

**THE HIGH COURT  
JUDICIAL REVIEW**

**2008 287 JR**

**BETWEEN**

**LUCAN EDUCATE TOGETHER NATIONAL SCHOOL**

**APPLICANT**

**AND**

**THE SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SCIENCE AND ALBERT Ó'CEALLAIGH, MICHAEL HAYES  
AND TOM ASHE**

**RESPONDENTS**

**AND**

**A.B. AND C.D.**

**NOTICE PARTIES**

**Judgment of Mr. Justice O'Keeffe delivered on the 27<sup>th</sup> day of January, 2011**

1. In this case, the applicant seeks relief by way of judicial review quashing the decision of the second, third and fourth named respondents which upheld the appeal of the notice parties on behalf of their son, ("S.") under s. 29 of the Education Act 1998 against the decision of the applicant to refuse him enrolment, which determination was communicated to the applicant by letter from the first named respondent dated 17<sup>th</sup> December, 2007. An order of *certiorari* was also sought in respect of the direction of the first named respondent communicated to the applicant by letter dated 17<sup>th</sup> December, directing the applicant to make arrangements for the enrolment of S. to the applicant in January 2008.

**Background**

2. The applicant is a national school under the patronage of Lucan Educate Together School Limited, a registered charity established around September 1997.

3. The first named respondent is named in these proceedings in consequence of the provisions of s. 29 of the Education Act 1998. The second, third and fourth named respondents were appointed by the first named respondent to act as an appeal committee in accordance with s. 29 of the Act of 1998 (hereafter collectively referred to as "the Committee").

4. The applicant in 2001 established an Outreach Class for children with Autism. The applicant was advised by letter dated 13<sup>th</sup> June, 2000, from the Department of Education and Science ("the Department") of the terms for the class and support that was envisaged would be available to the class. The applicant was advised by the Department that in the event of the establishment of a special class and in addition to teaching and childcare staff, it was envisaged that a multidisciplinary team would be available to support the class. The multidisciplinary team, it was stated, included support services for special classes established. The multidisciplinary team would include such support services as child psychiatrist, clinical psychologist, social worker, a speech and language therapist, childcare staff and nursing personnel.

5. The applicant asserts that on the basis of the assurances provided to the applicant by the Department, the applicant established an Outreach Class with the essential support services to be provided by Beechpark Services which is an agency of the Health Service Executive providing services for children with autism spectrum disorder.

6. The applicant drew up an enrolment policy for admission to its Outreach Class in accordance with its obligations pursuant to s. 15 of the Act of 1998. The enrolment policy in relation to the admission of children to Outreach Classes specified various requirements to be fulfilled in order to ensure that the school is the right placement for a particular child. The first of the requirements was assessment and approval from Beechpark Services, Clinical Support Team (under the auspices of the HSE). It further stated:-

"A child will be accepted for admission when all of the following criteria have been met;

(a)(i) the child has a diagnosis of an Autism Spectrum Disorder (this diagnosis being made from a professionally recognised clinical and psychological assessment procedure).

(ii) if the child presents with a general learning disability, it must fall within the mild range (this diagnosis must also be made from a professionally recognised clinical and psychological assessment procedure)."

7. S. was placed on a pre-enrolment list for the applicant's mainstream infant classes for September 2005. A request was made by the notice parties to defer the school place offered to him to September 2006. In June 2006, the notice parties contacted the applicant to request that S. be transferred to a pre-enrolment list for the Outreach Class. The applicant's Principal advised the notice parties for S. to satisfy the enrolment criteria for the Outreach Class for enrolment to the class to take place.

8. On 30<sup>th</sup> January, 2007, a meeting was held between the applicant's Principal and the Chairperson of the Board of Management of the applicant (Ms. Patricia Duffy) and Ms. Catherine O'Loughlin of the Education Welfare Board. An up-to-date psychological report detailing S's scores in all areas of development was requested and it was agreed that this report would be provided to the applicant

by the second named notice party.

9. The notice parties furnished a report to the applicant in May 2007. The applicant's Principal concluded that the report did not recommend S. for a placement in the Outreach Class and that S. did not meet the criteria for enrolment under the applicant's enrolment policy. The Principal advised the notice parties of the applicant's decision in this regard on 22<sup>nd</sup> May, 2007 and the notice parties indicated their intention to procure further reports.

10. The applicant's Principal sought a new assessment from the notice parties in relation to S., none was forthcoming.

11. Ultimately, by letter dated 5<sup>th</sup> October, 2007, the applicant advised the notice parties that S. would not be enrolled in the Outreach Class. The letter stated:-

"It is the decision of the Board of Management of Lucan Educate Together National School that we believe we cannot meet the educational requirements for S. as recommended in his psychological report. S's diagnosis of 'significant developmental delay' and 'significant learning disability' (referring to the psychological assessment reports submitted in May 2007) is such that we believe our classes are not suitable for his educational needs."

12. On 22<sup>nd</sup> October, 2007, the applicant received notice of appeal by the notice parties pursuant to s. 29 of the Act of 1998 which notice included new assessments on S. which had not been previously furnished to the applicant.

13. A Special Educational Needs Organiser prepared a report for the hearing of the appeal which was heard on 30<sup>th</sup> November, 2007.

14. The Committee upheld the notice parties' appeal against the applicant's decision to refuse enrolment to S..

15. The decision of the Committee stated, *inter alia*, as follows:-

"Lucan Educate Together has the capacity in its Outreach Class to enrol S.. This is established in the report of the Special Educational Needs Officer (Ms. Maggie Stapleton) and was accepted by the speakers on behalf of the school in the course of the hearing.

S. satisfies the main criteria for enrolment in the Outreach Class. The report by Professor Fitzgerald, 6<sup>th</sup> June, 2006 states that he 'meets the criterion for Autism with sub-threshold Attention Deficit Hyperactivity Disorder DSM – (IV) and mild Learning Disability...'

It is the view of the Committee that the inclusion in the school's enrolment policy of the criterion that 'if the child presents with a general learning disability, it must fall within the mild range' is inappropriate in the context of recent legislation. Notwithstanding this, two other reports indicate that S. is indeed functioning within the mild range. Accordingly he also satisfies this criterion."

16. The Committee recommended that S. be enrolled in an Outreach Class with the applicant when the school reopened in January 2008. In relation to the decision, it was agreed that capacity of the Outreach Class to enrol S. was never an issue.

17. The report of the Prof. Fitzgerald of 6<sup>th</sup> June, 2006 (insofar as is relevant) stated that he saw S. who met "the criteria for Autism with sub-threshold Attention Deficit Hyperactivity Disorder DSM – (IV) and mild Learning Disability according to Ms. Jackie Flanagan".

18. The report of Ms. Flanagan, Senior Clinical Psychologist, states as follows:-

"S. is a young man who currently presents as having an intellectual disability. His adaptive skills fall within the mild range of Adaptive Functioning. In the light of his scores on the Connors Scale, S. would benefit from referral to a psychiatrist."

19. The report states that Adaptive Functioning is a measurement of how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of them in their particular age group. It stated that overall, S. obtained a score which placed him in the mild range of Adaptive Functioning. The report did not state he had a mild learning disability.

20. A report of Pól Bond dated 8<sup>th</sup> October, 2007, obtained by the notice parties diagnosed S. as having significant development delay and significant learning needs.

21. A report of an assessment of 13<sup>th</sup> and 20<sup>th</sup> February, 2007, by Ciara McCarthy, Clinical Psychologist of Lucan Child and Family Centre in consultation with Aisling Whelan, Senior Educational Psychologist, of Beechpark Services diagnosed S. as having a significant development delay autism and a significant disability. A report of Catriona McClean of 9<sup>th</sup> October, 2007, found that S. would benefit from a school environment where he could enhance his social skills and enjoy the company of other children. She said she believed that he would benefit socially from a suitable learning environment and learn to cooperate more freely and routinely.

22. Ms. Duffy stated that the findings of the committee were flawed in conflating issues around intellectual disability with adaptive skills which were two different areas. She said that none of the reports provided a basis for the committee concluding that S. had a mild learning disability.

23. On 8<sup>th</sup> January, 2008, Ms. Duffy wrote to the notice parties requesting them to contact the Director of Services at Beechpark in order to request a letter of acceptance and advised the notice parties of the applicant's need for written confirmation of Beechpark Service Agreement to support S. with the full range of clinical services that he required at the applicant's school. This letter has been copied by the notice parties to the Department on 11<sup>th</sup> January, 2008, wrote to the applicant stating that it was the applicant's responsibility to apply for whatever resources were required to facilitate S's enrolment in January 2008.

24. Ms. Duffy stated that Beechpark Services had confirmed to the applicant that they were not an appropriate service to meet S's needs.

## **Grounds of Opposition**

25. The grounds of opposition stated that the respondents did not admit that the applicant's enrolment policy for admission to its Outreach Class was in accordance with its obligations pursuant to s. 15 of the Education Act or its obligations pursuant to other provisions of the Education Act. It was not admitted that the applicant through its enrolment policy was entitled to limit admissions to the Outreach Class to children on the autistic spectrum with a mild general learning disability. It stated that it was open to the committee to conclude that a diagnosis of autism was the main criterion for enrolment in the Outreach Class. It was contended that the committee was entitled to rely on the report of Prof. Fitzgerald on 6<sup>th</sup> June, 2006, and it was open to the committee to find that S. suffered from autism and mild general learning disability. It was stated that the committee was entitled to uphold the appeal even if S. was not suffering from a mild general learning disability. It was contended that having regard to the various opinions expressed in the reports referred to by the Appeals Committee that those terms could be interpreted as meaning that S. was in the mild range.

26. It was denied that the Committee was bound by the enrolment policy. It was denied that the Committee failed to understand the difference between a mild general learning disability and a significant learning disability.

#### **Affidavit for Chairperson of Appeals Committee**

27. Mr. Albert O'Ceallaigh, Chairperson of the Appeals Committee and one of the respondents referred in his affidavit to the applicant's contention in relation to its enrolment policy that a letter of acceptance from Beechpark Services was required for enrolment in the Outreach Class. He said that at the hearing this matter was raised and members of the Committee expressed the view that this enrolment policy gave the decision making power as to who should be enrolled in the school to Beechpark Services. He also referred to the fact that S's mother was not aware from earlier communications that a professional assessment would be required before the child could be enrolled in the Outreach Class. The notice party stated that when she was invited in May 2007, to an information evening for prospective new parents, she thought that the requirements for enrolment had been met.

28. He also referred to a difference as to the precise reasons for the school's refusal. On the one hand it was based on the findings contained in the report of Ms. McCarthy and Ms. Whelan and he stated that in the evidence at the hearing the applicant stated its main grounds for refusal was the appropriateness of placement in the Outreach Class. He stated that the letter of 8<sup>th</sup> February, 2007, from the Board of Management to the parents suggested that availability of resources appeared to be the issue which exercised the Board of Management. He stated that the Committee did not consider lack of resources to be a reason for refusal in circumstances where applications for resources may be made to the Department through the Special Educational Needs Organisers when a child is enrolled in a school. The Committee understood that the Department was under an obligation to make provision for an appropriate education.

29. He said that as far as the Committee was concerned, the main criterion for which the class was established was to cater for children with autism. He contended that it was open to the Committee on the facts defined that that was the main criterion for the enrolment policy.

30. In relation to the conclusions by Prof. Fitzgerald he contended that the Committee was entitled to rely on the report in reaching its conclusion. He said that the applicant notwithstanding the centrality of the level of learning disability to its decisions did not raise any issue in relation to Prof. Fitzgerald's report during the hearing. He said it was open to the Appeals Committee to conclude that S. did fall within a mild general learning disability.

31. In relation to the reports of Ms. Flanagan and Prof. Fitzgerald, he said that the question of whether two of the reports indicated that S. was functioning within the mild range and was not determinative of the appeal. He said the overarching conclusion of the Committee was that the school's enrolment policy insofar as it limited the categories of children who may be admitted was inconsistent with the Education Act. He said that in those circumstances whether or not S. fell within the mild general learning disability category was not central to the Appeals Committee's determination. The central issue in the determination was that the school's enrolment policy, despite its terms could not preclude the Appeals Committee from upholding the s. 29 appeal. The Committee felt that the policy did not respect the parental right of choice guaranteed by the Education Act, the object of maximum accessibility under the Act, the requirement to ensure that the educational needs of all students including those with a disability or special educational needs were provided for and the principle of equality.

#### **Evidence of Dr. Claire Mangan**

32. Dr. Claire Mangan, Consultant Educational Psychologist having reviewed the affidavits sworn in this application stated that she believed that the applicant's first criterion that an applicant for a place must have a diagnosis of autism and a general learning disability falling within the mild range which diagnoses must be made from a professionally qualified recognised clinical and psychological assessment procedure would be deemed representative of current specialist outreach provisions that have developed in mainstream schools within the wider educational sector. This criterion would be consistent with the education of children in the least restrictive environment. There were some children for whom this provision was more appropriate than others who are less likely to benefit from this type of specialist placement.

#### **Legislative Provisions**

33. Section 15 of the Education Act 1998 sets out the duty of a Board of Management (including the applicant) to manage the school and provides as follows:-

"(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 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."

34. Section 29 of the Education Act 1998, provides as follows:-

"(1) Where a board or a person acting on behalf of the board –

(a) permanently excludes a student from a school, or

(b) suspends a student from attendance at a school for a period to be prescribed for the purpose of this paragraph, or

(c) refuses to enroll a student in a school, or

(d) makes a decision of a class which the Minister, following consultation with patrons, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers, may from time to time determine may be appealed in accordance with this section,

the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may, within a reasonable time from the date that the parent or student was informed of the decision and following the conclusion of any appeal procedures provided by the school or the patron, in accordance with section 28 , appeal that decision to the Secretary General of the Department of Education and Science and that appeal shall be heard by a committee appointed under subsection (2).

(2) For the purposes of the hearing and determination of an appeal under this section, the Minister shall appoint one or more than one committee (in this section referred to as an "appeals committee") each of which shall include in its membership an Inspector and such other persons as the Minister considers appropriate.

(3) Where a committee is appointed under subsection (2) the Minister shall appoint one of its number to be the chairperson of that committee and who, in the case of an equal division of votes, shall have a second or casting vote.

(4) In hearing and determining an appeal under this section an appeals committee 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 organisations and recognised trade unions and staff associations representing teachers and such procedures shall ensure that –

(a) the parties to the appeal are assisted to reach agreement on the matters the subject of the appeal where the appeals committee is of the opinion that reaching such agreement is practicable in the circumstances,

(b) hearings are conducted with the minimum of formality consistent with giving all parties a fair hearing, and

(c) appeals are dealt with within a period of 30 days from the date of the receipt of the appeal by the Secretary General, except where, on the application in writing of the appeals committee stating the reasons for a delay in determining the appeal, the Secretary General consents in writing to extend the period by not more than 14 days.

(5) On the determination of an appeal made under this section, the appeals committee shall send notice in writing of its determination of the appeal and the reasons for that determination to the Secretary General.

(6) Where –

(a) an appeals committee upholds a complaint in whole or in part, and

(b) 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.

(7) As soon as practicable after the receipt by the Secretary General of the notice referred to in subsection (5), the Secretary General –

(a) shall, by notice in writing, inform the person who made the appeal and the board of the determination of the appeals committee and the reasons therefor, and

(b) in a case to which subsection (6) applies, may in such notice give such directions to the board as appear to the Secretary General (having regard to any recommendations made by the appeals committee) to be expedient for the purpose of remedying the matter which was the subject of the appeal and the board shall act in accordance with such directions.

(8) The Minister, in consultation with patrons of schools, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, shall from time to time review the operation of this section and section 28 and the first such review shall take place not more than two years from the commencement of this section.

(9) In the case of a school which is established or maintained by a vocational education committee an appeal against a decision of the board of such school shall lie, in the first instance, to the vocational education committee and thereafter to the Secretary General in accordance with subsection (1).

(10) The Minister shall, from time to time, following consultation with vocational education committees, national associations of parents and recognised trade unions and staff associations representing teachers, prescribe –

(a) the procedures for appeals under this section to vocational education committees, and

(b) which appeals shall 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 re-hearing.

(11) The Secretary General may, in accordance with sections 4 (1) (i) and 9 of the Public Service Management Act, 1997, assign the responsibility for the performance of the functions for which the Secretary General is responsible under this section to another officer of the Department of Education and Science.

(12) For the purposes of subsection (1)(c), 'student' means a person who applies for enrolment at a school and that person or his or her parents may appeal against a refusal to enroll him or her in the same manner as a student or his or her parents may appeal a decision under this section."

35. Section 19 of the Education (Welfare) Act 2000, provides as follows:-

"(1) 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 section 15(2)(d) of the Act of 1998.

(2) The parent of a child who has made an application referred to in subsection (1) shall provide the recognised school concerned with such information as may be prescribed by the Minister.

(3) As soon as practicable, but not later than 21 days, after a parent has provided, in accordance with subsection (2), such information as may be prescribed by the Minister thereunder, the board of management of the school concerned shall make a decision in respect of the application concerned and inform the parent in writing thereof.

36. As a result of the decision of the Supreme Court (23<sup>rd</sup> November, 2010), a *Board of Management of St. Molaga's National School v. Secretary General of the Department of Education & Ors*, I invited the parties to make any additional submissions they wished. The invitation was accepted.

37. The issue determined by the Supreme Court was done by way of preliminary issue of interpreting the jurisdiction of the Appeals Committee when hearing an appeal pursuant to s. 29 of the Act of 1998. In the course of her judgment, Denham J. stated at p. 11:-

"Consequently, the appeals process enables the appeals committee to have a full hearing on the matter and if so determined to replace its judgment on the matter for that of the Board and to make such recommendations as it considers appropriate. Such a decision is anticipated as a possible outcome of an appeal by the section itself, in the provisions enabling a Secretary General to require a board to remedy a situation in accordance with the recommendation of an appeal committee."

38. Denham J. further stated that the Appeals Committee:-

"is not limited to a review, for example, of the lawfulness or reasonableness, of a decision of a board of management."

39. She stated that she was satisfied that the Appeals Committee had the jurisdiction to conduct a full hearing of an appeal under s. 29 of the Act and was not limited to a review of the decision of the board of management.

#### **Decision**

40. This Court confines its judgment to the decision of the Committee and the reasons as stated therefor. Much of the extensive affidavit evidence of the Chairperson of the Committee is not contained in the decision and has to be excluded. Section 29 of the Act of 1998 requires that the determination of the appeal and the reasons for the determination are communicated to the Secretary General. Therefore, what is communicated is what is contained in the decision itself and not the supplementary affidavit evidence of

the Chairperson. The evidence of Dr. Mangan is also excluded together with any other evidence that is not relevant.

41. The first reason, that is given, namely the applicant had the capacity to enrol S. is not objectionable.

42. The second reason relies on Dr. Fitzgerald's report who in turn relies on the report of Dr. Flanagan to conclude that S. had a mild learning disability. This Court is satisfied that the report of Dr. Flanagan does not deal with S. having a mild learning disability. The report does refer to his adaptive skills which in turn are defined in the report, but this is a different condition to a learning disability. Furthermore, the report of Dr. Fitzgerald cannot be read as reasonably establishing that S. suffered from a mild learning disability. The court concludes that this reason was not substantiated on the facts/evidence available and is therefore an unreasonable conclusion.

43. As is a subsidiary point, it was not unreasonable for the Committee to describe autism as the main criterion.

44. The Committee next concludes that the inclusion in the school's enrolment policy of the criterion that "if the child presents with a general learning disability, it must fall within the mild range", is inappropriate in the context of recent legislation. No particulars are given as to what legislation is referred to although the affidavit of the Committee Chairperson refers to various legislative provisions. I have already referred to s. 29 as requiring the reasons for a determination to be set out in the decision. The first conclusion to be stated in relation to this reason, that a part of the school enrolment policy is inappropriate in the context of recent legislation is that it is vague and uncertain in its own terms. It purports to be a determination of the lawfulness of a part of the school's enrolment policy in the context of unspecified recent legislation. In my judgment, as expressed, it does not amount to a valid reason.

45. The enrolment policy is prepared by the Board of Management in accordance with Section 15(2)(d). There is no evidence before the court that the Minister made any directions in relation to the applicant's enrolment policy. Section 19 of the Education (Welfare) Act 2000, provides that the Board of Management shall not refuse to admit as a student in such school a child, except for such refusal is in accordance with the enrolment policy published under s. 15(2)(d) of the Act of 1998. In my opinion, the Committee cannot strike down or disregard a provision in the enrolment policy of a school and substitute what it may consider as appropriate. The enrolment policy when published has to have regard to the matters set out in Section 15(2)(d). This includes respecting the right of parents to send children to a school of the parents' choice, but it does not confer on a parent the right to send a child to the school of their choice.

46. Finally, the reasons conclude that two of the reports indicate that S. is indeed functioning within the mild range and it is stated that he also satisfies such criterion. Again, the decision does not state whose reports are relied on for this conclusion. If there is reliance on the report of Prof. Fitzgerald or Ms. Flanagan, this again is unsupported by their reports. Accordingly, this further reason should be struck down as unreasonable and unsupported by evidence.

47. The Act does not expressly make the Appeals Committee hearing the forum for determining whether the enrolment policy is valid or not having regard in particular to the many weighty considerations set out in the affidavit of Mr. O'Ceallaigh. Furthermore, s. 29(6) provides the procedure when a complaint (the subject matter of an appeal) is upheld in whole or in part. Recommendations may be made to the Minister as to the action to be taken. The appeal of the notice parties did not expressly put in issue the validity of the enrolment policy. At the conclusion of its decision the Committee suggested the Board of Management should revisit its enrolment policy for Outreach Classes in light of issues discussed in the course of the hearing with particular reference to recent legislation. This was a "*suggestion*" not a recommendation. No direction was given by the Minister on this matter under Section 29(7)(g).

48. I will hear counsel as to the appropriate reliefs.