Appendix C

GUIDELINES

FOR THE

IDENTIFICATION OF HAZARDS

AND THE

ASSESSMENT OF RISK

OF WALKED ROUTES TO SCHOOL

[OCTOBER 2000]

FORWARD

These Guidelines have been produced for those tasked with assessing the safety of ‘walked routes to and from school’.

This revised document was prepared by a working group to update the 1989 Guidelines. It now includes relevant case law, which provide the legal framework requiring Local Authorities to provide free school transport in appropriate cases.

The Working Group comprised the following people to whom the Local Authority Road Safety Officers’ Association (LARSOA) would like to express warm thanks.

John Moss	Cheshire County Council
David Rogers	Royal Society for the Prevention of Accidents
Josie Wride	Trafford Metropolitan Borough Council

[OCTOBER 2000]

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1.0 INTRODUCTION

The scope of these guidelines is limited to addressing the risks resulting from the inter-relation between pedestrians and traffic and does not address issues relating to personal security.

2.0 DUTY OF LOCAL AUTHORITY TO PROVIDE

The legal situation relating to school transport is based essentially on the Section 55 of the Education Act 1944, as amended by Section 53 of the Education Reform Act (1986).

(i) This requires local education authorities to "make such arrangements as they consider necessary and any such transport provided in pursuance of such arrangements shall be provided free of charge"{*appendix 3*}.

(ii) Section 39 of the 1944 Education Act requires a duty of parents to secure the regular attendance at school of registered pupils but it offers parents, as a defence against any action for failure to secure attendance, the possibility of proving that a pupil is not within walking distance of school and that the Local Education Authority (LEA) has not provided transport {*appendix 4*}.

(iii) Walking distance is then defined in the same section of the Education Act as up to two miles in the case of a child under eight and three miles for any older child. The walking distance must be "measured by the nearest available route".

3.0 AVAILABLE ROUTE AND ACCOMPANIED CHILDREN

The question of what constituted the nearest available route had been the subject of dispute or examination in a number of cases. It was established in the case of Shaxted v. Ward [1954] that distance, not safety, was the appropriate test.

The most significant in more recent years has been that of Rogers v. Essex County Council [1986] in which it was initially judged that a particular walking route to school, involving crossing a wooded area of scrub land was not regarded as "available", on grounds of safety. Essex brought the case on appeal to the House of Lords. The appeal was allowed, the Law Lords ruling that the route was available if the child "accompanied as necessary" could walk the route in reasonable safety {*appendix 5, 6 and 7*}. This was also reported in 'The Times' {*appendix 8*}.

4.0 AGE OF PUPIL AND NATURE OF ROUTE

This Judgement was given at a time when the 1986 Bill was in its final stages of the parliamentary process. A late amendment was introduced into the Bill which it was asserted would clarify and strengthen the law on school transport. Section 53 was then enacted so as to amend Section 55 of the 1944 Act {*appendix 8*} as follows:-

> "(3) In considering whether or not they are required by sub-section (1) above to make arrangements in relation to a particular pupil, the local education authority shall have regard (amongst other things) to the age of the pupil and the nature of the route, or alternative routes, which he could reasonably be expected to take".

5.0 RISK ASSESSMENT

In view of the amendment to the statutes and the case law described above, it is now necessary for assessments to be made of the safety of those routes whose lengths fall below those defined as reasonable walking distance. To assist LEA's in these assessments the following guidelines have been prepared.

6.0 DEFINITIONS

Before an assessment of any routes is made assessors should ensure they are familiar with the following definitions.

Footway - *A 'footway' or roadside strip is one which is of adequate useable walking width for the circumstances and is normally defined as one 'at least one metre wide, and in reasonable condition, suitable for walking on'. (Useable - clear of overgrowth i.e. shrubs/trees overhanging the footway)*

Step-off - *The term 'step-off' refers to the facility for pedestrians to easily be able to 'step off' clear of the roadway onto a reasonably even and firm surface.*

Available Route - *An 'available route' is a road metalled or otherwise and footpaths, pathways, bridleway, RUPP's (roads used as public paths) public roads or public land maintained by the local authority.*

Highway - *'Highway' includes all 'public rights of way'(footpaths bridleways, byways open to all traffic and 'roads used as public paths') and all 'public roads' (whether surfaced or unsurfaced).*

Public Rights - *'Public Rights of Way' are legally classified as footpaths, bridleways, byways open to all traffic and roads used as public paths. Many public rights of way have come into existence through 'deemed dedication' at common law or under the provisions of the Highways Act 1980.*

Public Footpath - *A 'public footpath' is a highway over which the right of way is on foot only. It is a civil wrong to ride a bicycle or a horse on a footpath. The user could be sued by the landowner for trespass or nuisance. It is a criminal offence under Section 34 of the Road Traffic Act 1988 to drive a motorised vehicle on a footpath.*

Public Bridleway - *A 'public bridleway' is a highway over which the right of way is on/by foot, on horse, donkey or mule and on a bicycle. Cyclist must give way to walkers and riders. A horse donkey or mule may also be led. There may also be a right to drive animals other than horses. It is a criminal offence to drive a motor vehicle on a bridleway.*

Public byway - *A 'public byway open to all traffic' (BOAT) (often open to all traffic simply termed 'byway') is a highway over which the right of way is on foot, horseback or bicycle, or by wheeled vehicles of all kinds including horse-drawn and motorised vehicles. Any such vehicles must be properly taxed and fit for use on public roads. Their drivers must be licensed and insured. Byways open to all traffic differ from roads in that they are primarily used for walking and riding, rather than by vehicles.*

Roads used as public paths. - *Where 'roads used as public paths' (RUPP's) are still recorded, highway authorities are under a duty to reclassify them as bridleways or byways open to all traffic or footpaths, according to the public rights which already exist over them. In the meantime, they have at least bridleway status. Landowners must be notified of any reclassification proposal.*

Public Roads - *Public roads include motorways, trunk roads, A, B, and C (classified) roads, and other minor (unclassified) roads which may or may not be surfaced with tarmac or stone. Public roads primarily carry vehicles, but they may also be used by walkers, cyclists and horse riders if the status of the road allows.*

Green Lane -	*The term 'green lane' has no legal meaning. It simply describes an unsurfaced path which may or may not also be a highway (e.g. an unsurfaced public road, byway open to all traffic, bridleway or footpath).*
Visibility	*The term visibility means the horizontal distance of unobstructed vision when measured from the eyepoint of a driver taken as being 1.05m from the road surface.* *This distance must be equal to, or greater than the appropriate minimum overall stopping distance (as set out in the Highway Code) given the recorded 85 % ile speed of traffic on the road.* --- *Note:'85% ile speed' is the speed at or below which 85 cars out of 100 travel in free flow conditions.* ---
Children -	*Case law presumes that children will be accompanied as necessary, as stated in the Education Act 1986 [section 53]. {Appendix 9}.*
Behaviour of 'Road User' -	*It is presumed that all road users will behave reasonably and responsibly.*
Traffic Interrupter -	*A traffic interrupter is any feature in the highway infrastructure or environment which creates measurable gaps in an otherwise constant stream of traffic.*

7.0 THE ASSESSMENT PROCEDURE

In assessing the safety of an available route[1] consideration is given only to the potential risk created by traffic, highway and topographical conditions, not personal safety.

7.1 It is essential that each case be considered objectively on its merits.

7.2 It is assumed that the child is accompanied[2] as necessary by a responsible parent or carer.

7.3 Where there is a footway or roadside strip of reasonable width and condition, public footpath or a bridleway, this will normally be assumed to provide an available route[3] for that part of the journey.

7.4 Where a verge exists, on a lightly trafficked or narrow road, which can be stepped on to by the child and accompanying person when vehicles are passing, it can normally be assumed to provide an available route for that part of the journey. This is what is referred to in these guidelines as a 'step-off'[4].

7.5 These guidelines assume that the walker will cross the road to utilise the footway[5] or roadside strip.

7.6 Many available routes may lie along roads that have neither footway nor verge. On such roads, consideration must be given to the width of the carriageway, traffic speed and composition (such as frequent heavy goods vehicles) and to visibility (i.e. sharp bends with high hedgerows or other obstructions to visibility).

7.7 Where road crossings are necessary, the availability of any facility (e.g. central refuges, pedestrian crossings, traffic signals etc.) to assist such crossing should be taken into consideration. Where no crossing facilities exist an assessment of the risks which may be generated by crossing the road (bearing in mind the traffic speed and flows, sight lines etc.,) should be made.

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[1] Available Route - refer to definitions (page 4)
[2] Case Law - Regina v Devon County Council refers to "accompaniment as necessary" {see appendix 8}
[3] Case Law - Rogers v Essex County Council [1986] refers to "available route" {see appendix 8}
[4] Step-off – refer to definitions (page 4)
[5] Footway or Roadside Strip - refer to definitions (page 4)

8.0 ROUTE ASSESSMENT SUMMARY

Assessment of Walked Routes
For a route to be classified as NON-HAZARDOUS there needs to be:-

BOTH

A Tick

A continuous adequate Footway on roads
which carry normal to heavy traffic. ☐
OR
Step-offs on roads which are lightly trafficked but have adequate
sight lines to provide sufficient advance warning .
OR
on roads with a low traffic flow, no step-offs, but sufficiently good
sight lines to provide adequate advance warning.

and B Tick

If there is a need to cross roads ☐

There must be:-
Crossing facilities (Zebra or Pelican crossings)
Pedestrian phases at traffic signals (including necessary refuges)
School Crossing Patrols
Traffic calming (sufficient to enable safe road crossing)
Pedestrian refuges
OR
Sufficient gaps in the traffic flow and site lines to allow enough opportunities
to cross safely.

i.e. If a crossing manoeuvre is required on the route, the available visibility at
the location should allow for a vehicle to stop given the 85%ile speed of the
flow of traffic and the stopping distances required for vehicles as stated in the
Highway Code (see Typical Stopping Distances Diagram pages 28-29)

Note:

i) ***In many rural areas, the exercise of continuous judgement is likely to be required. No criteria can provide all the guidance or answers to every situation which may be encountered.***

ii) ***On many rural roads it will be necessary to cross roads to enable improved sight lines to be gained to that sufficient time is available to judge when to 'step-off' or to stop and allow traffic to pass.***

iii) ***All vehicle counts are 2-way except on one-way systems. (Central refuges are deemed to create one-way systems)***

iv) ***The exercise of judgement will be needed to assess the relative risk of passing an obstacle such as a narrow bridge. The gap criteria may prove useful and assist in this type of situation.***

9.0 ROAD CROSSING ASSESSMENT

9.1 SAFE GAP ASSESSMENT AND TRAFFIC COUNTS

The difficulty of crossing at a site can be assessed by considering the number of gaps in the traffic flow which are acceptable to pedestrians.

Where vehicles enjoy free-flowing conditions the gaps between successive arrivals are randomly distributed and the waiting time for an acceptable gap may be found to be relatively short. However, in such conditions speeds are likely to be higher than normal and in consequence the length of the gap required to facilitate a safe road crossing will be longer.

An acceptable gap in which to cross, from kerb to kerb varies from person to person. The majority of pedestrians will accept a gap of 4-6 seconds at normal urban vehicle speeds to cross two lanes of traffic and even shorter gaps at slow vehicle approach speeds. Other groups may require somewhat larger gaps, of around 10 to 12 seconds or even longer.
(The above is an extract from Local Transport Note 1/95)

9.2 SITE SURVEYS

The heaviest vehicle flows usually occur during the morning journey period. Therefore, the site surveys should generally be conducted during this period, unless it is proven that the afternoon period is busier, in which case assessments should be carried out during that travel time sector. A minimum of three one-hour site surveys must be conducted, the data being recorded in 5-minute consecutive periods. The minimum of a one hour survey in the morning immediately before the school day commences and another immediately after the end of the school day. In addition, a further survey should be conducted during the busiest period, which may be either in the morning or afternoon.

9.3 GAP TIME

The survey should record the number of gaps, in each 5-minute period, which are greater than the road crossing time (using 3 feet per second as the walking speed). Four gaps in each 5-minute period indicate a road, which is reasonably able to be crossed without undue delay. It may be necessary to analyse the gap lengths, since long gaps could be interpreted to be, and classified as multiple gaps.

Further information about methods which might be used to determine gaps which would facilitate safe road crossings can be obtained by referring to Local Transport Note 1/95 which deals with the assessment of sites for proposed pedestrian facilities.

9.5 TRAFFIC COUNTS

(i) It is recommended that the traffic counts be recorded as 'light vehicles' equivalent values, by using the following multiplication factors:

Standard Vehicle Units (SVU's) For Recording Purposes

3 pedal cycles	=	1 SVU
2 motorcycles	=	1 SVU
1 car	=	1 SVU
1 light vehicle	=	1 SVU
1 HGV/PCV	=	2 SVU's

(ii) Where the half-hour two-way [one-way on dual carriageways] traffic flow is below 240 the road is assessed as safe to cross.

9.6 A special assessment may be required to determine whether or not there are special factors, which will enable the road to be crossed in reasonable safety. These factors may include for example traffic interrupters.

10.0 NOTES FOR LOCAL AUTHORITY OFFICERS

The purpose of these guidelines is to enable officers to determine the relative safety of an available route to and from school from a road safety perspective not from one of 'personal security' on the journey. These are two very different issues and must not be confused. This matter has been clearly defined in case law {see note paragraph 10.5 and appendix 5}.

Local Authorities will not be legally obliged to provide free transport just because parents perceive the route to be unsafe on the grounds of 'personal safety and security'. Decisions about the relative balance of service provision between issues related to road safety and those of personal safety and security are a matter for local determination and not the subject of these guidelines.

The assessment must cover the whole route from the child's home i.e. gate to the gate of the school. If a traffic calming scheme or 20 mph zone for example, has been introduced in the vicinity of the school, it is unlikely to mean that the whole route can be assessed as 'safe'.

10.1 FOOTWAY

If there is a Footway of adequate width throughout the whole length of the journey, and there is no need to cross the road, then the route is 'safe'. (Informed judgement by the professional may be necessary, dependent upon traffic flows and the nature of the route).

10.2 When there is a need to cross the road in order to use the opposite Footway, or to improve sight lines, it may be necessary to identify the safest crossing places. It may be helpful to provide advice about the safest crossing places.

10.3 On some country lanes the Footway may not be continuous. In such cases informed judgement will need to be made about the availability and sufficiency of 'step-off' points.

10.4 The presence or absence of street lighting on a route is not considered to be a factor.

10.5 In the case of Regina v Rogers and another, the Judgement by the House of Lords supported the line consistently taken by Essex County Council that for a route to be 'available', within the meaning of Section (39) 5, {*appendix 4*} it must be a route along which a child, accompanied as necessary, can walk with reasonable safety to school. A route would not fail to qualify as 'available' because of dangers, which would arise if the child were to be unaccompanied.

Note: *The Judgement (16.10.86) by the House of Lords and the speech by Lord Ackner rehearses the arguments on both sides. This gives a valuable insight into how the case law has evolved {appendix 5}.*

10.6 ACCIDENT RECORD

The assessor will wish to be aware of the accident record for the route in question, as it relates to the school journey.

Note: *The existence of an accident record on the route does not necessarily indicate that the route for the purpose of the school journey is 'unsafe'. Referral may need to be made to appropriate colleagues within the Local Authority to determine the type, nature and relevance of the accident record in order to establish whether or not recognition should be given to the data, and to what extent.*

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APPENDIX 1

**ASSESSMENT OF WALKED ROUTE TO SCHOOL –
ROUTE INSPECTION FORM**

ROUTE LOCATION: FROM: Address

TO: Name of School

VIA: Name of Roads

FINDINGS [TICK]: **ROUTE SAFE** ☐ **UNSAFE** ☐

DATE INSPECTED: STAFF NAME:

DISTANCE OF ROUTE: ………. Miles

IF UNSAFE – CRITERIA AREAS **TICK**

1. INADEQUATE FOOTWAY ☐
2. ROAD WIDTH ☐
3. WEIGHT OF TRAFFIC ☐
4. STEP-OFFS ☐
5. SAFE VISABILITY ☐
6. SPECIFIC UNSAFE POINTS ☐

<u>SUPPLEMENTARY COMMENTS</u>

SIGNED: …………………………………..

APPENDIX 2a

ASSESSMENT OF WALKED ROUTE TO SCHOOL – TRAFFIC CENSUS & GAP COUNT FORM (Morning)

Date: …………………………. Census taken by: ……………………….

Location: ……………………... Road No: ……………………..

Width of Carriageway: ………. Minimum Gap Time required: …………..
(width of road divided by 3ft per second walking speed)

Time	Car	Light Vehicle	HGV	PCV	Motor Cycle	Cycle	No. of Gaps in Excess of Minimum	Accom. Children	Unnaccom. Children
0800									
0805									
0810									
0815									
0820									
0825									
0830									
0835									
0840									
0845									
0850									
0855									
0900									
0905									
0910									
0915									
Totals									
SVU Totals							**Total SVU's**		

Percentage of HGVs: ……………………

APPENDIX 2b

ASSESSMENT OF WALKED ROUTE TO SCHOOL – TRAFFIC CENSUS & GAP COUNT FORM (Afternoon)

Date: …………………………. Census taken by: ……………………….

Location: ……………………... Road No: ……………………..

Width of Carriageway: ………. Minimum Gap Time required: …………..
(width of road divided by 3ft per second walking speed)

Time	Car	Light Vehicle	HGV	PCV	Motor Cycle	Cycle	No. of Gaps in Excess of Minimum	Accom. Children	Unnaccom. Children
1500									
1505									
1510									
1515									
1520									
1525									
1530									
1535									
1540									
1545									
1550									
1555									
1600									
1605									
1610									
1615									
Totals									
SVU Totals							**Total SVU's**		

Percentage of HGVs: ……………………

APPENDIX 3

Education Act 1944 [Section 55] (i)

Provision of transport and other facilities

Section 55 - (1) A local education authority shall make such arrangements for the provision of transport and otherwise as they consider necessary or as the Minister may direct for the purpose of facilitating the attendance of pupils at schools or county colleges for at any course or class provided in pursuance of a scheme of further education in force for their area and any transport provided in pursuance of such arrangements shall be provided free of charge.

(2) A local education authority may pay the reasonable travelling expenses of any pupil in attendance at any school for county college for at any such course or class as aforesaid for whose transport no arrangements are made under this section.

APPENDIX 4

Education Act 1944 [Section 39]

Duty of parents to secure regular attendance of registered pupils.

39.-(1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section.

(2) In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave or -
(a) at any time when he was prevented from attending by reason of sickness or any unavoidable cause;
(b) on any day exclusively set apart for religious observance by the religious body to which his parent belongs;
(c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation for him at or near the school or for enabling him to become a registered pupil at a school nearer to his home.

(3) Where in any proceedings for an offence against this section it is proved that the child has no fixed abode, paragraph (c) of the last foregoing sub section shall not apply, but if the parent proves that he is engaged in any trade or business of such a nature as to require him to travel from place to place and that the child has attended at a school at which he was a registered pupil as regularly as the nature of the trade or business of the parent permits, the parent shall be acquitted:
Provided that, in the case of a child who has attained the age of six years, the parent shall not be entitled to be acquitted under this subjection unless he proves that the child has made at least two hundred attendances during the period of twelve months ending with the date on which the proceedings were instituted.

(4) In any proceedings for an offence against this section in respect of a child who is a boarder at the school at which he is a registered pupil, the child shall be deemed to have failed to attend regularly at the school if he is absent therefrom without leave during any part of the school term at a time when he was not prevented from being present by reason of sickness or any unavoidable cause.

(5) In this section the expression "leave" in relation to any school means leave granted by any person authorised in that behalf by the managers, governors or proprietor of the school and the expression "walking distance" means, in relation to a child who has not attained the age of eight years two miles, and in the case of any other child three miles, measured by the nearest available route.

APPENDIX 5

House of Lords Judgement 16.10.86

All England Law Reports 7 November 1986

Rogers and another v Essex County Council

HOUSE OF LORDS
LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK, LORD MACKAY OF CLASHFERN, LORD ACKNER AND LORD OLIVER OF AYLMERTON
28 July, 16 October 1986

Education - School attendance - Duty of parent to secure regular attendance of pupil - Failure to secure regular attendance - Proceedings against parent - Defence - Distance of home from school - Nearest available route - Shortest route dangerous to unaccompanied child - Whether route "available"- Education Act 1944, s39(2)(c)(5).

The distance of the shortest public route between the house where a 12 year old child lived and the school where she was registered was 2.94 miles. Part of that route consisted of an isolated, unmade and unlit track which, particularly in winter, would be both difficult and dangerous for a young girl to cross on her own. The child failed to attend school regularly and her parents were convicted of failing to ensure her regular attendance, contrary to s39(2) of the Education Act 1944. The parents appealed, relying on s39(2)(c) of the Act which provided that it was a good defence to show that the school was not within walking distance of the child's home and the local authority had not provided transport or alternative schooling arrangements. In the case of a child over eight years old, "walking distance" was defined by s39(5) as "three miles, measured by the nearest available route." The Crown Court dismissed the appeal but the parent's appeal to the Divisional Court was upheld on the grounds that the nearest available route was that route which the child could safely use unaccompanied. The local authority appealed to the House of Lords, contending that the nearest available route was the shortest route usable without trespassing.

Held - For the purpose of deciding under s39 of the 1944 Act whether a school was within walking distance of a child's home, the nearest available route between the child's home and his or her school was the nearest route along which the child could walk to school with reasonable safety when accompanied by an adult and a route did not fail to qualify as the nearest available route because of dangers which would arise if the child was unaccompanied. The local authority's appeal would therefore be allowed.

Notes
For the duty of parents to secure attendance of pupils and for statutory defences to proceedings against parent s for non-attendance of registered pupils see 15 Halsbury's Laws (4th Edition) Paras 32-33 , and for cases on the subject see 19 Digest (Reissue) 499.503. 3885, 3902.

Case referred to in opinions
Shaxted v Ward (1954) Farrier v Ward (1954)

Appeal
Essex County Council appealed, with leave of the Divisional Court of the Queen's Division given on 10 May 1985, against the decision of that court (Parker LJ and Tudor Evans J) on 19 February 1985 allowing an appeal by the respondents, Peter Albert Rogers and Violet Rogers (the parents), by way of case stated against a decision of the Crown Court at Chelmsford (His Honour Judge Ward and justices) on 13 July 1984 dismissing the parents appeal from their conviction by the justices for the county of Essex acting in and for the petty sessional division of Colchester on 23 May 1984 for an offence under ss 39 and 40 (1) of the Education Act 1944 by reason of the failure of the parents daughter to attend regularly at the Stanway Comprehensive School where she was a registered pupil. The Divisional Court certified that a point of law of general public importance was involved in its decision.

The facts are set out in the opinion of Lord Ackner.

Conrad Dehn QC and David Mellor for the local authority.
Gavin Lightman QC and Edward Irving for the parents.

Their Lordships took time for consideration.

16 October. The following opinions were delivered.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend Lord Ackner, with which I agree, I would allow the appeal and answer the certified question in the negative.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Ackner. I agree with it and for the reasons which he gives I would allow the appeal and make no order as the costs.

LORD MACKAY OF CLASHFERN. My Lords. I have had the opportunity of reading in draft the speech prepared by Lord Ackner. I agree with it and concur in the order which he proposes.

LORD ACKNER. My Lords, the short question raised by this appeal is: who is to pay for the transport to the Stanway comprehensive school of Shirley Rogers, a schoolgirl aged 12 at the material time? Should it be the appellants, the Essex County Council, which is the local education authority or the respondents, Shirley's parents? The local authority have offered Shirley the use of the school bus but subject to payment of the concessionary fare of £20 a term, the parents not qualifying for free transport on a means test basis. The parents, in principle, have refused to make any payment for school transport. The answer to the question is provided by the Education Act 1944 of which only a few sections need be referred to.

Education Act 1944

Section 36 imposes on parents the duty to secure the education of their children. It provides:

"It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability and aptitude and to any special educational needs he may have, either by regular attendance at school or otherwise."

Section 39 imposes the duty on parents to secure regular attendance of registered pupils. Shirley was registered at the Stanway School. The section provides:

"(1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section.

(2) In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave or - (a) at any time when he was prevented from attending by reason of sickness or any unavoidable cause: (b) on any day exclusively set apart for religious observance by the religious body to which his parent belongs:(c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation for him at or near the school or for enabling him to become a registered pupil at a school nearer to his home....

(5) In this section the expression ...."walking distance" means, in relation to a child who has not attained the age of eight years two miles and in the case of any other child three miles, measured by the nearest available route".

Section 55 relates to the provision of transport and other facilities. As amended, it provides:

"(1) A local education authority shall make such arrangements for the provision of transport and otherwise as they consider necessary for as the Secretary of State may direct for the purpose of facilitating the attendance of pupils at schools or county colleges or at any course or class provided in pursuance of a scheme of further education in force for their area and any transport provided in pursuance of such arrangements shall be provided free of charge.

(2) A local education authority may pay the whole or any part, as the authority think fit, of the reasonable travelling expenses of any pupil in attendance at any school or county college or at such course or class as aforesaid for whose transport no arrangements are made under this section.

This appeal is concerned with the "walking distance" from Shirley's home to her school and in particular whether the nearest available route exceeded three miles, she being in the older age group referred to in s39 (5), quoted above. The dispute arises in the following circumstances.

The facts

The distance from Shirley's home to the school by the shortest route is 2.94 miles. That route involves crossing Copford Plains by an isolated and partly unmade track which is entirely unlighted. In winter this route is one of considerable danger for a young girl who would have to walk over Copford Plains in darkness. Copford Plains are also extremely difficult to cross in winter and may be passable on foot in the morning but impassable by the evening. There is an alternative route by metalled

roads but this is 3.2 miles in length. The parents quite reasonably regarded the Copford Plains route as unsuitable for use by Shirley, if unaccompanied. Thus, since as stated able, the local authority were only prepared to make the school bus available on payment of the concessionary fare, which the parents were not willing to pay, Shirley stayed away from school during the period from 13 December 1983 until 17 April 1984. Informations were then preferred against the parents by the local authority alleging that the parents were guilty of an offence against s39. On 23 May 1984 the justices for the county of Essex, sitting at Colchester, convicted the parents and ordered that they both be conditionally discharged for a period of 12 months. The parents appealed to the Crown Court at Chelmsford and on 13 July 1984 the appeal against conviction was dismissed. The appeal against sentence was allowed to the extent of substituting absolute discharges for the conditional discharges imposed by the magistrates. The Crown Court expressed considerable sympathy for the parents but concluded that they were bound by the decision of the Divisional Court in Shaxted v Ward [1954].

The parents appealed by case stated to the Divisional Court. I have already set out the material facts which the Crown Court found. There was no finding that the route was impassable on any day that Shirley failed to attend or that the route was unsuitable, if she was accompanied. At the hearing of the appeal by the Divisional Court on 4 February 1985 the parents repeated their contention that the nearest available route of which the walking distance from a child's home to his school is to be measured for the purpose of the 1944 Act, must be, not merely the nearest route which a child can lawfully walk, but a route which a responsible parent would allow a child to use *unaccompanied*. In a reserved judgement Parker LJ, with whom Tudor Evans J agreed, accepted this submission and distinguished Shaxted v Ward. On 10 May 1985 the divisional Court gave leave to appeal to your Lordships' House on terms that the local authority would not seek to disturb the order for costs in the Divisional Court and would pay the parents cost of this appeal in any event. The certified point of law of general public importance is in these terms:

> "Whether the nearest available route by which the walking distance of a school from a child's home is to be measured for the purposes of the Education Act 1944 must be not merely the nearest route which a child can walk without trespassing but a route which a responsible parent could allow a child to use unaccompanied."

Shaxted v Ward

This decision is, of course, not binding on your Lordships' House and whether or not the Divisional Court was entitled to distinguish it, s it purported to do, is not an issue which need concern your Lordships. Nevertheless, it was a decision of a strong court which has stood unchallenged for over 30 years and has been relied on over that period by local education authorities. It involved considering the crucial s39 (5) of the 1944 Act and the facts of the case were similar to the facts in this appeal. It concerned two children who were under eight years of age and the route from their home to the school, at which they were registered pupils, was under two miles. The route was safe for the children to use, if escorted, but there was a particular portion of the road near the school where for small children, an escort would be desirable. The prosecutor contended that "available route" meant a route which could be followed without

committing a trespass. The justices accepted this submission and the parents were convicted. They accordingly appealed by case stated.

At the outset of his judgement Lord Goddard CI said:

"The short point that arises is this: The Justices found that the route which these children had to travel was "safe for these children to use, if escorted. The bit of road near the school, where an escort would be desirable for small children, was common to both the children in question." I think that the justices recognised that it would be desirable for children to be escorted or in some way conducted along or across a certain piece of road where there was probable a good deal of traffic. They found that it was usual for parents to provide escort for their children to and from school, where necessary".

Having referred to s39 of the 1944 Act Lord Goddard CJ continued;

"The justices have to find whether the school is within walking distance; and it is said that the route which the children took, which was under two miles, was not the "nearest available route" because part of it was said to be dangerous for children to walk along unescorted. I cannot read the word "available" as meaning necessarily safe, because we can see how these words came to be included in the Act."

Lord Goddard CJ then considered the earlier Education Acts where the words "measured according to the nearest road" were used and concluded that the words in the 1944 Act "measured by the nearest available route" were not intended to make any change in the law. He then stated:

"To some extent I sympathize with the views of the parents in this case and it may be that they would like to bring pressure upon the Kent County Council to have a person on the road to see that "this bit of the road", as the justices call it, is safe for the children to cross. Those, however, are matters for the education authority to consider and to put into operation if they think fit. I can only say that, it there is a road which measures not more than two miles or a route along which a child can walk and its measurement does not exceed two miles, that is the nearest available route. It may sometimes be unsafe; sometimes the route might be flooded, and, if that happened and the person could not walk along the road, that might be a reasonable excuse for not using it on that particular day, but we are not concerned with that but with a case where the parents think that the route is not safe. Parliament has not substituted safety as the test but the distance. Any question with regard to safety must be and I have no doubt, will be taken into consideration by the education authority. In my opinion, therefore, the justices came to a right decision and the appeal fails."

Byrne and Parker JJ both agreed.

It has been urged before us that in his judgement Lord Goddard CJ, when considering whether a route was available, was discounting al safety considerations. I cannot accept this submission. In the context in which the Lord Chief Justice made his observations he was concerned with a route which was said to be dangerous only in the children walked along it unescorted.

The true meaning of 'availability' in S39 (5) of the Act

In the submissions made to your Lordships it was common ground that available in the context of s 39(5) means capable of being used. During the course of the argument counsel for the local authority appeared reluctant to accept that for a route to be available it must be reasonably capable of being used. His reluctance seemed to stem from an anxiety on behalf of his clients not to accept the responsibility from time to time of deciding whether or not the route which is the nearest route is reasonably capable of being used by a child of the relevant age not withstanding that under s39(2) c the onus is clearly on the parent to prove that the school is not within walking distance of the child's home. It is clear that the word available qualifies the word route. The availability of the route cannot be determined by the mere study of a map. That is must be reasonably practicable for a child to walk along it to school does not, to my mind, admit of any argument. Of course it must be free from obstructions or obstacles which would make its use impracticable. Dangers inherent in a particular route are factors that must be taken into account when considering its availability. A route which involved crossing a river by means of a footbridge would, other thinks being equal, quality as an available route. However, if as a result, for example, of recent severe flooding, the bridge became unstable and unsafe to use, that route would cease to be available.

The short issue in this appeal is whether 'availability' is to be measured by what is reasonable for an *unaccompanied child to use?* Counsel for the parents was constrained to concede that in the case of a very young school child, certainly a child of five, six or seven. Parliament must have assumed that the child would be accompanied, however short the distance, if there existed any real hazard, e.g. crossing a busy road. Accordingly, there would be few if any routes in the first category provided for in s39(5)(the two-mile route) which any responsible parent would allow an unaccompanied child to use. If the availability of the route was to be measured by what is reasonable for an unaccompanied child who had not attained the age of eight years, there would have been no point in prescribing in the subsection the two mile route requirement. Any such child with very few exceptions would have to be provided with free transport, although in practice, as Parliament must have appreciated, such a child would almost always be accompanied, so that the transport would not in fact have been necessary at all. The crucial point appears not to have been considered by the Divisional Court. It is certainly not referred to in the judgement of Parker LJ.

What then was the purpose of defining 'walking distance' in relation to a child who had not attained the age of eight years? The answer, to my mind, is clear: it was simply to provide that where the nearest route from home to school was reasonably capable of being used by a child along or (in the majority of cases) with an escort and did not exceed two miles, the school was within 'walking distance' of the child's home. If, as is rightly conceded, the route does not in that situation fail to quality as 'available' because of dangers which would be consequent on the child being unaccompanied, when, if at all, would the route thus fail to qualify? Counsel for the parents submits that once the child is of sufficient age to go out on a street alone, then if the route is not reasonably safe for the child to walk along it unaccompanied to route is not 'available' . Quite apart from the fact that there are no words in the section to support such a submission, the test suggested is hopelessly vague. What sort of street is one to have in mind, what sort of traffic is it to carry, what time of day, indeed what weather or season is to be assumed etc? Further, is the test an objective test applicable to all children of a given age or is it to be applied subjectively to the

particular child whose parents have raised the issue? The complete impracticability of such a test in itself persuades me that it was never in the contemplation of Parliament. In my judgement a route to be 'available' within the meaning of S39(5) must be a route along which a child accompanied as necessary can walk and walk with reasonable safety to school. It does not fail to qualify as 'available' because of dangers which would arise if the child is unaccompanied.

It has been argued that unless your Lordships decide that availability has to be measured by what is reasonable for an unaccompanied child, then parents, who normally accompany their children, but who fail to do so temporarily because of some crisis such as an illness and as a result the child fails regularly to attend school, will have committed a criminal offence. In my judgement this submission overlooks S39(2)(a) which provides that the child shall not be deemed to have failed to attend regularly if he was prevented from attending by reason of 'any unavoidable cause'.

There is a final point which I would wish to stress. Under S55 of the Act, which is set out in extenso above, the local education authority has a discretion to provide free transport where the relevant walking distance is less than three miles(or, as the case may be, two miles). The local authority in their written case fully accepted that if a local education authority failed unreasonably to exercise this discretion, it would be liable, on an application for judicial review to be ordered to carry out its statutory duty. In fact, in pursuance of their powers under S55(2) the local authority, having been satisfied that the parents did not quality for free transport on a means test basis, in the exercise of this discretion offered the use of the school bus at the concessionary fare referred to above.

I would accordingly allow this appeal, discharge the order of the Divisional Court and would answer the certified point of law in the negative. In view of the local authority's undertaking not to disturb the order for costs made by the Divisional Court and to pay the costs of the parents of this appeal. I would make no order as to costs.

LORD OLIVER OF AYLMERTON. My Lords. I have had the opportunity of reading in draft the speech delivered by my noble and learned friend Lord Ackner. I agree with it and concur in the order which he proposes.

Appeal allowed. No order as to costs.

Solicitors: RW Adcock, Chelmsford (for the local authority): Ellison & Co. Colchester (for the parents).

Mary Rose Plummer Barrister.

APPENDIX 6

The Weekly Law Reports - Farrier v. Ward - Feb. 12, 1954

[QUEEN'S BENCH DIVISION]

* FARRIER v. WARD.

1954 Jan. 25 - Lord Goddard C.J. Byrne and Parker JJ.

Education - School - Attendance - 'Walking distance' - Direct route not safe for children unless escorted - Meaning of 'nearest available route' - Question of safety - Education Act, 1944 (7 & 8 Geo. 6, c.31), s. 39 (5).

Section 39 (2) of the Education Act, 1944, provides that a child under eight years of age shall not be deemed to have failed to attend school regularly if his parent proves that the school is not within walking distance of the child's home. By subsection (5): the expression 'walking distance' means, in relation to a child who has not attained the age of eight years two miles, measured 'by the nearest available route'.
The words 'nearest available route' in section 39 (5) of the Act refer only to measurement of the distance between the child's home and the school; if a route fulfils the requirements of that section as to distance, the fact that it may be unsafe is not material.

CASE STATED by Kent justices sitting at Canterbury.

On July 13, 1953, informations were preferred by Francis George Ward, the County Education Welfare officer, against Bertie Herbert Harold Shaxted and Albert George Farrier, charging that each, being the parent of a child of compulsory school age, was guilty of an offence in that the child who was a registered pupil at Preston County Primary School failed to attend regularly thereat between April 21 and August 26, contrary to section 39 (1) of the Education Act, 1944.

At the hearing of the informations the following facts were proved or admitted. Each defendant was the parent of a child of compulsory school age who was under eight years of age and a registered pupil at the Preston school and who failed to attend during the material period. Each child lived in the hamlet of West Stourmouth and the route from his home to the school was under two miles. These routes were safe for the children to use, if escorted. Both children had to travel by a bit of road near the school where an escort would be desirable for small children. It was usual and the duty of parents to provide escort for their children but nevertheless the education authority arranged for an omnibus which took children from Stourmouth to and from Preston School during the period in question. On the return journey the bus reached Preston School at 4.45 p.m. to collect the children, the children at that school having finished their lessons at 3.45 p.m. The defendants wanted a special omnibus from school and would not provide any escort for their children.

It was contended for the defendants (a) that the direct routes were not safe for their children to use when returning from school in a party; (b) that the afternoon bus provided by the education authority was not suitable transport for the return journey; and (c) that for those reasons they were prevented by unavoidable cause within the nearing of Section 39 (2) (c) of the Act from sending their children to school. They

also contended that the words "in relation to a child" in Section 39 (5) referred not merely to the words 'walking distance' appropriate to the respective ages specified in the subsection but to the later words 'nearest available route', limiting them to such routes only as were safe for a child of the ages specified to use and that the nearest available safe route was more than the distance specified in the section.

The prosecutor contended that 'available route' meant a route which could be followed without committing trespass.

The justices were of opinion that the direct routes were safe for children when escorted; that there was no unavoidable cause within the neaning of section 39 (2) (c) because the direct routes were safe if the parents had escorted the children or arranged for their escort; and that in the circumstances the bus provided was suitable. They considered, therefore, that the suggested interpretation of the words 'available route' was irrelevant, but that if it were relevant the defendants' interpretation of the words 'available route' would be strained and unnatural. Accordingly, they held that the Preston school was within 'walking distance' of the home of both appellants, who were not entitled to transport for their children. The justices convicted the defendants.

The defendant Farrier appealed.

M.D. Van Oss for the appellant
Gerald a. Thesiger Q.C. and K. Jupp for the prosecutor.

Hares v. Curtin was cited in argument. [1913] 2 K.B. 328.

LORD GODDARD C.J. The short point that arises is this: The justices, found, that the route which these children had to travel was, 'safe for these children to use, if escorted. The bit of road near the school, where an escort would be desirable for small children, was common to both the children in question.' I think that the justices recognized that it would be desirable for children to be escorted or in some way conducted along or across a certain piece of road where there was probably a good deal of traffic. They found that it was usual for parents to provide escort for their children to and from school, when necessary.

The real question is whether the school is within walking distance of the children's home because section 39 of the Education Act, 1944, provides that it is a reasonable excuse for the parent to prove 'that the school at which the child is a registered pupil is not within walking distance of the child's home, and that no suitable arrangements have been made by the local education authority either for this transport to and from the school or for boarding' By section 39(5) ; 'walking distance' means in relation to a child who has not attained the age of 8 years two miles, measured by the nearest available route. The justices have to find whether the school is within walking distance; and it is said that the route which the children took, which was under two miles, was not the 'nearest available route' because part of it was said to be dangerous for children to walk along unescorted. I cannot read the word 'available' as , meaning necessarily safe, because we can see how these words came to be included in the Act.

By section 74 of the Elementary Education Act, 1870, the excuse was if 'there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the by-laws may prescribe'. In section 49(6) of the Education Act, 1921, the reasonable was 'that there is no public elementary school open which the

child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of the child, as the by-laws may prescribe'. There is no difference in the words in those Acts.

Before the Act of 1921, it was suggested in Hares v. Curtin which was decided in 1913, that a cart track could not be the nearest road because the walking distance had not been measured according to the nearest road; and Lord Alverstone, giving judgement, said "It does not mean a road of any particular class, but simply a route from the residence of a child to the nearest school."

In the Education Act, 1944, the words used are two miles measured by the nearest available route." I do not think that it was meant to make any change in the law at all, except that it omits a number of somewhat unnecessary words and substitutes the expression which was used in the court in Hares v. Curtin.

To some extent I sympathize with the views of the parents in this case, and it may be that they would like to bring pressure upon the Kent County Council to have a person on the road to see that 'this bit of the road,' as the justices call it, is safe for the children to cross. Those, however, are matters for the education authority to consider and to put into operation if they think fit. I can only say that, if there is a road which measures not more than two miles or a route along which a child can walk and its measurement does not exceed two miles, that is the nearest available route. It may sometimes be unsafe; sometimes the route might be flooded, and, if that happened and the person could not walk along the road, that might be a reasonable excuse for not using it on that particular day, but we are not concerned with that but with a case where the parents think that the route is not safe. Parliament has not substituted safety as the test but the distance. Any question with regard to safety must be, and I have no doubt will be taken into consideration by the education authority. In my opinion, therefore, the justices came to a right decision and the appeal fails.

BYRNE J. I agree. Mr Van Oss contends that the meaning of the word 'available' is that there is no sound reason why that route should not be used by children. I am bound to say that I cannot read that meaning into the word but, as it appears in the Act of 1944, all that is meant by the 'nearest available route' is the method by which the two miles are to be measured from the child's house to the school in order to ascertain whether it is a walking distance.

PARKER J. I agree with both judgements which have been delivered.

Appeal dismissed.

Solicitors: Jaques & Co. for Girling, Wilson & Bailey, Margate; Sharpe, Pritchard & Co. for Gerald Bishop, Maidstone.

APPENDIX 7

The Weekly Law Reports - Shaxted v. Ward - Feb. 1954

SHAXTED v. WARD

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J. Byrne and Parker, J.J.), January 25 1954.]
Education - School attendance - Duty of parent to secure regular attendance of pupil - 'available route' - Road unsafe for unescorted children - Dangerous crossing - Education Act, 1944 (s.31), s.39 (5).

By the Education Act, 1944 s.39 (2) (c), a child shall not be deemed to have failed to attend regularly at school if the school at which the child is a registered pupil is not within 'walking distance' of the child's home. By s.39 (5) walking distance means, according to the age of the child, two or three miles measured by 'the nearest available route.'

The appellant, the father of a child, aged six years, who had failed to attend school regularly, being charged with an offence under s.39(1) of the Act (which provides that, if a child of compulsory school age fails regularly to attend school, the parent of the child shall be guilty of an offence), contended that, although the direct route from the child's home to the school was within the distance laid down in s.39(5) part of the road was unsafe for unescorted children as it included a dangerous crossing, and, therefore, was not an 'available route'; that the nearest available safe route was more than the distance laid down in s.39(5); and therefore, there was a reasonable excuse for non-attendance.

HELD : distance, not safety, was the test for determining 'the nearest available route', and, therefore, the school was within walking distance of the child's home, and the appellant was guilty of an offence.

FOR THE EDUCATION ACT, 1944, S.39, SEE HALSBURY'S STATUTES Second Edition, Vol. 8, p.183.
Cases referred to:

(1) Hares v. Curtin, [1913] 2 K.B. 328; 82 L.J.K.B. 707; 108 L.T. 974; 76 J.P. 313; 19 Digest 568, 89.

Cases Stated by Kent Justices.

At a court of summary jurisdiction, sitting at Canterbury on Aug. 13, 1953, the respondent, Francis George Ward, an education welfare officer, preferred informations against each of the appellants, Bertie Herbert Harold Shaxted and Albert George Farrier, charging that each, being the parent of a child of compulsory school age, was guilty of an offence against s.39(1) of the Education Act, 1944, in that the child, who was a registered pupil at Preston County Primary School, failed to attend regularly thereat between April 21 and June 26, 1953.

It was proved or admitted that each of the appellants was the parent of a child of compulsory school age who was a registered pupil at the said school and failed to attend that school during the period mentioned in the information: that each child lived in the hamlet of West Stourmouth and within the distance from the school laid down in s39(5) of the Act as 'walking distance' in relation to each such child respectively by the direct route; that this route was safe for the children to use if

escorted, the bit of road near the school where, owing to the presence of a dangerous crossing, an escort would be desirable for small children being common to both the children in question; that is was usual, and the duty of parents, to provide escort for their children to and from school, when necessary; that the education authority, nevertheless, arranged for an omnibus taking the children from Stourmouth to and from a secondary school at Sandwich to take the children of the appellants to and from school during the period in question; that on the return journey the omnibus reached the school at 4.45 p.m. to pick up these children there, they having finished their lessons at 3.45 p.m. ; that the appellants wanted a special omnibus from the school and would not provide an escort for their children; that another Stourmouth resident, a Mr S., who was a co-defendant with the appellants and gave evidence, admitted that his son could have attended the school regularly, but he had ‘had to stand by the other parents’.

On behalf of the appellants it was contended: (i) that the direct routes were not safe for their children to use when returning from school in a party; (ii) that the afternoon bus from school was not suitable transport for the return journey and, (iii) that, therefore, they were prevented by unavoidable cause within the meaning of S.39 (2)(a) of the Education Act, 1944, from sending their children to school; (iv) that the words ‘in relation to a child’ of the ages specified in s.39 (5) referred not merely to the words ‘walking distance’, but that those words also governed the later words ‘nearest available route’, limiting those words to such routes only as were safe for a child to use, that the direct routes were not safe for the children and the nearest available safe route was more than the distances specified in the section, and so the children were entitled to transport, but not suitable arrangements had been made for their transport from school. On behalf of the respondent it was contended that ‘available route’ meant a route which could be followed without committing trespass.

The justices were of opinion that no defence had been made out because (i) the direct routes were safe for children when escorted; (ii) there was no unavoidable cause, because the direct routes were safe if the parents had escorted their children or arranged for their escort, and also the omnibus provided was suitable in the circumstances; (iii) the suggested interpretation of the words ‘available route’ was irrelevant because the justices held (a) that the direct routes were, in fact, safe for the children in question, and (b) that the omnibus provided from school was a ‘suitable arrangement’ for the transport of the said children; (iv) and, further, the suggested interpretation of the words ‘available route’ was strained and unnatural. The justices held that the school was within walking distance of the home of each appellant so that the appellants were not entitled to transport for their children, and they convicted the appellants. The second appellant withdrew his appeal.

Van Oss for the appellant, Shaxted.
Thesiger, Q.C. , and Jupp for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The question is whether or not the school is within walking distance of the child’s home. By the Education Act, 1944 s.39 (1), a parent is guilty of an offence if his child fails to attend regularly at the school where he is a registered pupil, but by s.39(2): “.....the child shall not be deemed to have failed to attend regularly at the school’ (c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child’s home, and that no suitable arrangements have been made by the

local education authority either for his transport to and from the school or for boarding accommodation....”
We need not deal with suitable accommodation if the school is within walking distance, which by s.39 (5)

“... means in relation to a child who has not attained the age of eight years two miles, and in the case of any other child three miles, measured by the nearest available route.”
What the justices had to decide was whether or not the school was within walking distance, and it is said that the route which the child took, and which is under two miles, is not the nearest available route because part of it is said to be dangerous for children to walk alone unescorted. I cannot read the word ‘available’ as meaning necessarily safe, because we can see how that word got into the Act. By the Elementary Education Act, 1870, s.74 (3), it was a reasonable excuse:

“That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the bye-laws may prescribe.”
The Education Act, 1921, S.49 (b) provided an identical “reasonable excuse”. Before the Act of 1921, in Hares v. Curtin (1), in which it was suggested that a cart track could not be a road and that the walking distance had not been measured according to, “the nearest road”.

LORD ALVERSTONE, C.J., giving judgement, said ([1913 2 K.B. 331):
“It does not mean a road of any particular class, but simply a route from the residence of a child to the nearest school”.

In the Act of 1944 the words used in s.39(5) are “two miles... measured by the nearest available route”. I do not think they were meant to make any change in the law, except that a number of somewhat unnecessary words were cut out and there was substituted the expression which has been used in this court in Hares v. Curtin (1).

To some extent I sympathise with the views of the appellant in the present case. It may be that parents would like to bring pressure on the Kent County Council to have some one to see that this ‘bit of road’, as the justices call it, is safe for the children to cross- someone, for example, as is seen in London, wearing a white smock and holding a board with the words “Children Crossing, Stop”. That, however, is a matter for the education authority to consider and put into operation if it thinks fit. I can only say, speaking for myself, that a route along which a child can walk and which measures not more than two miles is “the nearest available route”. It may sometimes be unsafe. Sometimes the route might be flooded, and, if so, and the child could not walk along it, that might be a reasonable excuse for not using it on that particular day. We are not dealing with that sort of question. We are dealing with the question where the parents think it is not safe. Parliament has not substituted safety for distance as the test. Any question with regard to safety must, and, I have no doubt, will, be taken into consideration by the education authority. I think in this case the justices came to a right decision and the appeal fails.

BYRNE, J.: I agree. Counsel for the appellant contended that the meaning of the word ‘available’ in the Education Act, 1944, s.39 (5), is that there is no sound reason why that route should not be used by children. I am bound to say that I cannot read that meaning into that word. The ‘nearest available route’ means the method by which the two miles are to be measured from the child’s house to the school in order

to ascertain whether or not it is a walking distance.

PARKER, J.: I agree.

Solicitors: Jaques & Co., agents for Girling, Wilson & Bailey, Margate (for the appellant); Sharpe, Pritchard & Co., agents for Gerald Birship, Maidstone (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

APPENDIX 8

Article: 'The Times' House of Lords - Law Report December 2nd 1988

Reasonable to expect child to be accompanied

Regina v Devon County Council, Ex parte George
Before Lord Keith of Kinkel, Lord Bradon of Oakbrook, Lord Oliver of Aylmerton, Lord Goff of Chieveley and Lord Lowry [Speeches December 1]

A local education authority has been entitled to refuse free transport to and from school for a boy aged nine who lived 2.8 miles away. The authority had been entitled to conclude that it was reasonably practicable for the boy to be accompanied and to take that into account in reaching its decision.

The House of Lords allowed an appeal by the authority from the Court of Appeal (Lord Donaldson of Lymington, Master of the Rolls, Lord Justice Parker and Lord Justice Taylor) (The Times March 22; [1988] 3 WLR 49) who had reversed the decision of Mr Justice Mann dismissing an application by the boy, Christopher Noel George (by his stepfather and next friend Mr Paul George), for judicial review of the authority's decision.

The Education Act 1944 provides by Section 36: "It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full time education ….. by regular attendance at school or otherwise".

By Section 39: "(1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly … the parent … shall be guilty of an offence…

"(2) … the child shall not be deemed to have failed to attend regularly… (c) if the parent proves that the school … is not within walking distance of the child's home and that no suitable arrangements have been made by the local education authority … for his transport to and from the school….

"(5) … 'walking distance' means, in relation to a child who has not attained the age of eight years two miles and in the case of any other child three miles measured by the nearest available route,"

By Section 55: "(1) A local education authority shall make such arrangements for the provision of transport and otherwise as they consider necessary … for the purpose of facilitating the attendance of pupils at schools … and the transport provided in pursuance of such arrangements shall be provided free of charge.

"(2) A local education authority may pay the whole or any part, as the authority think fit, of the reasonable travelling expenses of any pupil … for whose transport no arrangements are made under this section.

"(3) In considering whether or not they are required by sub section (1) above to make arrangements in relation to a particular pupil, the local education authority shall have regard (amongst other things) to the age of the pupil and the nature of the route, or alternative routes, which he could reasonably be expected to take".

(Section 55(2) was amended by section 11 of and Schedule 1, Part 1 to the Education (Miscellaneous Provisions) Act 1984, Subsection (3) was added by amendment under section 53 of the Education (No 2) Act 1986, which came into force on January 7, 1987.)

Mr Conrad Dehn, QC and Mr Raymond Cox for the authority: Lord Campbell of Alloway, QC and Mr John Friel for the Boy.

LORD KIETH said that the boy's route to the school was rural, unlit and without a footpath and used to some extent by tractors, milk tankers and cattle wagons.

The council's policy on school transport was set out in a document including a paragraph 3(d) revised on March 12, 1987: "Transport to be provided without charge to children within the statutory walking distance where (I) having regard amongst other things to the age of the child and the nature of the route or alternative route which he could reasonably be expected to take, they consider it necessary for the purpose of facilitating his attendance at school: (ii) an authorised officer of the school health service certifies that transport is required for a child on medical grounds; (iii) the director of social services advises that there are overriding social needs that make the provision of transport essential; (iv) the education committee decides on the merits of a particular case, that special arrangements should be made."

The minutes of the council's school transport panel's decision of March 18, 1987, read: "We have had regard amongst other things to Christopher's age (nine) and the nature of the route which he could reasonably be expected to take. We are satisfied that the route in question which is 2.8 miles long and therefore within the statutory walking distance for a child of that age is one which an accompanied child can walk and walk with reasonable safety and that the council is not required by section 55(1)… to make arrangements in relation to him.

"Further in our opinion this is not a case where in the council's discretion transport should be provided free of charge. None of the circumstances set out in paragraphs 3(d) (I) – (iv) of the council's policy exist.

"There is no suggestion that Christopher is not a normal healthy boy for his age. We would expect a child of Christopher's walking this route to be accompanied but are not satisfied that it would not be reasonably practicable for one of Christopher's parents to accompany him or otherwise secure his regular attendance at school".

The reference to the child being accompanied clearly had an eye to the decision of the house in Rogers v Essex County Council (1987 AC 66, 78) where Lord Ackner had said:

"A route to be 'available' within the meaning of section 39(5) must be a route along which a child accompanied as necessary can walk and walk with reasonable safety to school. It does not fail to qualify as 'available' because of dangers which would arise if the child is unaccompanied."

To 'facilitate' section 55(1) meant to "make easy, promote, help forward," (concise Oxford Dictionary). In 'In re an Inquiry under the Company Securities (Insider Dealings) Act 1985 (1988 AC 660, 704), Lord Griffiths, in a difference context, had paraphrased "necessary" as "really needed", which was a helpful way of expressing the concept.

The question under section 55(1) regarding pupils living within the statutory walking distance was whether the authority considered arrangements for free transport to be necessary for the purpose of facilitating their attendance.

Obviously free transport would make the attendance of every such pupil easier, however close to the school he or she happened to live, but that could not determine the matter. It was for the authority and no one else, to decide whether free transport was really needed for the purpose of promoting the attendance at school of a particular pupil.

That must depend on the authority's view of the circumstances of the particular case, to which it was directed by section 55(3) to have regard. Its function in that respect could be described as a 'discretion', although it was not, of course, an unfettered discretion but rather in the nature of an exercise of judgement.

The intention of Parliament clearly was that pupils living outside the statutory walking distance would in all cases be provided with free transport and that pupils within that distance would normally walk to school but would be provided with free transport if the authority considered it necessary for the purpose of facilitating their attendance.

His Lordship could find nothing in the council's policy document inconsistent with that intention.

It was apparent that the school transport panel had taken into account Christopher's age and the nature of the route, in particular its length. The senior assistant education officer had inspected it.

There had been material on which the panel might properly have concluded that it was reasonably practicable for the boy to be accompanied, in respect that his stepfather had stated in an affidavit that he was unemployed and available for the purpose.

There was nothing to suggest that the panel had not been exercising a judgement as to whether free transport was necessary for the purpose of facilitating Christopher's attendance at school.

It had been argued on his behalf that the matter of the accompaniment of a child was relevant only to the availability of a route under section 39(5) and that an authority was not entitled to take into account under section 55(1) even the possibility of a child being accompanied.

So, if a route, however short, was unsafe for an unaccompanied child, the authority was obliged to provide free transport. That argument had to be rejected. By section 39, the parent was under a legal duty to bring about the child's attendance at school. There were various things that a parent might have to do to that end, such as seeing that the child got up in the morning and set out in reasonable time. In the case of an unwilling child, it might be necessary for the parent to take the child to school.

In general, the parent had to do those things that were reasonably practicable to be done and that an ordinary prudent parent would do. That might include accompanying the child where it would be unsafe for it to go unaccompanied.

If a child lived 100 yards from school but the route involved crossing a busy trunk route and the parent, although available to do so, refused to accompany the child and refused to allow the child to go to school on the ground that it would be dangerous, the parent would be guilty of an offence under section 39(1); neither paragraph (a) nor paragraph (b) would avail him.

It followed that parliament had contemplated that in appropriate cases a child would be accompanied to school. So a local education authority was fully entitled, when making a decision under section 55(1), to take into account whether or not there were any circumstances that prevented its being reasonable practicable for the child to be accompanied to school over a route that would fail to be treated as not available to an unaccompanied child.

It had not been demonstrated that the council had made any mistake in law as to the nature and extent of its duties and powers, nor had its decision in the present case been unreasonable. Lord Brandon, Lord Oliver, Lord Goff and Lord Lowry agreed.

Solicitors: Sharpe Pritchard for Mr. W. A. Burkinshaw, Exeter; Teacher Stern Selby.

APPENDIX 9

Education Act 1986 [Section 53]

53. In section 55 of the 1944 Act (provision of transport and School other facilities), the following subsection shall be added at the transport end –

“(3) In considering whether or not they are required by subsection (1) above to make arrangements in relation to a particular pupil, the local education authority shall have regard (amongst other things) to the age of the pupil and the nature of the route, or alternative routes, which he could reasonable be expected to take.”

REFERENCES

1.	Guidelines for the Assessment of the Safety of Walking Routes to School	-	November 1989 CRSOA
2.	Guidelines for the Management and Operation Of the School Crossing Patrol Service	-	August 1994 LARSOA
3.	Local Transport Note 1/95 The Assessment of Pedestrian Crossings	-	April 1995 HMSO
4.	Managing Public Access A Guide for Farmers and Landowners	-	September 1994 Countryside Commission
5.	All England Law Reports	-	November 1986
6.	The Weekly Law Reports	-	February 1954
7.	Highway Code	-	DETR New Edition 1999