

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**2007 1563 JR**

**BETWEEN**

**COUNTY WESTMEATH VOCATIONAL EDUCATIONAL COMMITTEE**

**APPLICANT**

**AND**

**THE SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SCIENCE**

**AND**

**FREDDIE BELL, MAIRE NÍ MHARTÍN AND PADDY HOGAN**

**RESPONDENTS**

**AND**

**DAVID NOONAN AND THERESE NOONAN**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice O’Keeffe delivered on the 10th day of July, 2009**

1. The Applicant seeks *certiorari* by way of judicial review of the decision of the second to fourth named Respondents (hereinafter “the Appeals Committee”) of 15th October, 2007, whereby the said Respondents upheld the notice parties’ appeal against the refusal by the Applicant to enrol the notice parties’ son (“the son”) as a student in Mullingar Community College. The Applicant also sought judicial review of the purported finding of the Appeals Committee that the enrolment policy of the Applicant may be at variance with the rights of parents, including the Notice Parties, regarding the enrolment of children. It also sought *certiorari* by way of judicial review of the finding that the notice parties’ son has no school placement.

2. Various declaratory reliefs were sought against the decision of the Appeals Committee.

3. This case concerns the Education Act 1998 (“the 1998 Act”) and the Education (Welfare) Act 2000 (“the 2000 Act”). Under the 1998 Act, students who are over eighteen years and/or the parents of students who are under eighteen years are conferred with certain entitlements under the 1998 Act, to be enrolled in schools. Where a school refuses to enrol them and/or suspends a student for a period of time and/or takes certain other action, there is an entitlement on behalf of the student to make an appeal under s. 29 of the 1998 Act.

4. The Applicant in these proceedings is County Westmeath Vocational Educational Committee, notwithstanding the fact that the decision under appeal was that of the Board of Management of Mullingar Community School. Under the 1998 Act, Boards of Management of recognised schools outside the vocational sector are separate bodies corporate responsible for the school concerned. In the case of Vocational Educational Committee schools, the Boards do not have a separate legal identity. The schools are part of the Vocational Educational Committee structure and for operational purposes the Boards of Management are run as sub-committees of the Vocational Educational Committee. The Applicant in this case is responsible for management of Mullingar Community School.

5. Ms. Hanley, the Principal of the school (who is also an *ex officio* member of the Board of Management of the school) stated that the second named Notice Party came to see her in May 2007, at which time her son was enrolled in St. Mary’s CBS School (“the CBS”). The Notice Party informed her that her son had been told that he would not be “welcome back” to the CBS. Her son came to see her on the following day. He wanted to change schools in September. The school received, in July 2007, a letter from the Notice Parties seeking to have their son enrolled in the school. The Notice Parties were advised by letter of 13th July, 2007, pursuant to the enrolment policy, that documentation, including references from the previous school, were to be included with such application.

6. The application form was dated 12th August, 2007, and stated that the reasons for applying for admission was “change of school”.

7. Ms. Hanley states that during the period 2007 up to the date of application, she had discussions with the principal of the CBS from which it was clear that the son had a serious disciplinary problem and that that school would not keep him on its rolls “if it could avoid it”. The content of such discussions were completely at variance with the documentations sent to her by the CBS which supported his application for admission. The Board of Management of the school met on 14th August, 2007, and decided to refuse the application for enrolment. The reasons for that refusal were recorded by the Board of Management as follows:

*“Members were provided with copies of applications to enrol from three students, together with a copy of the school’s Admission and Enrolment Policy. Two of these students are currently enrolled in St. Mary’s CBS Secondary School and are being discouraged from returning in September. A discussion on the matter followed. Mr. McDermott stated that unless the students were formally expelled, they continued to be the responsibility of the school they were enrolled in, to provide their education. Ms. Purcell referred to a reference made by the Principal of St. Mary’s that the student ‘has a great future ahead of him provided the correct structures are in place’, and felt that these structures should be in place in his current school. It was felt by some members of the Board that there appeared to be contradictions in the documentation provided by the school. Mr. Barrett and Mr. Reidy felt that the school had a duty of care to our own students and that they needed to feel that they had the support of school management. It was felt that it was paramount that every effort is made to support students and teachers of our school. The image of the school is important and all members agreed that difficult decisions were necessary to uphold the well-being of existing students.*

*Having considered these two applications, the Board felt that in the circumstances, they were unable to accede to the request for enrolment."*

8. The Notice Parties were informed by Mullingar Community College by letter dated the 15th August, 2007, that its decision was, "Having considered the application, the Board regret that they are unable to accede to your request as it would not be in the best interests of the school community". The Notice Parties appealed the refusal to the Vocational Educational Committee. The Appeals Application Form is dated 20th August, 2007. The form stated that the appeal application was in relation to a refusal to enrol the Notice Parties' son in the pre-Leaving Certificate year in Mullingar Community College, the Board of Management of such school having refused him entry. The grounds upon which the decision was being appealed was stated to be that the son had no school for pre-Leaving Certificate year 2007. The appeal to the Applicant was a first step in the process and was required to be completed within a 30 day period.

9. The appeal procedures provide for efforts at local resolution as a first step. The facilitator, Mr. Tom Ashe, was appointed. In the course of this initial process, the Notice Parties went on two weeks holidays.

10. Mr. Ashe's report is dated 12th September, 2007. He recounts a meeting with the Notice Parties on 29th August, 2007, who were anxious that a place in the school would be found for their son as quickly as possible, as at that time, he had no school to return to in September. He was a pupil, it said, in the CBS, up to the of May, but because the school was not satisfied with his behaviour, he was told to complete his studies for his Junior Certificate at home and to look for another school if he intended to pursue his studies. The full text of this report is set out in paragraph 54 hereof.

11. By letter dated 18th September, 2007, the Notice Parties were informed by the Applicant that as it would not then be possible to arrange a hearing between the Applicant and the Notice Parties before the conclusion of the 30-day maximum period allowed, that it was regretted that the Chief Executive Officer of the Applicant could not adjudicate on the appeal and the Notice Parties were advised of their further right of appeal to the Department of Education and Science.

12. The Notice Parties requested an appeal hearing under s. 29 of the 1998 Act. A further Appeal Application Form was sent to the Department by the first named Notice Party and dated 20th September, 2007. It was again stated that the appeal was in relation to the refusal to enrol, that the son had no school to return to for the year 2007, and that as he had already missed almost a month of the school year, that the Notice Parties were very eager to locate a school for him. He needed a fresh start and another start to show what he was capable of achieving. He would like to complete his Leaving Certificate. Mullingar Community College is the nearest school to where they lived.

13. The second, third and fourth named Respondents are the Appeals Committee appointed by the first named Respondent under s. 29 of the 1998 Act. The hearing was held on 15th October, 2007. The Appeals Committee upheld the appeal of the Notice Parties against the refusal by the Applicant to enrol the Notice Parties' son in the Applicant's school. The Appeals Committee recommended that the son be enrolled forthwith in the pre-Leaving Certificate year at Mullingar Community College.

14. The Appeals Committee made its decision for the following reasons:

- The enrolment policy of Mullingar Community College with regard to transfers from post-primary schools, may be at variance with the right of parents to enrol their child in the school of their choice.
- Following the withdrawal (of the son) from his previous school, he had no school placement.
- Mullingar Community College has the capacity to accommodate the son in the Pre-Leaving Certificate class.
- Based on the evidence presented at the hearing, the Committee felt that the level of misbehaviour by the son did not warrant a refusal to enrol in Mullingar Community College.

15. The Appeals Committee stated that it took into account a range of issues:

- The written and oral submission from both parties.
- The Enrolment Policy of Mullingar Community College
- The wish of Mullingar Community College not to be seen as the school of last resort for pupils with behavioural problems.
- The Notice Parties were not issues with an enrolment policy when they applied to enrol the son in Mullingar Community College.
- The effort made by the son and the Notice Parties to address the son's behavioural problems.

16. The Appeals Committee concluded by saying it wished "to draw the attention of the National Welfare Board to the irregular open-ended suspension and refusal to take (the son) back to his previous school".

17. In relation to what was stated at the appeal hearing, both Ms. Hanley and the Chairman of the Appeals Committee, Mr. Freddie Bell, each exhibits notes for and of the appeal proceedings. Ms. Hanley prepared her own notes and a further set of notes was prepared on behalf of Mr. Bell. These notes are exhibited and comprise some three pre-typed pages from Ms. Hanley and seventeen handwritten pages on behalf of the Appeals Committee. It is apparent from looking at these notes, that not all the matters referred to therein as having been discussed at the hearing are dealt with specifically in the decision of the Appeals Committee.

18. Ms. Hanley in her affidavit, does, however, say that she raised a number of issues with the Appeals Committee regarding the whole practice of what would be regarded as "offloading" of difficult pupils in the local vocational college. She pointed out the serious discrepancy between the references received by the school from the CBS in relation to the third party's son, and what appeared to be the true position on the ground. The fact that his parents had canvassed many schools and had been refused by a number of schools, that appeals had been commenced under s. 29, but either not upheld or abandoned, and the implications that these would have for any suggestion that the community school was the school of choice for the parents, were pointed out to the Committee, she said.

19. Ms. Hanley, in her affidavit, contended that the Appeals Committee had no legal power to make the finding it did regarding the enrolment policy, but she would contest the validity of same, in any event. She said that Mullingar Community College was not the "school of choice" of the Notice Parties for their son. It was clear that at the time the school made its decision not to enrol the Notice Parties' he was already enrolled in the CBS School. The Appeals Committee relied upon the son's withdrawal from the CBS to overturn the decision not to enrol him and this took place after the Board of Management took its decision and it was clearly a *de facto* expulsion, as the facilitator's report makes clear. The committee was in no position, she said, to find that the son's level of behaviour was not sufficiently serious, as it did not canvass the issue with the previous school. Having regard to the number of children with special needs or special considerations then enrolled in the school, any additional or disruptive pupil represented a significant strain on an already strained class/student situation within the school. She referred to the facilitator's report dated September 2007, which was before the Appeals Committee and such account was at variance with the references received by the Applicant from the CBS. The Notice Parties' son had a school placement at the time when the decision was made not to enrol him in

the Applicant's school and there was no basis whatever for the Appeals Committee to make any other decision.

20. The parties were supplied with the Admission and Enrolment Policy for Mullingar Community College. Section D deals with Application Procedures and states that such procedures are in accordance with the requirements of the 1998 Act, the 2000 Act and the Equal Status Act 2000. The procedures are guided by principles of equality of access and participation, parental choice of school, respect for diversity, inclusiveness, and openness, accountability and transparency. In relation to "Transfers", it states as follows:-

"While it was appreciated that in certain exceptional circumstances, transfers are unavoidable (e.g. a change of residence or a family moving into the area), as a matter of general policy, transfers into the school are discouraged in the overall interests of the continuity of the students education.

An application to transfer is defined as one from a student who has previously enrolled in another school in or outside the catchment area, or from a student who makes application after the commencement of the autumn school term. It is not the policy of the Board of Management to accept transfer applications from students already enrolled in local post-primary schools, except in exceptional circumstances. Where the Board is satisfied that such exceptional circumstances do exist, the following considerations and procedures will apply:

(a) Reasons for transfer should be clearly stated,...

(c) This college also reserves the right to request a confidential reference from the authorities in previous school(s)

(d) The Board of Management reserves the right to refuse an application in exceptional circumstances, which might include

(i) an established prior record of poor behaviour."

21. The policy also states that the following factors will be considered in respect of applications: class size, availability of staff, availability of appropriate accommodation, the rights of Applicants and the rights of existing students and staff within the college.

### **Basis of Review**

22. The Applicant submitted that it based its review against the decision on the following bases:

(i) That the findings of the Appeals Committee on analysis were either bad in fact or in law, were irrational and/or *ultra vires* and/or erroneous and/or were made in the absence of any evidence available to support the said findings.

(ii) The Appeals Committee misapplied and misunderstood the extent of its jurisdiction.

(iii) The combination of the appeals procedure and/or the findings made therein brought about a result which is arbitrary and/or in breach of the constitutional natural justice and/or the entitlement of the Applicant in fair procedures. The Applicant did not know the nature and scope of the decision making process which the Appeals Committee was undergoing and was to rely upon for the purpose of making its decision. In particular, there had been no indication that the Committee were intent on making findings in respect of the extent of (as opposed to the existence of) the son's disruptive behaviour.

(iv) The Board of Management of Mullingar Community College acted in accordance with law, in accordance with its enrolment policy and in accordance with the facts of the situation as they pertained when the decision was made. The Board was as a result of the appeal subject to an *ex post facto* decision which is in the face of s. 19 of the 2000 Act, and had been taken on a mixture of findings relating to matters of fact, some of which were in existence at the time of the decision and others of which came into being later on, such that a reasonable fair and legal decision made by the Board of Management has been unfairly and unlawfully impugned by the decision of the Appeals Committee.

(v) In the conduct of the appeal, the Appeals Committee acted, in effect, as a placement service for the Department of Education in respect of the Notice Parties' son, even in the face of uncontroverted evidence as of October 2007 there was not a place for him in the Pre-Leaving Certificate year. This was not a function, it was submitted, of the Appeals Committee but was the function of the statutory body, the educational welfare body, and reference was made to s. 27 (1) of the 2000 Act.

### **Legislative Background**

23. The preamble to the 1998 Act stated:

"An Act to make provision in the interests of the common good for the education of every person in the State, including any person with a disability or who has other special educational needs, and to provide generally for primary, post-primary, adult and continuing education and vocational education and training; to ensure that the education system is accountable to students, their parents and the State for the education provided, respects the diversity of values, beliefs, languages and traditions in Irish society and is conducted in a spirit of partnership between schools, patrons, students, parents, teachers and other school staff, the community served by the school and the State; to provide for the recognition and funding of schools and their management through board of management; to provide for an inspectorate of schools; to provide for the role and responsibility of principals and teachers and to establish the National Council for Curriculum and Assessment and make to make provision for it and to provide for all related matters."

24. Section 6 of the Act provides:

"Every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act:-

(e) To promote the right of parents to send their children to a school of the parents' choice having regard to the rights of patrons and the effective and efficient use of resources;

(l) To enhance the accountability of the education system."

25. A student is defined in relation to a school as meaning a person enrolled in the school. However, in relation to s. 29 a student means a person who applies for enrolment to school and that person or his or her parents may appeal against a refusal to enrol him or her in the same manner as a student or his or her parents may appeal a decision under this section.

26. Section 9 provides that a recognised school (which the Applicant was) shall provide education to students which is appropriate to their abilities and needs. It also provides, it shall use its available resources to "subject to this Act and in particular section 15(2)(d) establish and maintain an admissions policy which provides for maximum accessibility to the school".

27. Section 10 deals with the recognition of schools by the Minister. Section 11 deals with the withdrawal of such recognition.

28. Section 14 deals with the establishment and membership of boards of management of schools. It provides:-

"(1) It shall be the duty of a patron, for the purposes of ensuring that a recognised school is managed in a spirit of partnership, to appoint where practicable, a board of management the composition of which is agreed between patrons of schools, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers and the Minister.

(2) A board established in accordance with sub-section (i) shall fulfil, in respect of the school, the functions assigned to that school by this Act, and, except in the case of a school established or maintained by a vocational educational committee, each board shall be a body corporate with perpetual succession and power to sue and may be sued in its corporate name.

(3) Pending the establishment of a board as provided for by sub-section (i), the persons who have responsibilities under the structures and systems in place in a school for the management of that school at the commencement of this part, including boards of governors, shall, as appropriate, discharge the functions of a board under this Act.

(4) Members of a board shall, except where articles of management otherwise provide, be appointed by the patron of the school.

(5) When making appointments to a board established in accordance with sub-section (i), the patron shall comply with directions given by the Minister in respect of an appropriate gender balance and the Minister, before giving any such directions, shall consult with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers.

(6) The Minister, with the agreement of the patron, national association of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, shall prescribe matters relating to the appointment of a board."

29. Section 15 sets out the functions of a board:

"(1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that board has responsibility.

(2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall:-

(a) do so in accordance with the policies determined by the Minister from time to time;

(b) uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school, and at all times act in accordance with any Act of the Oireachtas or instrument made thereunder, deed, charter, articles of management or other such instrument relating to the establishment or operation of the school,

(c) consult with and keep the patron informed of decisions and proposals of the board,

(d) publish, in such a manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school, including the policy of the school relating to the expulsion and suspension of students and admission to and participation by students with disabilities or who have other special educational needs, and ensure that as regards that policy principles of equality and the right of parents to send their children to a school of the parents' choice are respected and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with,

(e) have regard to the principles and requirements of a democratic society and have respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society,

(f) have regard to the efficient use of resources (and, in particular, the efficient use of grants provided under section 12), the public interest in the affairs of the school and accountability to students, their parents, the patron, staff and the community served by the school, and

(g) use the resources provided to the school from monies provided by the Oireachtas to make reasonable provision and accommodation for students with a disability or other special educational needs, including, where necessary, alteration of buildings and provision of appropriate equipment.

(3) For the avoidance of doubt, nothing in this Act shall confer or be deemed to confer on the board any right over or interest in the land and buildings of the school for which that board is responsible."

### Submissions of the Applicant

30. Mr. Feichin McDonagh, S.C. on behalf of the Applicant submitted that the 1998 Act does not give parents a right to send a child to a school of their choice. There is nothing it was submitted in the Act which seeks to grant or establish the right. It was submitted that s. 15(2)(d) requires a Board of Management in drawing up an enrolment policy to have regard to the "right". It was submitted that once the enrolment policy is drawn up and published, neither the Board of Management nor an Appeals Committee has any function or role in seeking to set up against that enrolment policy, some free-standing positive right to send a child to the school of their choice. There would be little point in drawing up an enrolment policy if in fact a parent had a right to send a child to school he or she wishes. When a parent applies to a school of his or her choice, that school must consider the application in the light of the relevant enrolment policy.

31. It was submitted that the Minister for Education and Science would never have asserted or claimed an entitlement to give directions to schools as to how they accept pupils. If it was the intention of the Oireachtas to give such power to an Appeals Committee, it was submitted it would have done so expressly in the legislation. No such power should be inferred.

32. Reliance was placed on s. 19 of the 2000 Act which provides that the board of management of a recognised school shall not refuse to admit as a student in such school, a child in respect of whom an application to be so admitted has been made except where such refusal is in accordance with the policy of the recognised school concerned published under s. 15(2)(d) of the 1998 Act. As soon as practicable but not later than 21 days after a parent has provided the information that may be prescribed by the Minister, the board of management of the school concerned shall make a decision on the application and inform the parents in writing. This section was relied on to demonstrate that the enrolment policy as published under s. 15(2)(d) is and must be the basis for admission or non-admission of students. It was submitted that the Respondents are in effect in hearing a s. 29 appeal ignoring the enrolment policy. It was submitted that the 1998 Act does not confer upon an Appeals Committee any power to "review" or impugn the enrolment policy of a school. The Appeals Committee even if taking a decision afresh is nonetheless bound by the same parameters of the board of management which took the decision under appeal had been bound, including in particular under the enrolment policy of the school, it was submitted.

33. It was submitted that the four reasons given by the Appeals Committee for the decision, both jointly and separately, and in terms of the relationship to each other are bad in fact, in law, were made *ultra vires* or irrationally or in breach of constitutional and national justice.

### The Respondents' Submission

34. Mr. Michael McGrath, S.C. on behalf of the Respondents submitted that it was the Applicant's contention that the Appeals Committee had no power to make a finding that the enrolment policy may be at variance with parental choice or to adjudicate upon the Applicant's enrolment policy or presumably to even consider the issue. It was submitted that his ground must be seen in the context of the Applicant's submissions to the Appeals Committee that the Committee should not even be hearing the appeal because the refusal was in accordance with the school's enrolment policy. The Applicant's case, it was contended, was that if a child was enrolled in another school that an Appeals Committee should not make a recommendation against a second school (in this case Mullingar Community College), but also that it should act as a bar to an appeal hearing. If this were correct it was submitted that an Appeals Committee cannot make a finding in respect of a school's enrolment policy on the facts of a specific case, and in such circumstances schools could in fact render the appeals process prescribed by s. 29 redundant. A school would simply have to show that a refusal to enrol a child (on whatever grounds) was in accordance with the school's enrolment policy, and the Appeals Committee could not upset that refusal. It was submitted that it cannot be the intention of the Oireachtas when enacting s. 29 that the section would be rendered redundant.

35. It was contended that the decision was not "an inchoate finding of insufficient precision and/or was too vague to be the grounds of an enforceable decision".

36. It was submitted that the concept of parental choice was recognised and given express protection under Article 42 of the Constitution and also s. 15(2)(d) of the 1998 Act.

37. It was submitted that the Notice Parties had chosen Mullingar Community College to enrol their son, but that choice had been frustrated by the Applicant's refusal to enrol the son and in particular by the Applicant's reliance on part of its enrolment policy to justify same. To the extent, the enrolment policy or the Applicant's interpretation of same can be used to frustrate parental choice, the enrolment policy is at variance with that of parental choice. It was submitted that the principle of parental choice is a legitimate consideration in the context of a s. 29 appeal and that the 1998 Act itself recognised parental choice and expressly states that the Applicant procedures are "guided by principles of ...parental choice of school".

38. The Respondents referred to the ground of challenge that the assertion by the Applicant that in fact Mullingar Community College was not the Notice Parties school of choice, and in so concluding the Applicant contended that the finding was irrational. The Respondents suggested that it was the contention of the Applicant that because the parents had previously applied to other schools, Mullingar Community College was not their school of choice, and the Respondents submitted that "school of choice" in the context of the principle of parental choice was not and could not be so limited.

39. The Respondents referred to the Applicant's submission that because the withdrawal of the son from his previous school "took place following the decision, the subject matter of the appeal and indeed following the commencement of the appeal" the Appeals Committee was not entitled to have regard to that withdrawal. It was submitted that the ground of challenge was misconceived in two respects. Firstly, to suggest that the withdrawal had taken place after the decision, the subject of the appeal, or after the commencement of the appeal, ignores the factual situation in reality. Whilst it was correct to say that the son remained formally enrolled in his previous school at the time of the Applicant's decision and at the commencement of the appeal against that decision, the son had in fact been withdrawn by his parents since May, 2007. Alternatively, it was open to the Appeals Committee to reach the conclusion that he had in fact been withdrawn since May, 2007 and that decision was it was submitted reasonable and rational on the *O'Keeffe* and *Keegan* tests (*O'Keeffe v. An Bord Pleanála* [1993] I.I.R. 39, and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642). However, it was further submitted that the fact that the son had enrolled in another school could not be determinative of the s. 29 appeal, nor could it act as a bar to such an appeal.

40. It was submitted on behalf of the Respondents that the question of whether the son's departure from his previous school was a withdrawal or an expulsion from that school is irrelevant to the Appeals Committee's considerations. The only fact of relevance it was submitted was that, the son's days in his previous school had come to an end and that he therefore had no school placement. The son had no longer a school placement and this was relevant to the s. 29 appeal, and not the cause of his departure from the CBS school. The Respondents submitted that there was no inconsistency in the decision of the Appeals Committee which referred to both a "withdrawal" and to the "open-ended suspension and refusal to take the son back to his previous school and that such did not

amount to errors on the face of the record”.

41. In relation to the issue as to whether or not the Applicant’s school had the capacity to accommodate the son, the Respondents submitted that this was discussed at the appeals hearing and also that it was clear from the affidavit of Mr. Ó Bradaigh at para. 17 that it was the school’s case that the school could not accommodate the son without some difficulty, and that it was not that there was no capacity in the school. Finally, the Respondents submitted that it was entitled to entertain and consider the misbehaviour of the son as a basis for the Applicant refusing to enrol the son. It was submitted that the Appeals Committee was entitled to consider the question of behaviour in any case in order to decide whether it was appropriate to make a recommendation that a child should be enrolled in a particular school. The question of behaviour had also been the basis upon which the Applicant viewed the application when it stated in its papers that it did not want to be the “last resort for difficult students”. Furthermore, the question of misbehaviour was discussed at the hearing.

#### **Appeals Procedure**

42. Section 29 of the 1998 Act provides for an appeal to the Secretary General of the Department of Education and Science where the board of management refuses to enrol a student in a school. Appeals Committee(s) is/are to be appointed by the Minister and shall act in accordance with such procedures as may be determined from time to time by the Minister following consultation with patrons, national associations of parents, recognised school management organisation and recognised trade unions and staff associations representing teachers. The procedures have to ensure that parties to an appeal are assisted to reach agreement on the matters, the subject of the appeal where such agreement is practicable, the hearings are to be conducted with a minimum of formality consistent with a fair hearing and appeals are to be dealt with within a period of 30 days from the date of the receipt of the appeal by the Secretary General. (The Secretary General can extend the period by not more than 14 days).

43. On determination of the appeal, the determination and the reasons for the determination are to be sent in writing to the Secretary General. Where the Appeals Committee upholds a complaint in whole or in part and it appears to the Appeals Committee that any matter which was the subject of the complaint (so far as upheld) should be remedied, the Appeals Committee shall make recommendations to the Secretary General as to the action to be taken. This is what occurred in this case.

44. The Secretary General is required to inform the parties of the determination of the Appeals Committee and the reasons therefor and may give such directions to the board of management as appears to the Secretary General to be expedient for the purpose of remedying the matter which was the subject of the appeal and the board is required to act in accordance with such directions.

45. In the case of a school which is established or maintained by a vocational education committee, an appeal against a decision of the board shall lie in the first instance to the vocational education committee and thereafter to the Secretary General.

46. The Minister is also required to prescribe the procedures for appeals to vocational education committees and which appeals should inquire into whether the procedure adopted by a board in reaching a decision or conducting an appeal was fair and reasonable and which appeals shall be by way of a full rehearing.

47. Where a student applies for enrolment to a school, such person or his or her parents may appeal against a refusal to enrol him or her in this school under section 29.

48. In my judgment, section 29 is sufficiently explicit to indicate that the scope of the appeal is restricted to an appeal against the particular decision, the subject matter of the appeal. This is clear from the language in section 29(1)(5)(6) and (7). Section 29(1) confers an entitlement of a student or his/her parent to appeal the decision (in the instant case the refusal to enrol a student in a school). Subsection (5) refers to the determination of an appeal and the reasons for that determination being sent to the Secretary General. Subsection (6) refers to the Appeals Committee upholding a complaint in whole or in part and it appearing to the Appeals Committee that any matter which was the subject of the complaint (so far as upheld) should be remedied, and that the Appeals Committee shall make recommendations to the Secretary General as to the action to be taken. This acknowledges that it is the original complaint that is to be investigated and in respect thereof the Appeals Committee may make recommendations, insofar as the complaint was upheld. Subsection (7)(b) refers to the directions of the board of management which the Secretary General may give for the purpose of remedying the matter which was the subject of the appeal. The section gives the facility for an appeal against a decision of the board of management in respect of the enrolment of a student having regard to its enrolment policy, and its application relevant to the particular facts at the time when the decision was made. In the instant case the decision is the board of management’s decision of the 14th August, 2007, refusing to enrol the son. If it were otherwise the Appeals Committee would be entitled to consider matters obtaining as of the date of its hearing, then there effectively would be no determination of the merits of the decision of the Board of Management in the first instance. The Appeals Committee remit is to consider the facts and circumstances obtaining as of the date of the decision the subject matter of the appeal.

#### **Findings of the Appeals Committee**

49. The Appeals Committee recited as a reason for its decision that “The enrolment policy of Mullingar Community College, with regard to transfers from post primary schools may be at variance with the rights of parents to enrol their child in the school of their choice”.

50. The enrolment policy of Mullingar Community College has been published and comprises the matters set out in section 15(2)(d) of the 1998 Act. There was no evidence that any directions had been given by the Minister in relation to this subsection.

51. In my opinion, what this reason is stating is that the enrolment policy may be *ultra vires* or contrary to law as it does not reflect adequately or at all the right of parents to enrol their child in the school of their choice. Section 15(2)(d) does not give an absolute right to a parent to enrol their child in the school of their choice. Such a right of parents to send their children to a school of their choice must be respected in the published enrolment policy of the school having due regard to the matters set out in section 15(2)(d). Furthermore, it appears to me that the manner in which this reason is drafted in the decision is directed at the enrolment policy itself, rather than its application by the board of management. It is the enrolment policy itself that is being impugned.

52. It is true to say that there was no express finding made by the Appeals Committee that the enrolment policy of the college was at variance with the rights of parents to enrol their child in the school of their choice. Nevertheless I conclude that this reason influenced materially the decision of the Appeals Committee and that the Appeals Committee was not entitled to entertain such consideration as a basis for allowing the appeal of the Notice Parties. The conclusion of the Appeals Committee that the enrolment policy of Mullingar Community College may be at variance with the rights of parents to enrol their child in the school of their choice is in the manner expressed is *ultra vires* the Appeals Committee powers. By giving such a reason for its decision it is clear that the issue raised was considered sufficiently important by the Appeals Committee as to form one of the reasons for its decision. Furthermore, parents do not have an absolute right to enrol their child in the school of their choice as I have already stated.

53. The second reason for the decision was:-

"Following the withdrawal of (the son) from his previous school, (the son) has no school placement."

54. It was submitted by the Applicant that at the time of the decision made by the Board of Management, the son remained enrolled in the C.B.S. School and that this was the relevant date for the purpose of the consideration by the Appeals Committee. The report of the Facilitator, Tom Ashe, dated the 12th September, 2007, (which was available to the Appeals Committee) stated:-

"I met [the Notice Party] in their home on Wednesday the 29th August, 2007, to discuss the issues in relation to this case. It was obvious that both were very anxious that a place in a school would be found for their son as quickly as possible because at this point in time, he had no school to return to in September. The son was a pupil in the CBS up to the end of May this year but because the school was not satisfied with his behaviour he was told to complete his studies for his Junior Certificate at home and to look for another school if he intended to pursue his studies. The Notice Parties were advised by the Principal that if they insisted the son was going to return to the CBS then he would put a proposal for the exclusion of the son to the B.O.M.. This 'informal expulsion' was put to the parents in late 07 and they did not appeal it because they were reluctant to have their son labelled but did feel uncomfortable with the status of the son...

However, the Principal of (Mullingar Community College) pointed out to me that she is precluded from considering the application of the son because of the school's published Admission and Enrolment Policy "it is not the policy of the B.O.M. to accept transfer applications for students already enrolled in post-primary schools, except in exceptional circumstances". At the time of application the son was still a pupil of CBS as he had not been expelled and at the time of writing this report this is still the case. The Principal also strongly maintains that it would not be in the interests of the existing students in her school and that it would have a very adverse effect on the morale of the staff which has toiled laboriously over several years to raise the profile of the school and they intend to do nothing that might interfere with that progress...

It is my understanding that the B.O.M. of the CBS proposes to meet on Tuesday next, 18th September to review the position of the son and to consider his return to the school or perhaps his formal expulsion."

55. It is clear from the board of management's refusal to enrol the son on 14th August, 2007, that the board of management considered the school's admission and enrolment policy and decided that the two students whose applications they were considering (including the son) were at the time enrolled in CBS.

56. In my opinion, the critical date is the date of the decision of the Board of Management in respect of which the appeal has been made at that time. The notice parties' son continued to be enrolled by CBS and the withdrawal from his previous school did not take place until some time in September. Whilst the Respondent Mr. Bell engages with the evidence and the provisions of the Education Acts in his affidavit, it is what is stated in the decision of the Appeals Committee which is relevant for this application. The transfer policy of the school did not accept application from students already enrolled in local post-primary schools, except in exceptional circumstances. From the wording of the reason given by the Appeals Committee, it appears that they were considering events that took place in September, 2007. Mullingar Community College was entitled to require strict compliance with this provision. The fact that a student is enrolled or not enrolled in a particular school is a matter of fact capable of ascertainment and is to be contrasted with the use of language such as "withdrawal from his previous school" and "has no school placement". The Appeals Committee was aware of the rule that was being invoked and if relying upon it in its decision the Appeals Committee could have addressed it.

57. In conclusion on this reason the Appeals Committee was not entitled to give this as a sustainable reason having regard to the college's enrolment policy at the time the college declined the son's application to enrol as a student on 14th August, 2007.

58. A further reason was:-

"Mullingar Community College has the capacity to accommodate the son in the pre-Leaving Certificate class".

59. In my opinion there was evidence from Mr. Ó Bradaigh upon which the Appeals Committee could have reached this conclusion. It cannot be said that the reason was irrational or unreasonable.

60. The fourth reason was:-

"Based on the evidence presented at the hearing the Committee felt that the level of misbehaviour by the son did not warrant a refusal to enrol in Mullingar Community College."

61. In its decision the Appeals Committee stated that it took into account, *inter alia*, the effort made by the son and his parents to address the sons' behavioural problems. Whilst I have been furnished with notes of what was stated by various parties at the hearing of the Appeals Committee, such notes are unofficial and have no status in these proceedings. It is very difficult for the court to conclude, from the wide range of evidence on matters such as the level of misbehaviour of the son which particular evidence was accepted by the Appeals Committee and formed the basis for the Appeals Committee giving its reason under this heading. However, from the documents submitted and the affidavits sworn, it cannot be said that this reason is irrational or unreasonable. There was evidence to support such a conclusion and the Applicant's witnesses participated at the hearing in the consideration of this issue.

62. Having regard to the conclusions I have come to in relation to the ambit of an appeal hearing and the facts to be entertained by such hearing, I conclude that the Appeals Committee did not act in accordance with its jurisdiction in coming to its decision.