Neutral Citation No: [2019] NIQB 41 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	***Ref:*** McC10947 ***Delivered:*** 01/5/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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No 2018/078581/01

IN THE MATTER OF AN APPLICATION BY AF BY HIS FATHER AND NEXT FRIEND
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

BOARD OF GOVERNORS OF A GRAMMAR SCHOOL

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McCLOSKEY J

[1] The court re-emphasises that the Applicant has the protection of anonymity on account of his age and the disorder specified in the papers. To this end there shall be no publication of the identity of the Applicant or any member of his family and, further:

(a) The Applicant shall be known as "AF".

(b) The school in question shall be known as "*the school*".

(c) And see [2] below.

[2] The proposed Respondent was not correctly identified at the outset. This was subsequently rectified in the formal pleading. I refer to the court's formulation in the title hereof, which reflects the grant of anonymity to the Applicant.

[3] The Applicant was the subject of four successive school suspension decisions, the first occurring on 16 March 2018 and the most recent being dated 21 June 2018. The grounds of challenge are:

(a) Disregard of the Applicant's Asperger's and ADHD disorders.

(b) Infringement of the school's "*Positive Behaviour*" policy in the same respect.

(c) Breach of Article 1 of Protocol 2/Article 14 ECHR, contrary to section 6 HRA 1998.

(d) Unlawful discrimination on the basis of disability contrary to Article 14(3) of the Special Educational Needs and Disability (NI) Order 2005.

(e) Breach of Article 2 of the European Communities (… Persons with Disabilities …. etc) Order 2009, in conjunction with the right to education enshrined in Article 25(2)(c) of the UN Disabilities Convention ("the UINCRPD").

Grounds (d) and (e) are a specific challenge to the school's policies, entailing an assertion of an unlawful failure to make express provision for disabled students.

[4] While the various grounds of challenge are formulated under different legal guises, the core of the Applicant's challenge is that there has been no, or no sufficient, consideration of his disorders in the making of the successive impugned decisions and he has been treated less favourably than pupils without comparable disabilities. This species of judicial review challenge engages the principles in Re SOS Application [2003] NIJB 252 at [17] – [19].

[5] Proceedings were not initiated until 21 August 2018. In its initial order, dated 14 September 2018, the court observed:

> *"More fundamentally, it is far from clear that there is any issue of substance requiring adjudication by the Court. The most recent suspension decision appears to be dated 21 June 2018, having a duration of one day. Linked to this there has been a failure to comply with the JR Practice Note PAP requirements, given that the relevant correspondence is confined to the first two of the four successive suspension decisions. One further matter of note in this regard is that the certificate of legal aid is confined to challenging the first two decisions only. The Applicant seeks an Order extending time to bring these two discrete challenges (cf RCC Order 53 Rule 4) ….*
>
> *There is no indication of urgency in the papers and no application for expedition."*

[6] A further seven months have elapsed. There have been amendments to the Applicant's case. A skeleton argument was received only two weeks ago. The court finds itself adjudicating on whether to grant leave to proceed only now, over one year after the first of the impugned decisions and ten months following the second.

This is a manifestly excessive period in any schooling context, where expedition is of paramount importance.

[7] I weigh the foregoing in tandem with the following considerations:

(i) The explanation offered for the initial period of delay, namely legal aid difficulties.

(ii) The failure to observe the PAP requirements of the JR Practice Direction as regards the third and fourth impugned decisions.

(iii) The inadequate configuration of the case at the outset.

(iv) The sluggish prosecution of the case thereafter,

(v) The unequivocal evidence that the relevant policy of the school has been revised.

(vi) The equally unambiguous evidence that the impugned suspensions cannot operate to the Applicant's detriment following completion of the operative school year [last June, 2018].

(vii) The parents' declination that the Applicant should be progressed to Stage 2 of the relevant code, which would have entailed a referral to educational psychology with possible ensuing additional pupil support mechanisms.

(viii) The failure to pursue the statutory remedy provided by Article 14(3) of the Special Educational Needs and Disability Order (NI) Order 2005.

[8] The factors listed above, in combination, impel against the grant of leave to apply for judicial review.

[9] To all of the foregoing I add the following. The Applicant's core complaint, namely discriminatory treatment, is of demonstrably frail evidential foundation. Already weak on the evidence presented by the Applicant, it is at this stage confounded by a substantial *corpus* of persuasive evidence emanating from the school, much of it undisputed. I consider that the school authorities concerned have at all material times taken reasonable and appropriate steps and measures to ensure that the Applicant has received full equality of treatment.

[10] Furthermore, had it been necessary to proceed to adjudication of the previous, now superseded policy [there being no challenge to the new policy], I would have held that the former instrument was capable of being operated in a non – discriminatory manner: and clearly was thus operated in the Applicant's particular case.

Order

[11] Giving effect to the foregoing:

(i) Leave to apply for judicial review is refused.

(ii) The application to extend time under RCC Order 53, rule 4 is also refused.

(iii) The parties will address the court on costs.