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*Judgment: approved by the Court for handing
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY S.H. FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of the decisions of the Western Education & Library Board and the Department of Education not to make provision for the applicant's transport to and from school and further of the decision of the Department to regard Holy Cross College, Strabane, as both a Catholic maintained secondary school and a denominational grammar school for the purposes of the transport arrangements made under the Education & Libraries (Northern Ireland) Order 1986.

[2] The background to this case arises out of changes to schooling arrangements in the Strabane area. Previously there were three schools in the area and they have now amalgamated, being a Catholic girls grammar school known as Strabane Convent Grammar School and two non-grammar schools, namely, St Colman's High School and Our Lady of Mercy High School. The three schools have been amalgamated and are known as Holy Cross College. The new school is described by the Department as a bilateral school, meaning that it is a school with a grammar stream that is treated for the purposes of transport arrangements as being in the grammar sector and in the secondary sector.

[3] The applicant lives in Strabane and she is in her first year of secondary education. She received an A grade in the transfer test last year and was admitted to her first choice school, Loreto Convent Grammar School, Omagh, some twenty miles from her home, where she commenced as a pupil in September 2006. Her parents wish her to have a grammar school education. Her parents do not look favourably on Holy Cross College, although it was their second choice. The parents consider that Holy Cross College is not successful in attracting grammar school applicants and that many pupils prefer to travel to other towns such as Omagh and Londonderry to go to school. The applicant applied for transport costs for her to

travel from her home in Strabane to her school in Omagh and this was refused by the Board.

[4] The 1986 Order has three provisions that are relevant for the purposes of the issues that arise in this case. First, Article 44 of the Order deals with parental wishes and provides that:

“In the exercise and performance of all powers and duties conferred or imposed upon them by this Order, the Department and boards shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils shall be educated in accordance with the wishes of their parents.”

The second provision of relevance is Article 52 of the Order which deals with transport assistance and provides that:

“(1) A Board shall make such arrangements for the provision of transport and otherwise as it considers necessary or as the Department may direct for the purpose of facilitating –

- (a) the attendance of pupils at grant-aided schools; and
- (b) the attendance of relevant pupils at institutions of further education;

and any transport provided under such arrangements shall be provided free of charge”.

(2) Arrangements made by a Board under paragraph (1) [other than arrangements made in pursuance of a direction of the Department] shall be subject to the approval of the Department.

(3) A Board may in accordance with arrangements approved by the Department provide transport for, or pay the whole or part of the reasonable travelling expenses of(those pupils)

for whom the Board is not required to make provision under arrangements made under paragraph (1).”

The third is Schedule 13 of the Order which deals with the duty of parents to secure the attendance of children at school, and paragraph 3(2) of the Schedule provides that:

“... the child shall not be deemed to have failed to attend regularly at school only by reason of his absence therefrom if the parent proves -

- (i) that the school at which the child is a registered pupil is not within walking distance of the child's home; (ie. three miles) and
- (ii) that the child is one for whom the board is required to make provision under Article 52(1), but no suitable arrangements have been made by the board for his transport to and from school; and
- (iii) that no suitable arrangements have been made by the board for boarding accommodation for the child at or near the school or for enabling him to become a registered pupil at a school nearer to his home”.

[5] Circular 1996/41 issued by the Department to the Boards on 31 October 1996 deals with School Transport. Section 3 includes the heading “Nearest Suitable School” and the relevant paragraphs provide:

“3.3 Where there is a suitable school or schools within statutory walking distance from a pupil's home and a pupil attends a school outside the statutory walking distance, transport assistance will be provided only where the pupil has been unable to gain a place in any suitable school within statutory walking distance.

3.4 Where there is no suitable school within statutory walking distance from a pupil's home boards may provide transport assistance to any suitable school, provided that a suitable board or public transport service to or in the vicinity of that school is already available”.

I draw attention at this stage to the fact that the transport policy makes reference to the availability of a suitable school.

[6] Paragraph 3.5 states that a suitable school is a grant-aided school in any of the categories that follow. The Circular then sets out three sectors of education, namely primary, secondary and grammar. Within each sector are set out different categories of school. Within the primary sector the categories of school are Catholic maintained, controlled or other voluntary, integrated and Irish-medium. Within the secondary sector the categories of school are Catholic maintained, controlled, integrated and Irish-medium. Within the grammar sector the categories of school are denominational and non-denominational. Paragraph 3.6 provides that:

“As at present, applications may be made for a place in a school in more than one category in each school sector, and for schools in both the secondary and grammar sectors. Each application will be treated individually for the purposes of assessing transport entitlement and a suitable school will be the category of school in which the pupil is finally placed. **To be eligible for transport assistance to a school outside statutory walking distance, application must first of all be made to all schools in the same category that are within statutory walking distance before a preference is expressed for the more distant school.** To qualify for assistance to the more distant school applicants must be able to show that they are unable to gain a place in such schools in the same category within the statutory walking distance of their home.”

In relation to concessionary travel paragraph 7 of the Circular provides that:

“Where a board supplies its own transport and seats are available after the requirements of all eligible pupils have been met it may offer seats to ineligible pupils on a concessionary basis. It is for the board to determine which pupils shall be given such concessions”.

[7] An affidavit was filed by Ms Katrina Godfrey, Head of Resource Allocation Division of the Department of Education. In her affidavit she refers to the programme of rationalisation in the Catholic post-primary sector in the Strabane and Londonderry area. She states that in the year 2000 the Western Board published a development proposal under Article 14 of the 1986 Order which requested the amalgamation of three existing Catholic post-primary schools in the Strabane area and the creation of a single bilateral co-educational maintained secondary school with a grammar stream. This development proposal was approved by the Department on 8 January 2001. As indicated above this led to the creation of Holy Cross College.

[8] The affidavit states that following the creation of Holy Cross College the Department was requested by the Board to provide clarification regarding the status of the new school for the purposes of providing transport assistance. Ms Godfrey refers to the Department having previously considered how a bilateral school was to be treated, namely Lagan College in Belfast, which is a bilateral integrated school with an approved grammar stream. In October 1999 the Department provided directions to the South Eastern Board to treat the grammar stream separately from the secondary stream for the purposes of determining transport assistance within the terms of the existing directions.

[9] Ms Godfrey states that the Department provided directions to the Board in relation to Holy Cross College and that it was intended that it should be treated as a co-educational denominational grammar school and a co-educational maintained secondary school. She states the consequence to be that those pupils living within statutory walking distance of the new school, for whom Holy Cross College was the nearest suitable school, but who chose to attend a suitable school located outside walking distance, would not normally receive transport assistance.

[10] The Department issued letters concerning the application of the Circular to Holy Cross College. First, there was a letter of 7 February 2005 from the Department to the Board which stated that a bilateral school would now be included in the categories of suitable school as specified in paragraph 3.5 of the Circular. In the secondary sector they added a fifth category of school, bilateral, and in the grammar sector they added a third category of school, bilateral. That approach did not last long because on 8 April 2005 the Department issued a revised letter to the Board in which it stated that for the purposes of paragraph 3.5 of the Circular Holy Cross College was to be regarded as both a Catholic maintained secondary school and a denominational grammar school for pupils seeking entry to those respective categories of school and the Department's letter of 7 February 2005 on bilateral schools was thus withdrawn.

[11] These letters are explained in Ms Godfrey's affidavit at paragraph 9 as follows:

“The reason for the change was based primarily upon the fact that after issuing the letter of 7 February, the Department considered that it was capable of a construction which would have the effect of undermining its objectives pursuant to paragraph 3.6 of the policy which states that a ‘suitable school will be the category of school in which the pupil is finally placed’. Accordingly, if a child from Strabane obtained a place in a denominational grammar or maintained secondary school in Derry or Omagh, it could argue that Holy Cross was not a ‘suitable school’ for the purposes of transport assistance since the child had not been ‘placed’ in a

‘bilateral school’. If this interpretation was accepted, the intention of the Department would have been undermined. Accordingly, the letter of 7 February 2005 was withdrawn and the further direction of 8 April 2005 was issued.”

[12] Against that background an issue arose as to whether the Circular that provides for arrangements to be made by the Board falls within the category of arrangements that are approved by the Department under Article 52(1) or are arrangements directed by the Department under Article 52(1). In other words who is the real decision-maker, is it the Department or the Board?

[13] The issue of effect of the Circular was considered by Girvan J in S’s Application [2004] NIQB 64. At paragraph [9] he stated that although paragraph 1 refers to the Circular as being advice, paragraph 2.1 states that the Circular sets out the arrangements approved by the Department under Article 52. Read as a whole the Circular contained directions given by the Department to the Board for the purposes of Article 52. The Circular cannot be construed as merely advisory or directory. In so stating Girvan J did not have the documents that were exchanged by the Board and the Department in relation to the Holy Cross College. I have considered that material and it does contain items suggesting that it was the Board who made the arrangements subject to approval and it does contain other material suggesting that the Department was issuing directions. Overall, I consider that the Circular does amount to arrangements directed by the Board. I accept the argument that was advanced on behalf of the Board and the Department that the Circular and the letters amount to directions by the Department.

[14] The refusal of transport assistance to the applicant was in accordance with the terms of the Circular. The applicant is a pupil who lives within statutory walking distance of Holy Cross College and is attending Loreto College which is outside the statutory walking distance. As paragraph 3.6 of the Circular states:

“To be eligible for transport assistance to a school outside statutory walking distance, application must first of all be made to all schools in the same category that are within statutory walking distance before a preference is expressed for the more distant school.”

To be eligible for transport assistance to Loreto, being the school outside statutory walking distance, application first had to be made to Holy Cross College, being a school in the same category as Loreto and within statutory walking distance. Loreto was the applicant’s first choice school. Applying the terms of the Circular the applicant was not entitled to transport assistance.

[15] The issues that arise in this judicial review are as follows. First, whether there is a requirement that there be a “suitable school” for an applicant and not just

“suitable arrangements” for transport of an applicant to school. Secondly, whether the Department has power to treat what they describe as a bilateral school as the equivalent of a grammar school for the purposes of the travelling arrangements. Thirdly, whether the treatment of the Holy Cross College as a suitable school is *Wednesbury* unreasonable. Fourthly, whether irrelevant considerations were taken into account in classifying the school.

[16] On the first issue as to whether the legislative scheme renders it necessary to establish that Holy Cross College is a suitable school, there have been conflicting decisions in England as to whether the equivalent legislation, but not in all cases equivalent transport policies, requires suitable arrangements for transport to school or requires that the school itself be suitable. Before considering that issue further I should emphasise again the point made earlier, namely that the Department’s policy is based on the requirement that the alternative school should be a suitable school and that determines the issue. The alternative school must be a suitable school. The scheme of the Circular is to place schools in designated categories and in effect schools in the same category are deemed to be suitable.

[17] The cases decided in England have taken different positions on whether the effect of the legislation is to require the suitability of the alternative school but they also establish certain general propositions that are relevant to the other issues that arise in the present case. Reference is made to the Court of Appeal decisions in England to illustrate the debate about the suitability of the alternative school. S v Dyfed County Council [1995] 1 FCR 113, seems to lead the authorities on the suitable arrangements side of the argument and C v Essex County Council [1994] ELR 54 and J v The Vale of Glamorgan County Council [2001] EWCA CIV 593 adopt the suitable school approach. The balance of authority in England appears to favour the suitable school approach.

[18] The latest case referred to was R v Leeds County Council [2005] EWHC 2495 (Admin), a decision of Wilkie J. The applicants were members of the Jewish community living in Leeds and they wished their children to attend schools in Manchester in which the religious education provided was that of the Jewish religion to which they adhered. Three propositions emerge which are relevant to the issues in the present case. First of all, in the light of the equivalent English legislation, it is stated that the local education authority cannot properly refuse to provide free transport for a child whose journey is greater than the statutory distance on the basis that there is a nearer school within the statutory distance that the child could attend unless that school is suitable. This adopts the suitable school approach based on the statutory arrangements. The second point is that the local education authority’s conclusion in relation to suitability may only be challenged on grounds of irrationality. The local educational authority is the arbiter of this issue, subject to only to a *Wednesbury* challenge. The third point is that the question of the proper approach in determining whether an alternative school near the child’s home is suitable may involve consideration of a number of factors which were set out in

the Dyfed County Council case where the judge stated that relevant factors may include -

- (a) the reasons underlying parental preference which are important, but not determinative;
- (b) the inherent suitability of the preferred school;
- (c) the inherent suitability of the alternative school;
- (d) financial considerations including the avoidance of unreasonable public expenditure;
- (e) such policy considerations as have lawfully been adopted by the education authority and bear upon the question.

Taking such factors into account a decision had to be made whether the alternative school was suitable for the particular pupil. This naturally meant that, just as parental preference was not automatically by itself determinative, so neither would other factors such as financial considerations or matters of policy by themselves determine the answer.

[19] An example in the authorities that arises in relation to selective education might be referred to at this point. In C v Essex County Council [1998] ELR 108 the child lived in one area and had been accepted for a grammar school in another area and the Council refused to provide free transport between her home and the school because the selected school was not the nearest school which would have been suitable for her. The headnote states -

“1. A local education authority cannot properly refuse to provide free transport on the basis that there is nearer school which a child could attend unless it is of the view that the nearer school would be a suitable school for that child to attend.

2. When considering a challenge to a local authority’s refusal to provide free transport, if the refusal was based on the authority’s view that there was a nearer suitable school, the function of the court was to see whether it had been shown that the authority’s view about the school’s suitability was lawfully reached, which in most cases would require no more than a consideration of the rationality of its conclusion.”

4. The (local school) catered for children of all abilities, including those able enough to attend a grammar school. Even looking at the matter objectively, which was not the Court’s function, the fact that (the pupil) had been selected for a grammar school could not make the (local school) unsuitable for her. The grammar

school might be more suitable, but that did not make the (local school) unsuitable.

At page 9 of the decision McCullough J stated -

“If the parent of a very bright child in Chiddingstone decided, for whatever reason (perhaps because he disapproved of selection or did not want to separate her from her friends) not to enter his child for (the grammar school), no-one could reasonably tell him that the (local all abilities school) was not a suitable school for her. If the (local school) is suitable for a child it cannot become unsuitable simply because she passes an examination which shows that she is also suitable for a grammar school. One might reasonably say that, having been selected for a grammar school, such a school would be ‘more suitable’ for her than a wide-ability school, but that would not make the latter unsuitable.”

[20] I accept the applicant’s argument that the alternative school must be a suitable school. That position is achieved because the Department’s transport policy requires that the alternative school be a suitable school. It is not necessary to rely on the statutory provisions in order to reach that position. However, the balance of authority in England on the interpretation of the equivalent legislation adopts the suitable school approach. While it is not necessary to reach a view on the effect of the legislation I find the suitable school approach to the interpretation of the legislation to be more persuasive.

[21] The applicant’s second ground is whether or not the Department has power to treat the bilateral school, for the purposes of the transport policy, as being the equivalent of a denominational school in the grammar sector. The Department’s policy is to designate suitable schools by placing schools in categories and if the school nearby and the school attended are in the same category then the former is regarded as suitable. To translate that into this case, Holy Cross College grammar stream is treated as a denominational school in the grammar sector and as Loreto is in the same category Holy Cross College is deemed to be suitable.

[22] The 1986 Order provides certain definitions relating to schools. By Article 2(2) of the Order a secondary school established after 1 April 1992 is a grammar school if so designated by the Department. It has not been established that Holy Cross College has been designated by the Department for the purposes of Article 2(2) of the 1986 Order. However Holy Cross College has been approved by the Department as a bilateral school under the development proposal submitted under Article 14 of the 1986 Order, that is, it is a school with a grammar stream with Departmental authority to select pupils.

[23] It is correct, as Mr McCann for the applicant submits, that a bilateral school is not a designation which is identified in the Education Orders. There are two different entities recognised under the Secondary Schools (Admissions Criteria) Regulations (NI) 1997 which were made under Article 16 of the Education (Northern Ireland) Order 1997. The Regulations provide that the criteria to be applied in selecting children for admission to a school shall not provide for selection by reference to ability or aptitude except in the case of a grammar school or a school for which a development proposal has been approved by the Department under Article 14 of the 1986 Order and which enables the school to select some of its pupils by reference to ability or aptitude. Under the Regulations a school approved under Article 14 to select pupils is distinguished from a grammar school. However, for the purposes of considering the transport policy it is not necessary to determine whether Holy Cross College is or is not a grammar school. The Circular seeks to identify the categories of schools that are regarded as suitable for the purposes of transport policy and the Department may draw up categories of suitability as it considers appropriate, subject, of course, to *Wednesbury* in the broad sense of rationality and taking account of only relevant considerations. The fact that “bilateral” is not a part of the statutory language is not relevant for this purpose. Accordingly, I am satisfied that the Department is entitled to devise a transport policy that includes what are described as bilateral schools provided that decisions are rational and based on relevant considerations.

[24] The applicant’s third ground is that the designation of Holy Cross College as a suitable school is *Wednesbury* unreasonable. As the cases have decided in England, it is not a matter for the Court to make a decision as to what is a suitable school, but rather it is a matter for the relevant educational authority to make a decision as to what is a suitable school and that decision will be subject to scrutiny by the Court on the rationality test. So was it a rational decision that Holy Cross College be treated as a suitable school?

[25] The parents’ first choice for the applicant was Loreto College and they regarded that as the best school. They want a grammar school education for the applicant and they do not regard Holy Cross College as satisfying that requirement because it only provides a grammar stream. They regard Holy Cross College as a failing school and consider that local parents and teachers prefer alternative schools. The Department’s position is that it approved a scheme whereby there would be thirty-five per cent selection in the intake of Holy Cross College and it rejects the view that it is a failing school and the Board similarly rejects that view.

[26] An affidavit sworn by Rosemary Watterson, Chief Administrative Officer of the Board, refers to the school in these terms:

“Holy Cross College accepts pupils of all abilities, but does not have mixed ability classes. The College has a grammar/academic stream for both boys and girls, approved by the Department. All pupils are streamed

into classes on their ability - based on the Primary School Report, the Transfer Test Result and further tests carried out within the College (eg Cognitive Ability Tests etc). I understand that had the applicant taken up a place at Holy Cross College she would have been placed in the grammar academic class, the grammar/academic class, as all the other pupils who achieved an A grade in the Transfer Test. All the teachers who formerly taught in the Convent Grammar School, Strabane, who did not accept voluntary redundancy, have been retained in and continue to teach in Holy Cross College. Accordingly, the Board does not accept that Holy Cross College is in any way an inferior school to other grammar schools, nor does it accept that it is not a suitable school for the provision of a Catholic grammar education for the applicant."

[27] The figures available for the intake as at May 2006 indicates a total intake for the year at two hundred and six pupils, with the first preference of grade A at sixteen and of grade B1 at three, so there was a total of nineteen pupils with grade A or grade B1 out of a total of two hundred and six pupils. That does not meet the selection target set out in the proposal at thirty-five per cent.

[28] The Circular has placed schools in categories of similar schools. Loreto College is in the grammar school sector under the category of denominational. Holy Cross College is in the same category. That it is a denominational school is clear. The applicant's objection is to it being placed in the grammar sector because it only has a grammar stream and is not receiving widespread support. Whether technically it is a grammar school under the legislation is not the issue. The Department has chosen categories for the purposes of its transport policy and the issue is whether it is irrational to place the grammar stream at Holy Cross College in the same category as Loreto grammar school so that Holy Cross College is a suitable alternative school. Parents will face this problem with any denominational schools in the grammar sector where their preferred school is outside the three-mile limit and the nearer school is not regarded by the parents as being good enough. Holy Cross College was the applicant's second choice. It has a grammar stream so it applies a selection system. It has admitted nineteen As and B1s so the applicant would be in the class with the other top grades. The fact that many parents have chosen other schools does not make Holy Cross College unsuitable. Taking account of the considerations that were referred to in the Dyfed County Council case, concerning parental preference, suitability of the preferred school, suitability of the alternative school, financial considerations, policy considerations I do not accept that the decisions of the Department and the Board in relation to suitability can be regarded as irrational.

[29] The applicant's last ground is that the Department has placed Holy Cross College in the grammar sector on the basis of irrelevant considerations.

Ms Watterson in her affidavit gives voice to concerns about the viability of the Holy Cross College. She refers to the amalgamation of the three schools and states that in the light of the decision and the commitment of resources to the construction of a new campus, the Board was deeply concerned about the impact that an award of transport assistance to the applicant would have on the development. The Board was concerned not only about the viability of the school in general, but the grammar stream in particular. Further, she refers to transport assistance being granted to pupils living in the Strabane area to attend grammar or secondary schools outside Strabane. She states that the Board was of the view that if that were to happen numbers were likely to decline, particularly for A grades. She expresses a real and genuine concern on the part of the Board about the continued viability of the school and the grammar stream which may have implications for teaching staff and the construction of the proposed new campus. In the Board's view the sustainability of Holy Cross College would be very seriously threatened if transport assistance were to be granted to the applicant or to any other applicants in similar circumstances in the future.

[30] The affidavit of Ms Godfrey for the Department refers to the above considerations and states - "I can confirm that none of these factors were taken into account or considered by the Department when issuing directions regarding transport policy in relation to Holy Cross College." The Department's view, as expressed by Ms Godfrey, has been queried by the applicant on the basis that it does not correspond with the position of the Department expressed in e-mails exchanged between the Department and the Board dealing with the issue of transport policy in relation to the Holy Cross College. In particular, on 9 March 2005 a Department email stated -

"What WELB (the Board) was trying to do - and what we were happy to support wearing our transport hat - was avoid a situation where parents who wanted to send their children to a grammar school could bypass a bilateral school with a grammar stream and get transport assistance to a grammar school."

[31] There are precedents for bilateral schools, being schools that have a grammar stream but also have non selection for part of their intake, namely Lagan College, Belfast and St Patrick's College, Maghera. There are also precedents for the application of transport policy to the bilateral schools as they too have been placed in the grammar sector so that transport costs have not been paid if pupils opted for a grammar school outside the three-mile limit when the bilateral school was within the limit.

[32] The transport policy was not devised in order to protect the viability of Holy Cross College. The Board may well have concerns about the impact of a different policy or the exclusion of Holy Cross College from the grammar sector under the existing policy, but that does not invalidate the Department's approach. Nor does

the Department's intention that pupils should not bypass a local bilateral school for a grammar school that is further away. Once it is found that the alternative school may properly be treated as in the same category as the preferred school, so that it can be regarded as a suitable school, there are no grounds for challenge on this basis.

[33] This issue did emerge in C v Kent County Council [1998] ELR 108. The question was asked - If every child attending the nearest wide-ability school was provided with free transport to school and if every child attending the nearest grammar school was provided with free transport to school would the Council regard that as fair? McCullough J at page 9 stated that he was more than a little concerned about the answer that he was given to that question. He was told that such an approach would deprive the wide-ability school of its more able pupils and that the Council was trying to provide a system of transport which did not have that effect. The Judge referred to this answer as perhaps amounting to educational engineering. However the point had not been raised in the affidavits and he did not take the answer into account.

[34] On the basis of the answer given in C v Kent County Council the transport policy had been devised or operated by the local education authority to maintain the numbers of more able pupils at an all-ability school. In the present case the Department's transport policy and the definition of the sectors and the categorisation of schools within the sectors did not take the contested factors into account in devising the policy. I accept the Department's affidavit evidence to that effect. The policy set out in the Circular identifies the selective stream with the grammar sector and requires the pupils to first make application to the school within the statutory distance. The policy does not permit pupils to obtain transport costs to bypass the local grammar school, should the parents consider the local grammar school to be unsuitable, in order to enable the pupils to go to what the parents regard as a better grammar school that is further away. Equally, the policy does not permit pupils to obtain transport costs to bypass a local grammar stream, which parents may regard as unsuitable, in order that the pupils may attend what the parents regard as a better grammar school that is further away. I do not regard the approach that has been adopted as taking into account irrelevant considerations.

[35] The result is that I am not satisfied on any of the applicant's grounds of challenge in this case and the application for judicial review will, therefore, be dismissed.