Education Law Update

MAY 2017

Contents

Howard Cohen, Editor

I am delighted to introduce the very first Farrar's Building Education Law Group newsletter!

Farrar's Building is a leading set of London chambers with extensive experience in a wide range of legal areas.

We have recently experienced substantial growth in our education law work and are very keen to broaden this expansion.

This newsletter is just one part of our "offering" and is intended for both lawyers and non-lawyers. We hope it will appeal to everyone with an interest in this area of work.

In this quarter's newsletter, **Howard Cohen** considers the role and impact of the Office of the Schools Adjudicator (OSA), the body responsible for ensuring clarity on school admissions policies and compliance with the 2014 School Admissions Code. Having recently been involved in one of the largest appeals to the OSA in 2015/6, this is an area he is very well acquainted with!

Aidan O'Brien discusses the recent case of *Siddiqui v University of Oxford* [2016] EWHC 3150 (QB), in which the Claimant claimed damages of around £1 million against his old University for failing to achieve the degree results that he wished for. Aidan addresses the various categories of claim that may be brought for negligent educational provision.

Frederick Lyon examines the role and scope of the Office of the Independent Adjudicator (OIA) for students in higher education in examining university complaints procedures, including when they can act, what they can do and the legislation governing them.

The barristers in our Education Law team are skilled and experienced advocates, with substantial knowledge of this type of work, most particularly in admissions and exclusion appeals, examination appeals (school and University), disciplinary matters, internal University complaints, applications to the Office of the Independent Adjudicator and court proceedings of all types.

If you would like to speak to one of us, please contact the clerks on 0207 583 9241 or email them at **chambers@farrarsbuilding.co.uk,** or visit our website at **www.farrarsbuilding.co.uk** for more details. We hope to hear from you soon.

Office of the Schools Adjudicator Report 2015-6: Admission Appeals – Where are we now?

By Howard Cohen

1. The Office of the Schools Adjudicator (OSA) is the arms-length body formed by the Department of Education in 1999 to consider and rule upon objections to, and referrals about determined school admission arrangements relating to all state-funded schools. The main purpose of the OSA is to clarify the legal position on school admissions policies generally, and in particular, to ensure compliance by admissions authorities with the School Admissions Code, updated in December 2014 ('the Code').

2. The timeline for the determination of admission arrangements (and for objections to those arrangements by parents and others) has now changed, meaning that all schools, whether maintained, foundation, voluntary-aided or academies must publish those arrangements by 28th February 2017. Objections may be made to the OSA by 15th May 2017. The idea behind the change is that more appeals will be heard prior to the summer holidays so that if revisions to admissions arrangements are required, they are implemented prior to the deadline for school place applications at the end of October 2017. This now means that a parent wishing to object to planned changes to any state school's admission policy now has only a short prescribed window in which to do so.

3. Each year, the OSA's Chief Adjudicator publishes an Annual Report looking at overall compliance with the Code and making recommendations as appropriate. The report for the year September 2015 – August 2016 was published on 26th January 2017.

OSA Annual Report 2015/6 – The statistics

4. In the year to August 2016, the total number of new cases brought concerning admission arrangements was 200 (total cases considered: 315). Of these, issued outcomes were split almost equally with 73 upheld, 70 partially upheld and 73 not upheld. Thus of the decisions issued, 66% of objections were upheld to some degree. 75 more objections were not adjudicated upon by 31st August 2016 as intended but have been carried over into next year's figures. One interesting feature of this year's objections is that they related to schools covered by only 81 different admission authorities, with multiple complaints (48 being the largest group) about the same school's arrangements now apparently common.

Comparisons with previous years

5. What is clear is that the number of objections brought against planned changes to school admissions arrangements have varied substantially since 2009/10 when they stood at 520. Since then, they have dropped to 486 (2010/11), 203 (2011/2) and 189 (2012/3) before rising to 318 (2013/4) and 375 (2014/5). This year they have dropped again to 315 (2015/6).

6. The proportion of objections upheld to any degree has also varied substantially over time. In 2009/10, 48% of issued decisions upheld or partially upheld objections, whilst in 2010/11, this figure rose to 77%. In 2011/12, the figure was 68% before rising significantly in 2012/3 (83), 2013/4 (81%) and 2014/5 (76%). This year's figure of only 66% therefore represents a large drop, probably due to the *"bedding in"* of the 2014 Admissions Code and the greater efforts being made by school admission authorities to comply. That said, it is notable that two thirds of parents and others who object to planned admissions arrangements are clearly correct to do so.

Where are schools still failing to comply with the Admissions Code?

7. Although it is to be expected that over time, and with improved familiarity with the Admissions Code, schools will increasingly be able to successfully rebuff complaints

and appeals concerning their admissions arrangements, there continue to be a number of problematic areas. These are worthy of mention.

8. First, consultation. The Code requires (para's 1.42 – 1.45) admission authorities to consult on any proposed arrangements for the following school year. Even where there are no plans to change arrangements, admission authorities must nonetheless consult at least once every 7 years. Consultation must last for a minimum of 6 weeks and take place between 1st October and 31st January. The parties with whom the authority must consult are listed at paragraph 1.44 of the Code, and full details of the proposals must be published on the school's website.

9. The OSA Annual Report picks up a common failing that is failure to consult with parents. An assumption that other schools or the local authority will share the proposed arrangements with parents is wholly insufficient. What is more, the consultation must be meaningful and not merely a paper exercise. Good consultations highlight the precise changes planned and give a rationale for them. Public meetings are an example of good practice and all proposals must be published in full in a consistent and easy to understand manner on websites.

10. Second, catchment areas. According to the Code (para. 1.14), these must be *"designed so that they are reasonable and clearly defined."* According to R v Greenwich London Borough Council, ex parte John Ball Primary School (1989) 88 LGR 589 [1990] Fam Law 469, ("the Greenwich Judgment"), children should not be discriminated against in relation to school admissions simply because they reside outside the local authority area in which the school is situated. This year, the OSA upheld only a few objections based on catchment areas, finding that in the majority of cases, the reason for the catchment (or its removal) was fair in all the circumstances of the case. Further, it decided that there is no reason why grammar schools should not also adopt catchment areas, so long as they are fair, reasonable and clearly defined.

11. Third, feeder schools. The Code states that admission authorities may name feeder schools, so long as their selection as an over-subscription criterion for higher school entry is *"transparent and made on reasonable grounds."* The adoption of feeder schools attracted a substantial number of objections to the OSA, although most were not upheld. Reasonable grounds for having feeders might include the sharing of a religious character or enhancing the prospects of school entry for local children. Only where a secondary school named a group of primary schools with which it had little relationship in a different local authority area as feeders (without consulting that authority) was an objection upheld. It was notable that several secondary schools within multi-academy trusts (MAT's) had named all primaries within the same MAT as feeders (to reflect links/support continuity) although on investigation, the strength of such links varied. In these circumstances, feeder status depended upon the facts of each case.

12. Equally, the OSA upheld one objection to the inclusion of feeder schools as an oversubscription criterion on the basis that it was unfair to children at other non-feeders, especially where the feeder was a greater distance away from the secondary school in question. However, where there was space at the school for children who lived locally and priority for those who attended more distant feeders came after priority for local children, that was unlikely to be found unfair. Simply removing a feeder school was unlikely to be found unfair where, in changed circumstances, admission authorities had good reason to amend their entry arrangements.

13. On the issue of feeder schools, one of the recommendations made by the OSA's Chief Adjudicator is for the Department for Education to *"…consider the case for guidance to admission authorities on how to maximise the benefits of feeder schools in terms of continuity of education and shared work across schools while ensuring that the selection of feeder schools does not cause unfairness to other local children."*

How this is possible in practical terms is anybody's guess, particularly as the need for school places continues to rise in the coming years.

General

14. There are two other interesting and important points made within the Annual Report. First, there are myriad types of over-subscription criteria for school admissions which threaten in some cases to become overly complex and difficult to understand. Paragraph 14 of the Admissions Code clearly states that *"Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated."* Even where there are good reasons for detailed provisions in order to determine school entry (ie: a school is the only one with a particular religious character in a wide area), these must still be Code-compliant.

15. Second, in a number of cases, objections from parents and others were partially upheld where a school failed to meet the Code's requirements on consultation on, and publication of, proposed admissions arrangements. Despite that, the arrangements themselves conformed with the Code. Notwithstanding the understandable sense of grievance that this might cause, the focus of the OSA is on whether the Code requirements are met and any procedural flaws in reaching those arrangements *"may not sufficiently undermine the final arrangements determined."*

16. It is hard to understand how a decision, reached unfairly, could be held in any way to be substantively fair. Although not a matter for the OSA, a decision reached in this way could prove ripe for Judicial Review.

Summary

The OSA's Annual Report for 2015/6 therefore illustrates a generally improving picture insofar as Code compliance is concerned. However, there remain serious areas of uncertainty. With the increasing prevalence of MAT's, new uncertainties are almost certain to appear. The OSA's workload therefore appears likely to rise in the years ahead, a fact that could well explain its recent recruitment drive!

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Students want bang for their buck: Private law claims for breach of duty in the field of educational provision

By Aidan O'Brien

The news that an Oxford graduate is suing his alma mater following his failure to achieve his desired degree results should come as no surprise. Tuition fees have risen sharply over the past decade, changing the way many view the relationship between student and university.

Factual Background

Faiz Siddiqui claims that he has suffered a loss of around £1,000,000; due to the substandard tuition he received whilst reading Modern History at Brasenose College. Mr Siddiqui, who qualified as a Solicitor following graduation, claims that his life has been blighted due to 'negligent' teaching in his final year of study. Mr Siddiqui graduated in June 2000 with an Upper Second Class BA. He claims that, but for the University's failings, he would have obtained a First Class degree and been able to pursue a lucrative career at the commercial Bar.

Mr Siddiqui contends that four of the seven members of staff teaching one of his final year subjects took sabbatical leave at the same time. Mr Siddiqui argues that a significant number of students also received their lowest marks in the particular subject, thereby supporting his contention that the tuition provided was 'appallingly bad'. The University is said to have known that there would be a shortage of tutors for the subject in advance but taken no effective measures to address the same.

Mr Siddiqui now claims to suffer from depression and insomnia as a consequence of his 'disappointing examination results' and argues that he has been unable to hold down any professional day job for any significant length of time.

The University has already attempted to secure a strike out or summary judgment in the matter, on the basis that the claim lacks merit and is time-barred due to limitation.

Legal Analysis

Claims for negligent educational provision can take various forms. In private law claims founded on tort or contract (as distinct from public law claims, normally brought by judicial review), the relevant principles are now reasonably well settled. There are three broad categories of claim, relevant for present purposes:

Category 1: Claims which assert a breach of a duty owed in tort or contract arising in the exercise of academic judgment by the defendant's teaching staff.

Such claims generally concern the decision to award a particular grade to a student following an examination and revolve around issues of academic judgment. Claims of this nature are not justiciable as a matter of law, and are therefore liable to be struck out (e.g. *Clark v. University of Lincolnshire and Humberside* [2000] 1 WLR 1988, CA).

Category 2: Claims which allege negligent teaching methods, in the devising of courses or the means of acquainting students with the educational content of such courses.

These claims are actionable in principle (e.g. *Phelps v. Hillingdon London Borough Council* [2001] 2 AC 619). Given that such claims amount to an attack on the defendant's competence, exercise of skill and care in a profession, the merits of the claim must be assessed by reference to the 'Bolam test' (*Bolam v. Friern Barnet Hospital Management Committee* [1957] 1 WLR 582).

The relevant question is whether a defendant has acted *'…in accordance with a practice accepted as proper by a responsible body of … men skilled in that particular art.'* Such a claim will require a claimant to adduce expert evidence to establish that the Bolam standard has not been met.

Category 3: Claims of operational negligence in the making of educational provision.

Such a claim could, for example, involve an administrative error leading to a student sitting the wrong examination paper, containing questions about which the student had received no tuition. If such a case is proved on its facts then a court will not require expert evidence to find that the required standard of professional skill and care has not been met.

Mr Siddiqui's Case

In the case of Mr Siddiqui, the University rightly accepted that if an institution fails to take proper care of a student's career, by falling short in the delivery of the processes involved in obtaining the qualification for which the student is studying, the possibility of some injury is arguably foreseeable. The University, however, argues that, notwithstanding the existence of a duty of care, outside the domain of the non-justiciable exercise of academic judgment, Mr Siddiqui's claim is manifestly bad on the facts and, even if that is wrong, manifestly time barred.

Following the Univeristy's preliminary application for strike out or summary judgment, Mr Justice Kerr has determined, *inter alia*, that:

(1) The University's application did not require the Judge to hold a 'mini-trial' and therefore the question was whether the claim was merely more than arguable on the evidence available.
(2) The merits of Mr Siddiqui's claim did appear to have real prospects of success. It is arguable that his claim focuses on the insufficiency of teaching capacity and the alleged failure to remedy that and therefore does not necessarily need to be supported by expert evidence (i.e. a category 3 claim). Strike out or summary judgment would therefore not be appropriate on the evidence.
(3) Mr Siddiqui also has a real prospect of establishing that the 'date of knowledge' within section 14 of the Limitation Act 1980 fell less than three years before the issue of the claim.
(4) Mr Siddiqui also has real prospects of establishing that the claim is in time via operation of section 32(1), 32(1)(b) and 32(2) of the Limitation Act 1980 (deliberate concealment of any fact relevant to the claimant's right of action).
(5) Mr Siddiqui also has a real prospect of persuading the court at trial that it would be just and equitable to disapply the primary limitation period and allow the action to proceed,

pursuant to section 33(1) and (3) of the Limitation Act 1980

(6) The matter should be allowed to advance towards trial.

Discussion & Analysis

Students are right to demand that their educational institutions provide appropriate tuition, adhere to fair administrative processes and design coherent course structures. With the advent of tuition fees, students have become consumers of educational services and expect value for money. Whilst the failure to achieve a desired degree result is often the consequence of factors beyond the course provider's control, students are now taking steps to ensure that an institution's failure to adhere to the expected level of service does not adversely affected their future career prospects.

(1) Students who are concerned about the quality of their courses and/or institution's administrative processes should seek to raise these issues internally in the first instance. Educational institutions are obliged to investigate complaints and will have a formalized process for doing so. Student advisory services are also available for free advice.
(2) If internal processes are exhausted, students should consider making a complaint to the Office of the Independent Adjudicator in Higher Education. This service is impartial, free and easy to use.
(3) Legal action should always be considered a last resort, albeit this route has become more accessible following Barristers' widespread acceptance of 'Public Access' instructions.

The full judgment to for Siddiqui v University of Oxford can be found here.

Examining University Complaints Procedures with Academic Rigor: An explanation of the role of the Office of the Independent Adjudicator for Students in Higher Education

By Frederick Lyon

Reading the cases which have been recently considered by the Office of the Independent Adjudicator for Students in Higher Education (OIA) can be sobering. If nothing else they demonstrate that the rigour with which academics pursue their studies does not always translate into their decision making process when considering student complaints. Recent cases where the complaint was found to be justified have included:

- A student, whose appeal for an extension on their dissertation due to extenuating circumstances was delayed to such an extent that the deadline for submissions had passed before the appeal was considered;

- A disabled student who was withdrawn from his course following non-attendance. The university failed to take into account his disability as part of the disciplinary process even once evidence was presented to them;

- A PhD who student complained of being bullied by their supervisor. The university initially dismissed the complaint as 'miscommunication'. In the subsequent appeals process the university did not pass any of the supervisor's comments on to the student and (very surprisingly) did not pass the comments from the supervisor on to the appeals panel who still went on to dismiss the complaint.

The seriousness of these issues cannot be overstated for the individuals involved. In the case of postgraduate students there are considerable reputational (as well as financial) consequences to being withdrawn from or failing to complete a course. For all university students the result of a mismanaged appeals process could be catastrophic for their career, their health or in some cases even their immigration status.

The OIA were established pursuant to powers granted by the Education Act 2004. Their purpose is to consider complaints from students regarding the management of complaints and disciplinary processes carried out by higher education institutions. So when can they act, what can they do, and how can one bring a complaint?

When can the OIA act?

The OIA should only generally be consulted once the higher education provider's own procedures have been exhausted, although in exceptional circumstances they do consider appeals prior to this point. Their function is restricted solely to complaints made by students who are already enrolled on courses at higher education institutions, they therefore do not deal with complaints regarding admissions procedures.

Furthermore they can only consider those complaints that do not relate to 'academic judgment'. As well as being within their own rules this restriction of their powers is enshrined in statute under section 12(2) of the Education Act 2004. This is not, therefore, a forum to complain about the marking of papers, although it may be appropriate to question whether extenuating circumstances had been taken adequately into account or whether the universities own procedures had been appropriately followed (e.g. where the result of a decision is a capping of marks without the consideration of academic merits).

Where the complaint is a qualifying complaint it must be made promptly to the OIA and in any event within a year from the final date at which the higher education provider informed the student that their own process was concluded.

Crucially the OIA's function is to consider whether the institution complied with their own procedures and, if so, whether these procedures were adequate and the institution behaved reasonably in all the circumstances. It is therefore extremely important that all relevant information relating to the complaint is provided to the higher education provider in a clear manner at the time that an appeal of a decision is made by them under their own process. This early disclosure serves two purposes; firstly it ensures that the higher education provider is more likely to allow the appeal on its merits and secondly it highlights any failures of the institution should a further complaint need to be made to the OIA. Indeed it is only in exceptional circumstances that the Adjudicator will consider a complaint relating to new information which was presented only after the receipt of a completion of procedures letter unless the student could not reasonably have obtained it at an earlier date.

What can the OIA do?

Those institutions which are signed up to the scheme (which by law must include all universities) have agreed to be bound by the decision of the Adjudicator under the scheme.

That said, the reports of the Adjudicator following a review of the decisions made by the institution are only recommendations. Any institution which fails to comply promptly will, however, be named explicitly in the OIA annual report with all the reputational consequences which that would incur.

If a complaint is found to be justified or partly justified the recommendations which the Adjudicator can make include:

- Suggesting the institution to do something without further consideration (e.g. re-instating a student);

- Suggesting the original complaint to be reconsidered due to the institutions processes not being properly complied with;

- Suggesting a financial remedy, and setting the level of this remedy;

- Suggesting that the institution change its procedures for handling complaints or its regulations.

The remedies are not stand alone, and in many cases multiple recommendations will be made relating to a single justified complaint. Even if a complaint is not justified in a particular instance some recommendations for change may be made by the adjudicator.

How can a complaint be brought to the OIA?

Before a complaint is brought to the Adjudicator a student should consider the following factors:

- Is my complaint eligible (see above);

- Have I gone through all of my own institutions procedures? In relation to this point it will be important to get hold of a copy of the institutions rules relevant to your case, this allows one to see what the process will be at the institution and will also form the base of any decision to be made by the OIA;

- Have I put together all of the relevant information in relation to my complaint? This is something which will need to be kept under constant review, new information may come to light which will need to presented to a student's institution at the earliest opportunity;

Once the above checklist has been adhered to and the final 'completion of procedures letter' has been issued by the institution a complaint can be made to the OIA via the online complaint form. It is important that all of the relevant information is set out in this form and that the case is made clear to the Adjudicator at this early stage. This is because an oral hearing will be an exception rather than the rule and what is set out in the form will create the structure of any decision to be made by the Adjudicator. There is no court fee for submitting a case to be considered by the OIA.

This is only a very basic guide to the practice and procedure of the OIA. Students faced with needing to go to the OIA are likely to be nearing their final chance for their complaint to be successful. The procedure is designed to be sufficiently straightforward to be pursued without the services of a lawyer, however, given the importance of the outcome it may be prudent to seek some legal advice at an early stage to ensure that the claim is presented in the clearest form to the Adjudicator or to the Higher Education Institution's own appeal body.

Case Law Update

By Tom Emslie-Smith

Buckinghamshire County Council v SJ [2016] UKUT 0254 (AAC)

Significance: The Upper Tribunal gave guidance on the right of appeal under section 51 of the Children and Families Act 2014 against decisions about Education, Health and Care (EHC) plans. Specifically, the Tribunal considered how the appeal right is made effective for young people who lack capacity.

Facts: The young person, Ryan, was a 20 year old with various diagnoses of developmental disorders including autistic spectrum disorder. His parents successfully appealed to the First-tier Tribunal against a decision by the local authority not to make special educational provision. Buckinghamshire Council brought an appeal to the Upper Tribunal. Although it was conceded that the First-tier Tribunal had not made an error of law with regard to Ryan's capacity to bring an appeal, Judge Edward Jacobs gave guidance on this point as it was of wider relevance to other cases.

Held: Regulation 64 of the SEN and Disability Regulations 2014 introduces the concept of an alternative person. As a starting point, this is a representative of the young person, meaning someone who acts for a person who lacks capacity such as a Court of Protection Deputy, a donee of a lasting power of attorney or an attorney of an enduring power of attorney. If the young person does not have such a representative, the alternative person is a parent.

Regulation 64 requires a reference to a young person in section 51 Children and Families Act 2014 to be read as a reference to the alternative person. The result on appeal is that there is a statutory substitution of the alternative person for the young person. Therefore, in this instance the appeal was correctly registered by the First-tier Tribunal in the name of Ryan's parents.

If a young person's capacity to bring an appeal is in doubt, the most efficient way to deal with this would be to raise it as a preliminary issue. If a young person's capacity changes, the Tribunal may substitute another party as appellant or respondent. A young person who was the appellant before the First-tier Tribunal but lacks capacity before the Upper Tribunal will remain a party until substituted.

Devon County Council v OH [2016] UKUT 292 (AAC)

Significance: In overturning the Council's decision as to which educational establishment to name in the respondent's Education, Health and Care (EHC) plan, the First-tier Tribunal afforded too much precedence to SEN Codes of Practice in its approach. The correct test for determining an educational establishment is one of *appropriateness*. Case law stating that applicants are not entitled to 'Rolls Royce' provision is still good law. Subsequently introduced SEN Codes refer to enabling students to achieve the 'best possible outcomes in life' but these do not displace this principle. Nothing in the statutory scheme prevents the local authorities from having regard to the resources available.

Facts: O was a learning disabled student with an interest in horses. She had shown a great deal of commitment to helping in stables and competing in events. The Council decided that her needs could be met at P College in a course that would include some work with animals. O's parents wanted her to attend F Centre, a specialist training institution which would give more opportunity to work with horses. The local authority's position was that while F Centre was a suitable placement, it would be an inefficient use of resources to send O there. The parents appealed the EHC plan to the First-tier Tribunal.

The First-tier Tribunal held that P College was not an appropriate placement for O. The Tribunal relied upon paragraph 8.30 of the SEN Code of Practice, which provides that students should "follow a coherent study programme which provides stretch and progression and enables them to achieve the best possible outcomes in adult life." It appeared to suggest that this displaced case law that students were not entitled to "Rolls Royce" educational provision.

Held: The First-tier Tribunal failed to identify and/or apply the correct test of appropriateness and its use of the paragraphs in the Code undermined the intention of the statutory scheme. The appeal was therefore allowed.

The Interim Executive Board of X School v Her Majesty's Chief Inspector of Education, Children's Services and Skills [2016] EWHC 2813 (Admin)

Significance: An Islamic school that segregated its students by gender was not held to be in breach of the Equality Act 2010.

Facts: X school was run with an Islamic ethos and segregated male and female students in classes, corridors and social areas. The Defendant schools inspector produced a report following an inspection conducted under section 8 of the Education Act 2005, which was sent to the school prior to intended publication. The report found that the leadership and management were inadequate on grounds that the policy of segregating the pupils was detrimental to their development and contrary to the Equality Act 2010.

Held: The denial of social interaction with members of the opposite sex was capable of amounting to a "denial of a benefit or facility" or a "detriment." However this, without more, would not amount to "less favourable treatment" within the meaning of section 13(1) of the Act. Both sexes were being denied the opportunity to interact, socialise or learn with or from the opposite sex. There was no evidence that boys and girls were treated unequally under the policy of segregation. At the time of writing an appeal is outstanding.

R (on the Application of Zahid) v The University of Manchester v The Office of the Independent Adjudicator for Higher Education [2017] EWHC 188 (Admin)

Significance: In a claim for review of expulsion from a Higher Education Institution (HEI), The High Court gave guidance on how it should exercise its discretion to grant permission to proceed, an

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extension of time, or a stay of claim where the same subject matter is brought before the Office of the Independent Adjudicator for Higher Education (OIA).

Facts: Various HEIs had decided that the Claimants could no longer continue their medical courses. The Claimants had made a reference to the OIA but had also brought a claim for judicial review before the High Court.

Rule 3.3 of the Students' Complaint Scheme Rules states that the scheme does not cover matters that are the subject of proceedings and have not been stayed. The Claimants therefore applied for a stay in the High Court.

Held: The High Court gave the following guidance:

1) There should be no need for the routine issue of proceedings to protect the Claimant's right to claim judicial review if the matter is not resolved by the OIA. The Courts will grant an extension of time for issue so long as the claim is brought within a reasonable time after the OIA's determination of the complaint. The student should issue within one month of the OIA's decision, and compelling reasons would be needed to persuade the Court that longer is needed.

2) The initial reference to the OIA should be made promptly and within three months of the complaint to avoid any contention that a subsequent claim is out of time.

3) If the HEI indicates that it will take a point on time limits, then the student should carefully consider issuing proceedings and applying for a stay. There may be costs consequences for opposing the stay without good grounds, or for issuing proceedings without engaging the HEI.

4) If protective proceedings are issued, the Court will be sympathetic to grant a stay at the earliest practicable stage, to allow the OIA reference to proceed to a conclusion.

5) If a stay is opposed, the Court will consider the likelihood that a judicial review claim might proceed notwithstanding an OIA reference, the delay that an OIA reference might cause, and the extent to which an OIA reference could help resolve issues between parties.

6) If possible, the application for a stay should be dealt with by way of a consent order. An adverse costs order may be made against a HEI that opposes a stay without good grounds.

7) If the student does not wish to make a reference to the OIA, the Court should nonetheless consider ordering a stay. The student should make clear on the claim form the availability of the procedure and why it is not their intended course.

R (on the application of HA) v Governing Body of Hampstead School [2016] EWHC 278 (Admin)

Significance: The decision of a school to transfer a student off-site was quashed for failure to provide written reasons for the decision and failure to keep the decision under review.

Facts: The Respondent school transferred the student off-site to undergo a college course, pursuant to section 29A(1) of the Education Act 2002 for the purpose of improving his behaviour. Upon enrolment at the college, the Claimant was informed that he would only be able to pursue one GSCE in maths. He was so upset that he refused to attend the College any further.

He sought judicial review of the decision to transfer him off-site. It was alleged that the decision maker acted under improperly delegated authority, that the school failed to notify the Claimant of the decision in writing, and that the school failed to keep the decision under review.

Held: The decision was made under proper authority. Under section 29A(1) of the 2002 Act, power to transfer off-site is given to the board of governors. However DfE guidance allows the head teacher to exercise delegated authority of the board of governors in matters of the internal organisation and management of the school. In this case the decision was communicated to the parents at a meeting by a teacher but it was found that the ultimate decision was made by the head teacher.

The school had failed to notify the Claimant of the decision in writing, contrary to the requirements of the Education (Educational Provision for Improving Behaviour) Regulations 2010. It was held that this might have produced a materially different outcome. The judge found that the Claimant's behaviour record was mixed, and the decision to send him off campus was by no means the only course that a reasonable decision maker could have made. The central requirement to give reasons in writing was key to fair and transparent decision making.

The school had failed to keep the off-site placement under review contrary to regulations 4 to 6 of the 2010 Regulations. In this case, the fact that the student had absented himself from the alternative educational provision did not obviate the need to review the situation. It may in fact have been a material factor to take into account in a review.

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