the respondent wrote to the court and the parties outlining that, as of that date, neither Rathmore nor Our Lady and St Patrick's could provide the educational provision required in a manner which accorded with the parents' wishes, that is the five hours of one-to-one instruction to be provided by the teachers teaching the subjects in the school. The parents, for reasons explained in the applicant's father's affidavit, felt that, if the tuition was provided by teachers working outside the school, the quality of tuition would be adversely impacted.

[26] On 29 June 2021 the challenge to the Tribunal's order was listed for hearing. On the morning of hearing the applicant withdrew the proceedings against the Tribunal, informing the court that the parents' preference was now for the applicant

to attend Our Lady and St Patrick's rather than Rathmore. It is the applicant's case that this was a concession they were forced to make because of the respondent's inaction vis-à-vis Rathmore in terms of securing educational provision as required at Rathmore. The applicant also made clear in court that there was now no obligation on the Education Authority to consult with Our Lady and St Patrick's College about the applicant's Statement, because that had been her school prior to the need to amend her Statement and consequently there was no statutory obligation to consult.

[27] The respondent wished to consult with Our Lady and St Patrick's College (hereinafter "the School") about the applicant's Statement before finalising it. It proposed, in correspondence, that the applicant consent, on a without prejudice basis, to it consulting with the School. This met with a response that the consultation was unnecessary in law and no consent was forthcoming. The respondent took the decision to consult with the School in any event. The applicant maintains that the respondent was not legally entitled to consult with the School while the respondent rejects that contention.

[28] On 9 August 2021, the respondent issued an Amendment Notice to the School, informing the School that it was considering identifying it on the Statement and making a formal request for a consultation response. On the following date the respondent informed the applicant that there was a place available for the applicant at the School which would meet her needs and advising that the respondent would prepare a final Statement as soon as practicable. Of note, the School was now providing five hours specialist teaching on a one-to-one basis, to be provided by the teachers who were teaching the relevant subjects within the school.

[29] The applicant issued these proceedings in August and leave was granted by Treacy LJ as outlined above. On 21 October 2021, the respondent issued an Amended Statement. As outlined above, although leave could not have been granted in relation to the content of that Amended Statement, the respondent consented to the applicant being permitted to bring that challenge within these proceedings and a judgment on that issue was handed down in December 2021.

Statutory Framework

[30] The legislation governing the process of making and amending statements of special educational needs is contained in: the Education (NI) Order 1996 (as amended by the Special Educational Needs and Disability (NI) Order 2005); the Education (Special Educational Needs) Regulations (NI) 2005; and the Special Educational Needs and Disability Tribunal Regulations (NI) 2005. It is not proposed to set out the provisions in full. For present purposes we are concerned with the issues of:

(i) Delay, both the delay in issuing an Amendment Notice to the applicant's parents, and the delay in issuing an Amended Statement; and,

(ii) The decision of the respondent to consult with the School despite there being no statutory requirement on them to do so.

[31] Schedule 2 to the Education (NI) Order 1996 ("the 1996 Order") governs the making and maintenance of Statements as provided for under Article 16 of the Order.

[32] Schedule 2, paragraph 3(1) provides that the Education Authority shall not amend a Statement except:

> "(a) in compliance with an order of the Tribunal,
>
> (b) as directed by the Department . . .
>
> (c) in accordance with the procedure laid down in this Schedule."

[33] In the instant case the need to amend the applicant's Statement was a consequence of the order of the Tribunal.

[34] Reading Schedule 2, paragraphs 3(3) and (4) together, the Education Authority is obliged to serve on the child's parents, both a copy of the existing Statement and an amendment notice.

[35] Article 23A of the 1996 Order provides that:

> "If the Tribunal makes an order, [the Authority] must comply with the order before the end of the prescribed period beginning with the date on which it is made."

[36] The "prescribed period" is set out in regulation 23(2)(d) of the Education (SEN) Regulations 2005 ("the 2005 Regulations"). It provides:

> "(2) In the case of an order … (d) to amend a statement, the [EA] shall serve an amendment notice on the child's parent under paragraph 3 of Schedule 2 to the 1996 Order, within 5 weeks."

As the applicant has identified, the Amendment Notice should therefore have been served on the applicant's parents by 4 May 2021.

[37] The Education Authority need not comply with these time periods if it is impractical to do so for a range of specified reasons, including, inter alia (a) there are exceptional personal circumstances affecting the child or parent or (c) the child's parent has expressed a desire to make representations on the content of the statement after a period of 15 days. [reg 23(4)].

[38] Regulation 17(6) of the 2005 Regulations provides:

> "Subject to paragraph 7, where under paragraph 3(4) of Schedule 2 to the 1996 Order a board [the EA] has served an amendment notice on the child's parent informing him of its proposal to amend a statement it shall amend the statement within 8 weeks beginning with the date on which the notice was served."

[39] The Education Authority must serve either: a copy of the proposed statement or amended statement, or the existing statement and amendment notice upon the proposed school (in this case Rathmore Grammar School) for the purposes of consultation (Schedule 2, para 6(2)). The Education Authority should specify the school named by the parents unless (a) the school is unsuitable to the child's age, ability or aptitude or special educational needs; or (b) it would be "incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources" [Schedule 2, para 5(3)].

[40] Once the Amendment Notice is served, the period for issuing the Statement is a further eight weeks [reg 17(6), 2005 Regulations]. The same exceptions governing an extension of this period apply under reg 17(4) as apply under reg 23(4).

Consultation with Our Lady and St Patrick's College

[41] It is proposed to address the applicant's complaint about the consultation between the respondent and the School in the first instance, as my conclusion on this issue is relevant to the issue of whether there was delay on the part of the respondent.

[42] The 1996 Order makes provision for mandatory consultation in two circumstances during the process of amending a statement. Parental consultation is mandated by Schedule 2 paragraphs 3 and 7 and consultation with a school which the Education Authority is considering specifying, in the instant case Rathmore Grammar School, is mandated by Schedule 2 paragraph 6 to the Order. In both cases, the respondent must serve either an amendment notice with the existing statement or a copy of the proposed amended statement.

[43] It is common case that while there was a mandatory requirement on the respondent to consult with Rathmore, there was no mandatory requirement for the respondent to consult with the School even when the School had been identified as the applicant's preference in place of Rathmore, in circumstances where the applicant had attended the School the previous academic year. Continuing to attend the School did not involve a change in school and consequently consultation was not required.

[44] There are two stages to the consultation that took place between the respondent and the School. Firstly, following the initial consultation with Rathmore, and before that consultation process had concluded, the respondent also consulted with the School about whether it could provide the educational provision required by the proposed Statement. This was during the period in which the applicant's parents had identified Rathmore Grammar School as their school of choice and while consultation with Rathmore was ongoing. Secondly, following the withdrawal of judicial review proceedings against the Tribunal on 29 June 2021 and after the School had been identified as the school of choice, the respondent further consulted with the School and that consultation process ended in and about 10 August 2021 when the School advised that a place was available for the applicant meeting her needs.

[45] It is apparent from the evidence in the case that the difficulty in securing a place for the applicant which met her needs was the requirement that she receive five hours of one-to-one specialist teaching to be provided by the teachers teaching the relevant subjects within the school. It is apparent from the affidavit evidence of the applicant's father that this was an important issue for the applicant's parents who considered that if the teaching was provided by someone other than the specialist teacher within the school they had concerns about the quality of the specialist teaching which would be provided. Whether or not their concerns were well-founded, it is apparent that they were sincerely held and proved to be a challenge to secure.

[46] The applicant maintains that the respondent acted unlawfully during both consultation periods, both before and after their withdrawal of their preference for Rathmore. The respondent says that whilst there was no statutory obligation upon the respondent to consult the School, the consultation with the School was not prohibited.

[47] The explanation proffered by the respondent for consulting the School whilst also consulting with Rathmore was that it was seeking to balance its obligation to enable the parents to express a preference as to the school whilst also taking on board the parents' representations about the provision of specialist teaching, prior to finalising the Statement.

[48] The respondent makes the case that during its initial consultation with Rathmore, Rathmore was advising that it could not provide the one-to-one specialist teaching which the applicant required, in the manner which the parents wanted that delivered, that is by the applicant's AS Level class teachers. I have quoted from Rathmore's response to the consultation process above, in which it identified the provision of specialist one-to-one teaching as a "sticking-point." The respondent's case is that whilst they continued to engage with Rathmore, they thought it advisable to also begin to engage with the School which the applicant had previously attended to see if that school could meet the applicant's needs in the manner the parents wished them to be met.

[49] In my view the respondent was faced with a challenge. While they recognised the need to consult with the applicant's parents preferred school, that consultation process identified a problem, in that Rathmore were stating that they were unable to provide the specialist teaching in a manner consistent with parental choice. Recognising that the method of provision proposed by Rathmore would be unsatisfactory for the applicant's parents, they sought to engage with the applicant's previous school in order to see whether that would secure what the applicant's parents sought, in terms of specialist teaching. I accept the respondent's explanation as to why they decided to engage with the School and I accept that they engaged in that consultation in good faith in order to see if they could secure the specialist teaching the applicant required, in the manner the applicant's parents wanted it delivered.

[50] I am conscious that there is a belief on the part of the applicant's parents that following the issue of the letter of 23 April to Rathmore and the expiration of the 15 day response time, the respondent ought promptly to have identified Rathmore as the school in an Amended Statement and that they believe that this course would have secured for the applicant the educational provision she sought in the school preferred by the parents. I address this issue under the heading of delay below. I make clear, however, that I do not consider that the decision of the respondent to consult with the School was designed to frustrate the applicant's being able to attend Rathmore.

[51] The consultation with the School continued after the parents indicated that they no longer wished to identify Rathmore as their school of choice, instead identifying the School. The parents made clear their objection to that consultation taking place. However, at the time they indicated that they were identifying the School as the school of choice rather than Rathmore, the School had not confirmed to the respondent that they would provide the specialist teaching in a manner consistent with parental choice. The respondent makes the case that they continued to consult with the School in order to secure that provision. Ultimately, the outcome was a positive one in that the School did agree to provide the one-to-one specialist teaching in the manner preferred by the parents. While the applicant subsequently challenged the contents of the Statement it was for different reasons relating to access arrangements and not to the provision of specialist teaching.

[52] I accept that the respondent's further consultation with the School was also conducted in good faith and with the object of securing the best outcome for the applicant.

[53] That the respondent acted in good faith is not necessarily an answer to the applicant's complaint that the respondent was not entitled, as a matter of law, to consult with the School. However, as a matter of law I am satisfied that the mandatory obligation to consult with the school preferred by the applicant did not preclude engagement with other schools when faced with the prospect that the preferred school might not ultimately meet the applicant's needs. Clearly any

engagement with another school should not frustrate parental choice, and had I considered that was the case that would have led to a different outcome. I am clear however that in the instant case the respondent sought, on a good faith basis, to meet the applicant's needs as comprehensively as it could and the engagement with the School was designed to secure that objective. Thus, while it is agreed between the parties, that there was no requirement on the part of the Education Authority to consult with the School, I also accept the respondent's case that there was no prohibition on their doing so. I can see no basis for reading into the legislation a prohibition on consultation between the Education Authority and a school which a student with a Statement of Special Educational Needs may/is going to attend, even if there is no legal requirement for such a consultation. To read a prohibition into the legislation would be to read words into the legislation which simply do not exist. Furthermore, it would curtail the Education Authority's ability to seek to secure the best outcome for a child. Such an interpretation is in my view inconsistent not only with the legislative wording but also with a purposive reading of the legislation. I reject the applicant's challenge to the legality of the consultations which took place between the respondent and the School.

Delay

[54] As indicated above the respondent conceded that time periods were not observed albeit defending the process as one ultimately designed to secure for the applicant the educational provision she needed, in a way which met her parents' preferences.

[55] The applicant complains firstly of the delay in serving on the applicant an Amendment Notice and further complains of the delay in producing the Amended Statement. It is also apparent that the applicant complains that the respondent should have named Rathmore as the school 15 days after the correspondence of 23 April 2021 was served on the school and attributes the delay in naming Rathmore to the situation where, as the applicant perceives it, she was left with little choice but to name the School as her preferred school, in order to secure specialist teaching in a manner consistent with parental choice.

[56] I will deal with the latter issue briefly. It is apparent that Rathmore was not prepared to provide specialist one-to-one teaching in the manner preferred by the parents. Their position was that they were unable to do so because it would require teaching staff to work additional hours which were not part of their contract. The applicant's parents appear to be of the view that the Education Authority could have compelled Rathmore to provide education in the manner sought. However, it appears to me that the Education Authority were faced with a situation in which the preferred school was making the case that it could not provide the education in the manner sought due to resourcing issues and therefore that it could arguably fall within the exception contained in Schedule 2, paragraph 5(3)(b) of the 1996 Order, i.e. that the attendance of the applicant at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or

the efficient use of resources. I note the language used by Rathmore in their response to the consultation process wherein they stated:

> "the school does not have the available teaching capacity to provide five hours of specialist teaching in Ella's chosen subjects."

My reading of that language is that they were essentially making the case that they might fall within the limited exceptions provided for in the legislation. I make clear that I make no finding that they fell within the exception, rather it appears to me that they were framing their objection in a manner which raised that as an issue, which created potential difficulties for the Education Authority in securing the provision identified for the applicant in the proposed statement.

[57] Naming Rathmore on the Statement in circumstances where there was a very real issue about whether the applicant would get access to the specialist education she was entitled to, in the manner which accorded with parental wishes, would in my view have been entirely counter-productive. The Education Authority continued to engage with Rathmore in order to see if the difficulty could be overcome. However, I do not agree that it can be criticised for failing to name Rathmore as the school on the Statement within 15 days of notifying Rathmore that they were considering naming them as the School, particularly in light of the issues being raised by Rathmore.

[58] Addressing the delay in service on the applicant's parents of the Amendment Notice, as outlined above the respondent was required to serve the applicant's parents with an Amendment Notice within the period prescribed by regulation 23(2)(d) of the 2005 Regulations which provides for a period of five weeks from the Tribunal Order. The five week period elapsed on 4 May 2021. As the applicant correctly identifies she did not receive an Amendment Notice within five weeks and she further complains that what her parents received on the 15 May 2021 was not an Amendment Notice.

[59] The purpose of serving the notice is to enable the parents to be consulted and to have meaningful input into the process. Substantively, it appears to me that the parents' unhappiness with events as they unfolded were: firstly, that they feel that more prompt engagement on the part of the respondent with Rathmore would have secured the applicant a place in their preferred school, with access to the provision she needed; and, secondly, that the proposed amended Statement ultimately provided to the parents did not meet the applicant's needs, particularly as it related to access arrangements.

[60] The latter issue has been addressed in my earlier judgment. As to the former, I have addressed that issue above. I do not believe that the act of serving the Amendment Notice within time made any substantive difference, nonetheless I accept that it was not served within the prescribed time. No good reason has been

advanced as to why it was not and it is clearly preferable that the formalities, which are designed to ensure a meaningful consultation process are followed.

[61] A document described as an Amendment Notice was sent to Rathmore on 23 April 2021. As noted above, the respondent accepts that the document should have been entitled "Amendment Notice" and was not and this document was sent with a compliments slip to the applicant on 15 May 2021.

[62] The applicant disputes that the document served on her parents was an 'Amendment Notice', while the respondent states that it was, save that it was incorrectly titled. The applicant has not identified any other irregularity with the document served on Rathmore, and subsequently on her parents. In my view, while it is unfortunate that the document was not correctly titled, nothing of substance turns on it and the 23 April 2021 document constituted an amendment notice, albeit service on the applicant's parents was late.

[63] The applicant further complains about the delay in the making of a final Statement.

[64] If one accepts that the document served on Rathmore, which ought also have been served on the applicant's parents and was eventually served upon them on 15 May 2021, represents the date upon which the Amendment Notice was served, then the eight week period for issuing an amended statement concluded on 17 July 2021. The applicant has suggested that the delay in service of the Amendment Notice on the applicant's parents may have had the perverse consequence of extending time for service of the Statement. I am of the view that the date by which the amended statement ought to have been made and served was 29 June 2021 (that is eight weeks from when the Amendment Notice ought to have been served) and that on the face of it the complaint about delay is made out.

[65] That said, I recognise that the respondent was encountering real challenges in finalising the Statement. There were broadly speaking three issues. Firstly, the Statement was required to identify a school. The applicant's parents had expressed a preference for Rathmore. On 7 June 2021 (before the expiration of the eight week deadline) the respondent wrote to the applicant's solicitors, by way of response to pre-action correspondence. In that correspondence the respondent explained that Rathmore was unable to make the necessary provision for the applicant and indicated that the respondent would be minded to name Rathmore "subject to a resolution being found as to the appropriate approach to providing the specialist teaching hours required by Part 3 of Ella's Statement. To that end, the EA would welcome further engagement with the parents to discuss this issue."

[66] Secondly, in terms of finalising a statement, there was a live issue in relation to Dr Weir's recommendations being set out explicitly in the Statement. On that issue, the respondent indicated that it was "content to revise the examination

concessions immediately upon receipt of the final formal agreement with CCEA, which has been requested from you by email of 4th June 2021."

[67] The latter issue remained in contention as between the applicant and the respondent and resulted in the decision handed down by me in December 2021. In terms of how it practically impacted on the finalising of the statement, the information sought was received from the School on an unspecified date but after 15 June 2022.

[68] The third difficulty encountered by the respondent in terms of finalising a Statement was the fact that the applicant had challenged, by way of judicial review, the Tribunal's decision. The respondent points to the inconsistency with, on the one hand seeking to compel the respondent to implement the Tribunal's order, whilst on the other hand challenging that order.

[69] Inasmuch as this latter issue represented a barrier to finalising the Statement, it fell away on 29 June 2021 when the applicant withdrew her proceedings against the Tribunal. The first issue as it related to Rathmore also fell away on that date because the applicant indicated in court that applicant was now electing to attend the School.

[70] Ultimately, the Applicant's final Amended Statement was not made until 21 October 2021, after the grant of leave in these proceedings. The respondent explains that some of the delay in the provision of an Amended Statement was occasioned by its engagement with the School in an effort to secure the appropriate educational provision for the applicant. While the applicant maintains that this consultation ought not have taken place, as outlined above, I have formed the view that the applicant's complaint about the consultation period is without merit, and I am of the view that the respondent was acting in good faith with a view to securing appropriate provision for the applicant's educational needs by consulting with the School.

[71] Addressing the delay in the production of the Amended Statement, I am of the view that given the applicant's stated preference for Rathmore and the response from Rathmore, it was legitimate for the respondent to continue to seek to engage for a period with Rathmore and the parents in order to see if a solution could be found. I accept that the conflict between, on the one hand, the choice of school, and on the other, whether that school could meet the applicant's needs, amounted to an "exceptional personal circumstances affecting the child or parent", thus falling within the exception provided for in regulation 23(4)(a) of the 2005 Regulations. I also accept that the challenge to the Tribunal decision represented an obstacle to the production of an Amended Statement and also justified the decision to delay its production. The issue of access arrangements may also have contributed to delay, but ultimately it is not necessary for me to address how that impacted matters, given my conclusions above.

[72] On 29 June 2021, the parents indicated that the applicant would now attend the school she had previously attended and further they withdrew their challenge to the Tribunal's order. Thus, the "exceptional personal circumstances" identified above, had fallen away. I nonetheless accept that a further period of consultation was legitimate for the purposes of securing for the applicant appropriate educational provision. The need to secure one-to-one teaching from within the school's existing teaching resources was an important issue for the applicant and her parents, nonetheless it also undoubtedly makes significant demands on resources within a school. In my view it was legitimate for the respondent to continue to consult in order to seek to secure the best outcome for the applicant and to delay production of an Amended Statement for a further period whilst that consultation took place. I therefore consider that the delay until 10 August 2021 when the School confirmed that they could provide a place for the applicant meeting her needs was justified. Again, I am of the view that the need for further consultation amounted to an "exceptional personal circumstances affecting the child or parent", falling within the exception provided for in regulation 23(4)(a) of the 2005 Regulations.

[73] On that date, 10 August 2021, the respondent advised the applicant that a final statement would be prepared as soon as practicable. Ultimately, an Amended Statement was not produced until 21 October 2021. I consider that the delay from 10 August 2021 until 21 October 2021 was unwarranted. There had already been considerable delay, albeit some of it justified. Nonetheless the further delay in the production of the Statement, for a period of over two months was, in my view unjustified and I conclude that the applicant's complaint about delay is made out in relation to the latter period. I do wish to make clear that the delay, while unsatisfactory, did not prejudice the applicant in anyway. She was permitted in these proceedings to challenge the content of the Statement and did so successfully and in a timeframe which enabled the appropriate access arrangements to be put in place. Nonetheless, timescales are put in place for a reason and the onus rested upon the respondent to meet them, subject to the statutory exceptions which prevent their being met.

Article 2 Protocol 1

[74] This issue was not addressed in any detail in oral submissions, with reliance placed upon the skeleton argument.

[75] In any event, it is my view that this is not a case where the applicant has been denied access to the educational provision she needs as a result of her Statement. The applicant's core complaint, leaving aside the issue of access arrangements, relates to her choice of school. I am satisfied that the provision of education to the applicant in accordance with her Statement in the School meets that respondent's obligations under article 2 protocol 1 and that there has been no breach of the Convention.

[76] The complaint about a breach of article 8 rights raises no further issue in this case and this aspect of the complaint is also dismissed.

Conclusion

[77] The applicant was successful before the court in relation to the issue as to the content of her Statement. She has also been partially successful on the issue of delay. In my view the issue as to the content of her Statement was *the* substantive issue and I am minded to award costs in the applicant's favour subject to any contrary submissions from the respondent.