Neutral Citation No: [2021] NIQB 21	*Ref:* COL11435
	ICOS No: 2021/14643/01
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 25/02/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR140 ACTING BY HIS MOTHER AND NEXT FRIEND

IN THE MATTER OF A DECISION BY THE BOARD OF GOVERNORS OF ST MALACHY'S COLLEGE BELFAST

_____

Notice Parties
(1) EDUCATION AUTHORITY
(2) DEPARTMENT OF EDUCATION

Third Party Intervenor
NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

_____

Mr Hugh Southey QC led Mr Sean Devine (instructed by Finucane Toner, Solicitors) for the applicant
Mr Paul McLaughlin QC led Mr Alisdair Fletcher (instructed by Joseph Napier of Napier & Co) for the respondent
Ms Nessa Agnew, Solicitor, for the Education Authority
Mr Philip McAteer for the Department of Education
Ms Monye Anyadike-Danes QC for NICCY

_____

COLTON J

Introduction

[1] The applicant is an 11 year old boy.

[2] He is a Year 7 pupil at Holy Cross Primary School in Belfast.

[3] Because he is a minor he brings these proceedings by his mother and next friend.

[4] Given that he is a minor, I grant him anonymity and he is to be referred to as JR140. Nothing is to be published from this judgment which would lead to his identification.

[5] He is one of many pupils who will be applying for admission to post primary schools in September 2021. The application period for such admission opens on Monday 1 March and closes on Tuesday 16 March.

Statutory Framework

[6] The relevant statute which governs the process whereby pupils transfer from primary to post primary schools in Northern Ireland is the Education (Northern Ireland) Order 1997 ("the Order") and in particular Part III thereof.

[7] For the purposes of this application the key provisions are as follows:

[8] Under Article 10 of the Order the Board of Governors of post primary schools must make arrangements for the admission of children to their school.

[9] In doing so, they must draw up, and may from time to time amend, the criteria to be applied in selecting children for admission to the school – see Articles 13 and 16.

[10] Article 16 provides:

> *"**16-**(1) Subject to the following provisions of this article, the board of governors of each grant aided school shall draw up, and may from time to time amend, the criteria to be applied in selecting children for admission to the school under Article 13.*
> *…*
>
> *(3) Where the criteria to be applied in respect of any school have been published under Article 17(2), the board of governors shall not amend those criteria in respect of that school year without the approval of the Department."*

[11] Sub-paragraphs (5) and (7) of Article 16 enable the Department to make regulations prescribing both the content and priority ranking of criteria and also a power to direct Boards of Governors to reconsider its criteria or that certain criteria should not be published.

[12] The Department has made no such regulations under Article 16.

[13] However, under Article 16B the Department may issue guidance as to admissions. Article 16B provides:

> ***"16B**-(1) The Department may issue, and from time to time revise, such guidance as it thinks appropriate in respect of the arrangements for the admission of pupils to grant aided schools and the discharge by …*
>
> *(b) the boards of governors of grant aided schools …*
>
> *(2) The guidance may in particular set out aims, objectives and other matters in relation to the discharge of those functions.*
>
> *(3) It shall be the duty of –*
>
> *(a) each of the bodies mentioned in paragraph (1) …*
>
> *to have regard to any relevant guidance for the time being in force under this article."*

[14] Article 17 deals with the obligations of the Education Authority to publish the arrangements for the admission of children to schools including the publication of the criteria drawn up by the Board of Governors.

[15] The Department has published guidance under Article 16B. The most recent iteration is circular no: 2016/15 which was revised and was recently issued on 21 October 2020. The guidance deals with the procedure for transfer from primary to post primary education and specifically at section 9 deals with admissions criteria.

The Applicant

[16] Returning to the applicant, in her supporting affidavit his mother informs the court that he is "heart set" on going to St Malachy's College Belfast in September 2021 when he completes his primary school education.

[17] He had been registered to sit the GL examination which in the past was the principal criteria for transfer to the school. This reflects the fact that, as the court understands it, the vast majority, if not all grammar schools in this jurisdiction relied on academic selection based on test results.

[18] Those examinations or tests will not take place this year because of restrictions arising from the Covid-19 pandemic.

[19] In accordance with the relevant timetabling the entrance criteria for St Malachy's College were published by the Education Authority on 2 February 2021.

[20] It is these criteria which the applicant challenges as unlawful.

History of Proceedings

[21] The proceedings were issued on Friday 19 February and received by the court on Monday 22 February.

[22] On the same day the matter was listed for a review.

[23] I am obliged to all the parties for their attendance at such short notice at this review.

[24] At the review hearing I granted leave on the papers and gave directions for the filing of position papers and affidavits and listed the matter for hearing on Wednesday 24 February at 3.00pm.

[25] Prior to the hearing the court received a further note and bundle of authorities from the applicant; a written submission; and an affidavit together with exhibits from the respondent.

[26] The court also received position papers from the two notice parties and written submissions from the intervening party.

[27] Again, I am grateful to the parties' legal representatives for their assistance in this regard.

[28] Mr Hugh Southey QC led Mr Sean Devine instructed by Finucane Toner solicitors for the applicant.

[29] Mr Paul McLaughlin QC led Mr Alisdair Fletcher instructed by Joseph Napier of Napier & Co for the respondent. The Education Authority were represented by Ms Nessa Agnew, solicitor. The Department of Education were represented by Mr Philip McAteer.

[30] The NICCY was represented by Ms Monye Anyadike-Danes QC.

[31] In summary:

> It is the duty of the Board of Governors to draw up the criteria for admission – Article 16(1).

[32] In doing so the Board is under a duty "to have regard to any relevant guidance published by the Department."

[33] In short it is the applicant's contention that the admissions criteria of the school do not follow the guidance and its departure from the guidance is unjustified.

The Admissions Criteria

[34] The admissions criteria drawn up by the Board provide as follows:

> *"In the event of there being more candidates in any criterion than places available within such criterion priority will be given in descending order to those who indicate on the online transfer form/application or its equivalent that they:*
>
> *(a) Where registered to sit the GL entrance assessment on 30 January 2021 or were granted special provision;*
>
> *(b) Are applicants who are siblings of present or past pupils of St Malachy's College;*
>
> *(c) Are applicants who are the eldest boy of the family eligible to transfer to mainstream post primary education. This criterion covers 'only' children and will treat twins or other multiples as joint eldest;*
>
> *(d) Are a pupil who is entitled to Free School Meals at the date of application (*the criteria goes on to explain the meaning of free school meals*);*
>
> *(e) Are pupils from the following contributory primary schools (not listed in order of preference)."*
>
> [63 schools listed]

The criteria are completed with (f) and (g) which are in effect "tiebreakers" and are not relevant to this dispute.

The Guidance

[35] The guidance in relation to admissions criteria is set out in section 9 of the Circular to which I have referred.

[36] Sections 9.1-9.5 set out some general matters by way of introduction.

- Admissions are a matter for individual school's Board of Governors.
- Criteria are not subject to the Department's approval.
- Department provides recommended and not recommended criteria which all Board of Governors are required by law to have regard to.

- Board of Governors should assume that admission numbers will not be increased.

- Schools should note the importance of ensuring that their admission criteria and the order and outworking of these criteria admit the children to whom they wish to give priority.

- The criteria should be agreed by the Board of Governors as a whole.

The Recommended Criteria

[37] These are set out at 9.6 as follows:

> *"9.6 The recommendation criteria are:*
>
> - *Applicants who are entitled to FSM (FSME) priority to be given so that the proportion of such children admitted is not less than the proportion of first preference FSME applications received within the total number of first preference applications received (See paragraph 9.8 and 9.14). Any school using this criteria* ***must*** *list it as the first criteria.*
>
> - *Applicants from a feeder/named primary school;*
>
> - *Applicants residing in a named parish (with near or suitable school);*
>
> - *Applicants residing in a geographically defined catchment area (with near suitable school).*
>
> - *Applicants for whom the school is the nearest suitable school.*
>
> - *Applicants who have a sibling currently attending the school.*
>
> - *The tie-breaking criteria.*
>
> *9.7 The Department no longer specifically recommends the use of "eldest child" criterion. Boards of Governors that wish to use such criterion are advised to consider carefully how it is constructed. Advice on the issue to consider when formulating an "eldest child" criterion is included at Annex 2."*

[38] Admissions criteria that are not recommended are set out at 9.15:

*"9.15 It is recommended that post primary schools **do not** use the following criteria:*

- *Preference criteria i.e. the prioritising of applicants according to the level of performance of an application.*
- *Familial criteria beyond sibling currently attending the school.*
- *Criteria prioritising children of employees/governors of a school.*
- *Distance tie-breakers – as a disadvantage rural/outline application.*
- *Criteria relating to compelling individual circumstances."*

The Grounds of Challenge

[39] Against this background the applicant focuses on 4 issues which he says constitute an unlawful departure from the criterion:

(i) The first relates to a failure to place criterion (d) (FSME Criterion) as the first criterion in terms of priority.

(ii) The second is that criterion (b) is unlawful as familial criteria beyond siblings currently attending a school is not recommended.

(iii) The third challenge relates to criterion (c) which the applicant says is contrary to the warning to Board of Governors to ensure when using an "*eldest child*" criterion to ensure the phrase "*child of the family*" is used as opposed to "*boy of the family*."

(iv) After leave was granted the Order 53 Statement was amended to allege a failure to include what are referred to as the "*geographical criteria*" in the Board's criterion.

[40] No issue was taken in relation to the amendment and the matter proceeded on the basis that the amendment was granted – even if this was not formally done by the court.

The Respondent's Evidence

[41] The court received an unsworn affidavit from the Chairman of the Board of Governors, Sir Gerald Loughran.

[42] The affidavit has been read by and approved by the Principal of the College, Mr Paul McBride.

[43] Additional exhibits include:

- The admissions criteria for the school in September 2020.

- Draft criteria – based on the premise that there would be academic selection. The draft criteria reflected the previous criteria used by the Board. These criteria were not published when it became clear there would be no academic selection.

- Minutes of the Board of Governors' meeting at which the selection criteria were agreed – 19 January 2021.

- A spreadsheet prepared at the request of the Chairman in advance of the meeting.

[44] The minutes of the meeting reflect in effect a one item agenda (with one short AOB item).

[45] The minutes indicate a discussion and focus on whether or not academic selection was a potential criteria for admissions in September 2021. After discussion which identified the relevant issues the minutes record that the Board of Governor's all agreed that academic evidence would not be used as a criteria for admission for September 2021. This was to be for one year only which was made clear in the website and in the criteria which were subsequently published.

[46] The minutes go on to record at paragraph (8) as follows:

> *"The Board of Governors reviewed the document "the procedure for transfer from primary to post primary school issued by DE on 21 October 2020. They discussed the recommended criteria listed and criteria that are not recommended. Having due regard for the advice given by DE and advice from our legal adviser, the Board of Governors agreed the following in respect of the criteria to be used in the order listed below."*

[47] The minutes then record the actual criteria which were subsequently adopted. In relation to criterion (b) the following is added:

> *"It was agreed that it was important to retain siblings from a pastoral perspective and also siblings of past pupils as it is part of the ethos and traditions of the college to maintain the family link and we would have pupils that have just left the college while a younger sibling is just joining."*

[48] At (ix) the minutes record that the Board of Governors agreed to remove the previous criteria relating to applicants who are sons or grandsons of former pupils of St Malachy's College in keeping with Department of Education guidance avoiding criteria beyond siblings. They also record that they made some alterations to the "*tie-breaker*" criterion which are not in issue.

[49] The minutes also note that special provision had been made for applicants who are transferring from primary schools outside Northern Ireland and those that have received more than half of their primary education outside Northern Ireland.

[50] In the Chairman's affidavit he explains the reasoning behind the adoption of the admissions criteria.

[51] He sets out the background and, in particular, that previous criteria had been based on academic selection which were then supplemented by sub-criteria.

[52] With the exception of the removal of criterion related to applicants who had parents and grandparents at the school these sub-criteria mirror the criteria adopted for 2021 save that a new criterion is introduced at (a) namely applicants who were registered to sit the GL entrance assessment on 30 January 2021 or were granted special provision. The former applies to the applicant.

[53] The affidavit points out that these criteria had never previously been challenged.

[54] Focussing on the specific challenges raised by the applicant, namely the failure to adopt the specific FSME criteria recommended by the guidance the Chairman makes a number of points:

- He draws the court's attention to the fact that the school has traditionally attracted a high proportion of applicants who are entitled to FSME. The affidavit includes a table which sets out the numbers of FSME pupils as a percentage of its total enrolment as compared with the grammar sector as a whole in NI. The statistics for the past four years indicate that the percentage is significantly higher than the average for both controlled grammar schools and voluntary grammar schools.

- During each of these years the college used the same admission criteria with the same priority as were used in 2020. The figures demonstrate that for 2016/17 the respondent had a percentage of enrolment of FSME students of 21.2%. For 2017/18 the figure was 23.6% for 2018/19 the figure was 23.3% and 2019/20 the figure was 22.4%. This compares with a range of 12.4% to 12.5% for controlled grammar schools and an average of 14% to 14.8% for voluntary grammar schools and an overall average for all grammar schools ranging between 13.7% to 14.3%.

- The affidavit explains the dilemma faced by the Board about the uncertainty of academic selection based on the GL entrance assessment not proceeding which led to a necessity to review its criteria – as reflected in the minutes.

- Focussing on the FSME criteria in particular a modelling exercise was carried out to ascertain what would have happened to the pupils who applied for admission in September 2020 if the college had omitted the first criterion (i.e. GL Assessment) and made admissions decisions based solely on the remaining (2020) criteria. In addition, the modelling included replacement of the first criterion (GL Assessment) with the FSME criteria in the form recommended in the Department of Education's Guidance.

[55] This table was prepared by Mr McBrien, the Bursar, under the instruction of the Principal, Mr McBride, and having being initiated by the Chairman. The spreadsheet was presented to the Board on 19 January 2021. At paragraph 12 of his affidavit the Chairman refers to:

> *"The analysis clearly showed that in September 2020 more applicants entitled to free school meals would have been admitted by using the existing non-academic related criteria (including FSME as criterion 4) than by using the Department's recommended FSME criterion and by ranking it first. In 2020, a total of 229 first preference applicants were received, of which 69 pupils were entitled to free school meals. This was not uncommon, in light of the high percentage of pupils entitled to free school meals who traditionally apply to the college. By using the Department's FSME criterion first, 51 FSME applicants would have been admitted. By coincidence this was the same as the number of FSME pupils who were actually admitted in 2020, using academic selection. In marked contrast, if the Board had used only its existing sub-criteria in 2020, a total of 62 FSME pupils would have been admitted."*

[56] The point about the exercise is that based on the data there was a real risk that a decision to follow the Department's recommended FSME criterion for 2021 could actually operate to the disadvantage of FSME pupils.

[57] In light of that risk the Board decided to retain its version of the FSME criterion rather than that of the Board. The Chairman avers:

> *"In light of the consistent pattern of FSME pupils who have applied to the college in recent years the Board of Governors did not consider that next year was likely to be different. The work undertaken by Mr McBrien had shown clearly that there was a <u>real risk</u> that a decision to follow the Department's criteria could actually operate to the disadvantage of FSME pupils. In*

> *light of that risk, the Board did not consider the evidence supported a change in approach."* (My underlining)

[58] Thus, the respondents retained an FSME criteria in its 2021 criteria in the same ranking as 2020.

[59] In relation to familial criteria beyond siblings attending the college, this is justified on the basis of strong family and pastoral perspectives central to the ethos of the school. The Chairman points out that this was something that was praised by the Education and Training Inspectorate. It is the respondent's view that brothers who have left the school can still influence and assist pupils to integrate into and learn of the school's ethos. This is a benefit both to pupils and the school.

[60] There is a temporal limitation in the sense that most applicants whose siblings are past pupils will have left in recent years.

[61] In relation to the use of a boy as opposed to a child of the family the respondent says that this is justified on the basis that St Malachy's is a single sex boy's school.

[62] The issue of the absence of the geographic criteria is dealt with in paragraph 22 of the Chairman's affidavit. It says as follows:

> *"Bullet points 3-5 of the Department's recommended criteria provide for geographical selection. The guidelines also recommend the use of criteria which identifies specific feeder primary schools. The college has traditionally drawn pupils from an extremely wide geographic range and has never felt it appropriate to distinguish between pupils based exclusively upon where they live. The college's admission criteria followed the Department's guidance by recognising 61 feeder primary schools rather than giving preference to any particular locality. This is not a random list but instead is made up of those primary schools that have sent at least one pupil to the college in the past seven years. It is the Board of Governors' view that this spread of primary schools covers an adequate geographical area. The college also considers that this form of criteria is more consistent with its priorities on admission. It encompasses primary schools from the maintained, controlled and integrated sectors. Consistent with the Department's guidelines, a recognised pool of feeder primary schools enables the college to build up relationships with those schools and to assist pupils both in making decision about their future and also during administration of the application process. The college has maintained this form of locality based criterion for many years without challenge and the constitution of this would be well-known to both primary schools and parent cohorts."*

[63] It is also pointed out on behalf of the respondents that the Board removed previous criteria which included applicants whose fathers and grandfathers had attended the school and also adjusted the tie-breaking criteria.

The court's approach

[64] In approaching this matter and, in particular, what is meant by "*have regard to*" I take the view that the respondent must engage with and give real weight to the guidance. It should only depart from the guidance on the basis of cogent and reasoned justification.

The Applicant's Submissions

[65] On behalf of the applicant Mr Southey says that a problem with the justification put forward on behalf of the respondent is that there is a lack of reasoning recorded in the minutes. He specifically refers to the guidance at 9.16 which says:

> *"Boards of Governors should carefully consider the content of their school's criteria and where guidance has not been followed the reason for this should be clearly recorded (e.g. in the relevant Board of Governors' minutes). If a school fails to follow guidance and does not have sufficient reason for doing so the school may not be indemnified by the Education Authority if legal proceedings are initiated against the school."*

[66] He refers the court to two decisions in England and Wales one which relates to the decision of a Planning Committee – **Young v Oxford City Council** in which the respondent sought to introduce witness statements and the case of **Caroopen v Secretary of State for the Home Department** which concerned a refusal by the Secretary of State of a claimant's leave to remain in an immigration case. In that case the court was considering the issue of supplemental letters.

[67] These cases clearly identify the danger of relying on subsequent material. The dangers include that even in a case of good faith there is a risk of ex post facto justification. It may be impossible to assess the reasoning process of individual members. There are dangers in speculating about them. In short, he says that the decision recorded in the minutes should speak for themselves.

[68] There is no doubt that it would have been preferable if there had been more detailed reasoning contained in the minutes, particularly with regard to the FSME criteria and how that was approached. This is particularly so that since it was clear that steps were taken to provide the Board with information on the implications of the FSME criteria which the Board might adopt.

[69] However, as in all legal disputes context is extremely important.

[70] The court here is dealing with a situation where there is no requirement on the Board to give reasons at the time criteria are published.

[71] It is clear that there is some reasoning in the minutes see for example the comments in relation to retaining siblings of past pupils. It is also clear from the minutes that the Board had the guidance and discussed it. The Board also had the benefit of the data informing them of the implications and use of different FSME criteria.

[72] The affidavit the court has received has been sworn by the Chair and endorsed by the Principal both of whom were present at the meeting at the relevant time.

[73] The court has the benefit of recent contemporaneous documentary evidence and an affidavit which explains the reasons which supported the decision. It does not contradict anything in the minutes of the meeting but in the words of Mr McLaughlin explains and elucidates what the Board of Governors did and why it adopted the criteria which it chose.

[74] I accept that because of the factors I have outlined above that I should be cautious in admitting this material but I consider that it is in the interests of justice that I should. I consider that the court is entitled to rely upon it in the circumstances and that it would be wrong to ignore the evidence contained in the affidavit which is clearly relevant and, in my view, reliable.

[75] Turning to the substance of the dispute, and in particular, the FSME issue which is the main focus of the challenge what is striking is that the DOE Guidance does not set out the thinking or policy objective behind the recommended criteria – indeed, the same can be said of the other criteria both recommended and not recommended. Furthermore, when referring to the recommendations they do not say how or in what respect they advance the policy thinking or objectives.

[76] That said, it is apparent that the purpose of the FSME criteria is to address discrimination on the basis of economic disadvantage in secondary level education. As Ms Anyadike-Danes said in her helpful submissions, entitlement to FSM is a proxy measure for deprivation. The objective of the recommended criteria in prioritising FSME as a criteria is consistent with stated public policy to improve educational attainment of student from less advantaged socio-economic backgrounds.

[77] In considering this matter it is important to understand what the FSME criteria in the guidance actually says – see paragraph [37] above.

[78] The outworkings of the guidance are illustrated in Annex 3.

[79] In short the effect of the Department recommendation in relation to FSME is to guarantee that a minimum number of such applicants will be admitted. As Mr Southey says this is a safety net. It does not provide a maximum number. Therefore, in this scenario as one works through the criteria when the minimum percentage number is reached it may be that alternative criteria such as for example feeder schools will have the effect of increasing the number of FSME admissions above the minimum percentage calculation.

[80] Clearly it is an important criteria and he argues that the respondent has misunderstood the effect of that guidance on this issue.

[81] In relation to extending siblings to include past pupils, whilst Mr Southey acknowledges the reasons given he says that they do not engage with the policy objective behind the guidance. The Board does not identify the disadvantage that led to this guidance. In this regard I should point out that neither does the guidance identify the disadvantage or how individual factors impact on the disadvantaged. In such circumstances it might seem unreasonable to impose this burden on the Board of Governors. He makes the same point in relation to the two remaining grounds, namely the use of the word "*boys*" instead of "*children*" and the omission of the geographical factors.

[82] Mr Southey says that including siblings who are past pupils discriminates against applicants from lower socio-economic backgrounds given that the majority of past pupils will be not from this background. In relation to not including the geographical factors he points out that this advantages wealthier families who can afford to arrange for transport from these schools which are most distant. However, in short he says that the respondents have not engaged with the underlying purpose of the guidelines.

[83] I want to make some general points before coming to a final conclusion.

[84] The Department has chosen not to issue regulations under Article 16 in respect of admissions to post primary schools.

[85] It has chosen an alternative and less prescriptive form – namely guidance.

[86] The Board is not legally obliged to adopt or follow the guidance.

[87] It has a broad discretion to formulate admissions criteria in accordance with its own priorities and needs of the school.

[88] In doing so it is constrained by its duty under Article 16B – to have regard to the guidance, by public law principles such as rationality, avoiding improper purposes and Human Rights Act obligations.

[89] Prior to 2021 it is clear that St Malachy's College and other grammar schools have departed from the Department's recommended FSME criteria because of its reliance on academic selection as its first priority.

[90] St Malachy's has however always included an FSME criteria. The evidence demonstrates that it has a consistently high percentage of FSME pupils within its enrolment – its FSME population is significantly in excess of the average for grammar schools in Northern Ireland.

[91] It is clear that in devising its criteria for 2021 it placed a particular focus on the issue of FSME applicants. It specifically addressed the potential impact of its FSME criteria as compared with the FSME criteria recommended by the Department and did so based on recent data – its 2020 applications.

[92] What the resulting data demonstrated was that there was a real risk that adopting the Department's FSME criteria would operate to the disadvantage of FSME pupils because of the way the Board's criteria worked.

[93] Therefore, in the context of the school's history of admitting FSME students and the real risk identified of potential disadvantage, in my view, the Board has adopted a patently rational and lawful approach in retaining its previous FSME criteria.

[94] It has actually addressed and actively engaged with the guidance on FSME applicants and has come to a decision not to follow the recommended guidance which is rational and justified.

[95] In this regard it is important to understand that the reference in the guidance that if using the FSME criteria it must be used first does not mean that it is mandated that FSME criteria must be first in priority. Rather it means that the particular FSME recommendation of the Department requires it to be the first priority if it is to have any meaning or practical implication.

[96] I consider that the same can be said of maintaining the criteria in relation to a sibling who is a past or present pupil.

[97] The reasons put forward by the Board are rational and are not motivated by any improper or unlawful objective. They have put forward a reasonable justification for the approach.

[98] In relation to the use of the word "*boy*" as opposed to "*child*" I consider again that this is reasonable in the context of an all boys' school – something that is contemplated in the guidance in Annex 2 in any event.

[99] I do have a concern that the Board has not had regard to section 2 of Annex 2.

[100] This provides that the Board of Governors "*may*" wish for this criteria to cover other circumstances where a family has not, in the opinion of the Board of Governors, had the opportunity to have an elder child already and currently enrolled, e.g. in cases where a child is more than 7 years younger than their next sibling; in cases where a family has moved residence; or cases where an older sibling cannot attend mainstream school, who for example attends a special school. There is no evidence before me other than the general averment that the Board took into account the guidelines to indicate that this specific matter was considered. However on its own I do not consider that this makes the criteria unlawful. The guidance is not particularly strong and merely indicates that the Governors "*may*" wish rather than requiring them to consider this issue.

[101] In relation to the omission of geographical locations as a general point the guidance does not say that a Board of Governors should use all the recommended criteria or that the criteria should be used in a particular order – save for the specific FSME criteria.

[102] The Board is entitled to make choices.

[103] I have already set out the justification for the approach the Board took by focussing on feeder schools – including the school attended by this applicant as being the main important criteria for it in this context.

[104] The Board has determined not to adopt the nearest suitable school criteria which is a prelude to adopting one of the other two geographical factors parish or catchment area.

[105] It seems to me that this is a choice it is entitled to make the reasons they have put forward are reasonable and cogent.

[106] Overall it seems to me that the Board has reached a balanced and reasonable set of criteria. This is further evidenced by the fact that the Board decided to omit criteria it previously adopted – in accordance with the guidance.

Human Rights Considerations

[107] In the Order 53 Statement the applicant also alleges a breach of section 6 of the Human Rights Act on the basis that the effect of the criteria is unjustifiable discrimination in relation to the applicant's rights to education under Article 2 of the First Protocol and Article 14 of the Convention.

[108] In the course of his submissions Mr Southey did not focus on this. The focus of the attack was on the guidelines which he says were designed to deal with the discrimination he identifies and the submissions he made were approached on that basis. Ms Anyadike-Danes supported that submission.

[109] The court did not therefore hear any arguments or submissions on the relevant test for establishing an Article 14 claim and the consideration of the tests established in cases such as **R v Secretary of State for Justice** [2018] 3 WLR 1831 namely consideration of the following issues:

(a) Do the matters complained of come within the ambit of a right protected?

(b) Was there a difference in treatment?

(c) Is there a differential treatment on a ground potentially prohibited by Article 14? This requires consideration of whether the difference in treatment is based upon a status that comes within the scope of Article 14.

(d) Whether the others who are said to receive differential treatment are in a truly analogous situation.

(e) Is the differential treatment justified?

[110] Whilst the matter was not argued for the sake of completeness it seems to me that there were significant arguments about whether or not this is in substance a challenge to a policy rather than a decision made in relation to the applicant and whether or not even if he comes within the category of other status he is at risk of disadvantageous treatment on account of his FSME status.

[111] However, at the end of the day, if the matter came down to justification I would conclude that the criteria challenged satisfy the requirement of legality. They pursue legitimate objectives. Importantly in the area of social economic policy, the margin afforded to public authorities is well established to be a wide one. For the purpose of any proportionality assessment the criteria must be "manifestly without reasonable foundation." Having regard to the circumstances of this case as set out above I do not see how the applicant could establish that the criteria met this test.

[112] Returning to the fundamental issue in the case I return to the test I referred to earlier. In answering the questions posed I consider that the respondent has engaged with and given real weight to the guidelines. Where it has departed from them it has done so on the basis of cogent and reasoned justification.

[113] For these reasons the application is dismissed.