[2020] IEHC 406

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 1025/2018 JR]

BETWEEN

CM (A MINOR)
(SUING BY HIS MOTHER AND NEXT FRIEND SM)

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 30th day of July, 2020

Introduction

1. This case was chosen as a test case due to the fact that the issues arising in it were representative of issues that have arisen in a number of cases in respect of children applying for assessments of needs under the Disability Act, 2005 (hereinafter referred to as *"the 2005 Act"*). This case was heard along with two other cases, *DB (a minor) v. HSE and JO'SS (a minor) v. HSE*, which were heard together and were agreed to be determined as test cases.

2. Arising from these cases, five broad issues have arisen for determination. This judgment will deal with these issues in broad terms. The judgment will then apply the broad determinations reached on the issues to the specific issues arising in the case of each of the minor applicants. However, while individual judgments will be delivered in each case, it will be necessary to read all three judgments together to understand the determinations reached by the court on each of the broad issues.

3. By way of overview and put in its simplest terms, these cases concern issues surrounding the operation of the statutory process providing for the assessment of needs of a person found to have a disability and the consequent service statement issued by the respondent, concerning how these health needs will be met for each applicant under the terms of the 2005 Act.

4. The 2005 Act provides a statutory mechanism whereby a person who is found to have a disability within the meaning of the Act, can apply for an assessment of their health and educational needs by an assessment officer. As part of this process, assessments will be carried out of the applicant across a number of disciplines e.g. psychology, physiotherapy, occupational therapy and speech and language therapy. Each of the assessors will furnish a report to the assessment officer setting out what the applicant's health needs are. This is done without regard to the availability of resources, or the capacity of the system to satisfy these needs. When the reports have been obtained from the various assessors, the assessment officer will issue an assessment report. That report will then be furnished to a liaison officer, who within a period of one month, will issue a service statement, which will set out what actual services will be provided to the individual applicant to satisfy the needs set out in the assessment report. However, it is important to note that the service statement is based upon what resources and services are actually available to cater for the particular applicant's needs in their own locality. In short, the service

statement sets out what services (if any) the applicant will get, when he or she will get them and where they will get them.

5. In these three cases, the applicants allege that the respondent is either failing to implement its statutory duties under the 2005 Act concerning the assessment of needs, or in the alternative, is purporting to carry out its duties in a way that is defective and is therefore not in compliance with the provisions of the 2005 Act.

6. One of the issues raised concerns a point of statutory interpretation, which in turn raises the issue of the interaction between the 2005 Act and the provisions of the Education for Persons with Special Needs, Act 2004 (as amended) (hereinafter referred to as *"the 2004 Act"*). Unfortunately, this issue is further complicated by the fact that while the two Acts are clearly interrelated, certain relevant portions of the 2004 Act have not yet been commenced, which has the effect that certain statutory pathways whereby a disabled child, who may have educational needs, cannot in fact have these needs assessed by the National Council for Special Education under the 2004 Act, because the relevant sections of the 2004 Act have not yet been commenced. This aspect will be set out in detail later in the judgment.

7. It is also relevant to note that while the 2005 Act deals with a very wide range of issues relating to disability within the community, the provisions of the Act dealing with assessments of needs have only been commenced in respect of applicants who are under five years of age.

Overview of the issues arising

8. At the hearing of these actions, five broad issues were identified as arising for determination. The following are those issues:

   (a) The Alternative Remedy Issue – (i) whether the applicants are prohibited from seeking the reliefs by way of judicial review which they seek in these proceedings, due to the existence of a statutory remedy provided under s. 14 of the 2005 Act; (ii) whether the remedy provided under the 2005 Act is an effective remedy.

   (b) The *"Geographical Lottery"* Issue – whether, in dealing with assessment of needs on a regional basis, the respondent is in breach of its statutory obligations to deal with all such applications in strict chronological order.

   (c) The s.8(3) Referrals Issue – whether s.8(3) of the 2005 Act requires the assessment officer, once he or she is of the opinion that there may be a need for an education service to be provided to an applicant, to request the National Council for Special Education (hereinafter referred to as *"the Council"*) to nominate a person with appropriate expertise to assist in carrying out the assessment, or whether the assessment officer is confined to making such referrals pursuant to s.8(9) of the 2005 Act, as maintained by the respondent.

(d) Section 13 Reports – whether the respondent is in breach of its statutory obligations by failing to furnish the Minister for Health with reports as directed by s.13 of the 2005 Act.

(e) The Service Statements Issue – (i) whether the liaison officer is obliged to give reasons in the service statement, when there is either delay or the non-provision of services to the applicant; (ii) whether it is permissible for the liaison officer in the service statement to make an onward referral to another assessment body.

The Disability Act, 2005

9. As the Disability Act, 2005 is central to the issues that arise in these test cases, it is necessary to give a brief overview of the provisions of that Act, insofar as they are germane to the issues that arise in these cases. The Act itself is very broad in its scope. It deals with much more than the assessment of needs of persons with disabilities. For example, Part 3 deals with access to buildings and services and sectoral plans; Part 4 deals with genetic testing; Part 5 deals with public service employment, and Part 6 deals with a centre for excellence in universal design. The wide ambit of the Act is clear from the long title to the Act.

10. The term *"disability"* is defined in the Act as meaning a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.

11. Part 2 of the Act is the relevant part for the purposes of these cases. Part 2 is headed *"Assessment of need, Service Statements and Redress"* it provides that *"Health Service"* means a service, including a personal social service, provided by or on behalf of the Health Service Executive. It provides that an *"Education Service"* means a service provided by a recognised school or centre for education (within the meaning in each case of the Education Act, 1998), or by a person or bodies specified by the Minister for Education and Science, who provides a programme of education, training or instruction and *"education service provider"* shall be construed accordingly. References to the *"Act of 2004"* means the Education for Persons with Special Education Needs Act, 2004 and references to the *"Council"* means the National Council for Special Education, which was established by s.19 of the 2004 Act.

12. Section 8 of the 2005 Act is central to the issues that arise in these cases. Accordingly, it is appropriate to set out its provisions:

"8.—(1) The Executive shall authorise such and so many of its employees as it considers appropriate (referred to in this Act as "assessment officers") to perform the functions conferred on assessment officers by this Part and every person so appointed shall hold office as an assessment officer for such period as the Executive may determine.

(2) An assessment officer shall carry out assessments of applicants or arrange for their carrying out by other employees of the Executive or by other persons with appropriate experience.

(3) Where an assessment officer is of opinion that there may be a need for an education service to be provided to an applicant, he or she shall, as soon as may be, request the Council in writing to nominate a person with appropriate expertise to assist in the carrying out of the assessment under this section in relation to the applicant and the Council shall comply with the request.

(4) An assessment officer shall be independent in the performance of his or her functions.

(5) An assessment under this section shall be carried out without regard to the cost of, or the capacity to provide, any service identified in the assessment as being appropriate to meet the needs of the applicant concerned.

(6) Where an assessment officer carries out or arranges for the carrying out of an assessment under this Part, he or she shall prepare a report in writing of the results of the assessment and shall furnish a copy of the report to the applicant, the Executive, and, if appropriate, a person referred to in section 9 (2) and the chief executive officer of the Council.

(7) A report under subsection (6) (referred to in this Act as "an assessment report") shall set out the findings of the assessment officer concerned together with determinations in relation to the following—

(a) whether the applicant has a disability,

(b) in case the determination is that the applicant has a disability—

(i) a statement of the nature and extent of the disability,

(ii) a statement of the health and education needs (if any) occasioned to the person by the disability,

(iii) a statement of the services considered appropriate by the person or persons referred to in subsection (2) to meet the needs of the applicant and the period of time ideally required by the person or persons for the provision of those services and the order of such provision,

(iv) a statement of the period within which a review of the assessment should be carried out.

(8)(a) An assessment officer may, for the purposes of carrying out an assessment of an applicant under this section, invite the applicant and, if appropriate, a person referred to in section 9 (2) to meet with him or her for interview and furnish any documents or things relevant to the assessment in the possession of the applicant

or person aforesaid that he or she may reasonably request and the applicant shall comply with the request.

(b) Where an applicant attends before an assessment officer pursuant to a request made to him or her under paragraph (a), the officer shall inform him or her of the purpose of the interview unless in his or her opinion the provision of such information might be prejudicial to the applicant's mental health, well-being or emotional condition or inappropriate having regard to the age of the applicant or the nature of his or her disability.

(c) An assessment officer shall—

(i) endeavour to ensure that the person or persons carrying out an assessment communicate with the applicant in a manner which facilitates appropriate participation by him or her in the assessment and promotes dialogue about the nature of the assessment and that note is taken of the views (if any) of the applicant concerning his or her needs or preferences in relation to the provision of services to meet his or her needs, and

(ii) ensure that the applicant is given adequate information relating to the process of the assessment and the results of the assessment unless in his or her opinion the provision of such information might be prejudicial to the applicant's mental health, well-being or emotional condition or inappropriate having regard to the age of the applicant or the nature of his or her disability.

(9) Where an assessment officer carries out or arranges for the carrying out of an assessment on a child and the assessment identifies the need for the provision of an education service to the child, he or she shall, in case the child is enrolled in a school, refer the matter to the principal of that school for the purposes of an assessment under section 3 of the Act of 2004 and, in any other case, refer the matter to the Council for the purposes of an assessment under section 4 of the Act of 2004."

13. Section 9 of the Act deals with applications for an assessment. Section 9(5) provides that where an application under subs. (1) or a request under subs. (4) has been made, the Executive shall cause an assessment of the applicant to be commenced within three months of the date of the receipt of the application or request and it is to be completed without undue delay. These provisions in relation to the time for carrying out of assessments are further augmented by the Disability (Assessment of need, Service Statements and Redress) Regulations 2007 (S.I. 263/2007), which provide in regulation 10 that the assessment shall be completed within a period of three months from the date on which it was commenced, save for in exceptional circumstances, when the assessment will be completed without undue delay and the applicant will be notified in writing prior to the expiry of the three month period for completion of the assessment, setting out the reasons why the assessment would not be completed within the three month period and

shall specify a timeframe within which it is expected that the assessment will be completed. Thus, once a completed application is received by the respondent, it must commence the assessment within three months of that date and must complete the assessment within three months of commencing the assessment, save in exceptional circumstances as outlined above.

14. Section 9(8) provides that a person who has previously made an application under subs. (1) may make a further application, if he or she is of the opinion that since the date of the assessment there has been a material change of circumstances, or further information has become available, which either relates to the personal circumstances of the applicant or to the services available to meet the needs of the applicant, or a material mistake of fact is identified in the assessment report.

15. Section 11 of the 2005 Act deals with service statements. This is a statement completed by an official known as a liaison officer. Section 11(2) provides that where an assessment report has been furnished to the Executive and the report includes a determination that the provision of health services or education services, or both, is or are appropriate for the applicant concerned, he or she shall arrange for the preparation by a liaison officer of a statement, referred to as a service statement, specifying the health services, or education services, or both which will be provided to the applicant by or on behalf of the Executive, or an education service provider, as appropriate, and the period of time within which such services will be provided.

16. Section 11(6) provides that a service statement shall not contain any provisions relating to education services where the subject of the statement is a child.

17. Section 11(7) provides that in preparing a service statement, the liaison officer shall have regard to the following: the assessment report concerned; the eligibility of the applicant for services under the Health Acts, 1947 – 2004; approved standards and codes of practice (if any) in place in the State in relation to the services identified in the assessment report; the practicability of providing the services identified in the assessment report; in the case of a service to be provided by or on behalf of the Executive, the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year and the advice of the Council in the case of a service provided by an education service provider, in relation to the capacity of the provider to provide the service within the financial resources allocated to it for the relevant financial year.

18. Section 14 provides for complaints in relation to assessments, or service statements. It provides that a complaint may be made by or on behalf of an applicant in respect of the following: a determination by the assessment officer that he or she does not have a disability; the fact, if it be the case, that the assessment under s.9 was not commenced within the time specified in s.9(5), or was not completed without undue delay; the fact, if it be the case, that the assessment under s.9 was not conducted in a manner that conformed to the standards determined by a body referred to in s.10; the contents of the service statement provided to the applicant and the fact, if it be the case, that the

Executive or the education service provider, as the case may be, failed to provide, or to fully provide a service specified in the service statement.

19. Section 14(2) provides that the complaint shall be made as soon as reasonably may be after the cause of the complaint has arisen. This is supplemented by the provisions of regulation 24 of the 2007 Regulations, which provides that a complaint shall be made not later than three months after the date on which the cause of the complaint has arisen.

20. The procedures for the processing of complaints are set out in s.15 of the 2005 Act. It provides that where a complaint is received by the Executive, it shall not later than 10 working days after such receipt, forward the complaint to a complaints officer. The complaints officer shall personally consider whether the complaint is frivolous or vexatious. If not, he or she shall go on to consider whether the complaint is suitable for informal resolution. If the complaints officer is of opinion that the complaint could be resolved informally, but it is not in fact so resolved, then he or she shall send a record of the matter back to the Executive, who shall refer the matter to another complaints officer for investigation.

21. If the initial complaints officer is of the opinion that a complaint is not suitable for informal resolution, he or she shall investigate the complaint and shall give the applicant concerned and, if appropriate, the assessment officer and the liaison officer concerned, or the education service provider concerned and any other person having an interest in the matter, an opportunity to be heard by him or her and to present to him or her any evidence relating to the complaint and shall prepare a report in writing setting out his or her findings and recommendations. The Act provides that he shall provide a copy of the report to the applicant and to other interested parties.

22. The report of the complaints officer may contain a finding that the complaint was not well founded, or it may contain a finding that the Executive failed to commence an assessment within the period provided for in the Act, together with a recommendation that the assessment be provided and completed within the period specified in the recommendation.

23. The Act also provides that if it is found that the content of the service statement concerned is inaccurate or incorrect, a recommendation can be made that the statement be amended, varied or added to by the liaison officer concerned within the period specified in the recommendation. The Act further provides that if the complaint officer's report contains a finding that the Executive, or an education service provider failed to provide or to fully provide a service specified in the service statement, a recommendation may be made that the service be provided in full by the Executive, or the education service provider, or both, as may be appropriate within the period specified in the recommendation.

24. Section 16 of the Act provides for the appointment of appeals officers. Section 18 provides that an applicant or a person on their behalf, may appeal to the appeals officer against a finding made by a complaints officer or against the non-implementation by the

Executive, or a head of an education service provider of a recommendation of a complaints officer and, if he or she does appeal, the appeals officer shall give the parties an opportunity to be heard by him or her and to present to him or her any evidence relevant to the appeal. Section 18(2) provides for an appeal by the Executive or the education service provider, in similar circumstances. Section 18(3) provides that an appeal under the section shall be initiated within six weeks of the date on which the finding or recommendation to which it relates was communicated to the person. That period can be extended by the appeals officer for a further period not extending twelve weeks, if the appeals officer is satisfied that the person has given reasonable cause for the extension. Section 18(5) provides that the appeals officer shall make his determination in writing.

25. Section 22 of the Act provides for the enforcement of determinations of various officers under the Act by the Circuit Court. It provides that if the Executive, or the head of the education service provider concerned, fails to implement a determination of the appeals officer, or to implement in full a recommendation of a complaints officer, within three months from the date on which the determination, resolution or recommendation was communicated to him or her, then the applicant concerned, or a person on their behalf, may apply to the Circuit Court on notice to the Executive, or to the head of the education service provider concerned, for an order directing him or her to implement the determination, or recommendation in accordance with its terms, or to give effect to the resolution, as the case may be.

The 2007 Regulations

26. Reference has already been made to some of the relevant provisions of the Regulations. Regulation 18 provides for the content of a service statement. It provides that the service statement shall be written in a clear and easily understood manner and it shall specify: the health services which will be provided to the applicant; the location(s) where the health service will be provided; the timeframe for the provision of the health service; the date from which the statement will take effect; the date for review of the provision of services specified in the service statement and any other information that the liaison officer considers to be appropriate, including the name of any other public body that the assessment report may have been sent to under s.12 of the Act. Regulation 19 provides that the service statement shall be completed within one month following receipt of the assessment report by the liaison officer. Regulation 22 provides that the service statement shall be reviewed no later than twelve months after the statement was drawn up, or no later than twelve months from when the statement was either last reviewed, or amended.

The Education for Persons with Special Educational Needs Act, 2004

27. The 2004 Act, makes extensive provision for the education of persons with special needs. It contains elaborate provisions for the education of children and young people with special needs. However, the sections which are of primary importance to this case, being s.3 which deals with the preparation of an education plan by a school and s.4 which deals with the assessment of a child by or on behalf of a health board or the Council, have never been commenced. This is of particular relevance to the issue of the interpretation

of the statutory pathways provided for in ss.8(3) and 8(9) of the 2005 Act. Accordingly, it is necessary for the proper interpretation of those sections, to look at the architecture that was established by ss.3 and 4 of the 2004 Act, notwithstanding that those sections have not as yet been commenced.

28. The provisions of s.3 of the 2004 Act can be summarised in the following way: where the principal of a school is notified by the parents of a student in the school that they are of opinion that the student is not benefitting from the education programme provided in the school to children who do not have special education needs to the extent that would be expected of the student, or where the principal forms that opinion independently, then the principal is mandated by the Act to take such measures as are practicable to meet the educational needs of the student concerned. Where the principal having taken such measures, is of the opinion that the student concerned is still not benefitting from the education programme provided in the school and that his or her difficulty in doing so may arise from his or her having special education needs, the principal, after consultation with the parents of the student, shall arrange for an assessment of the student to be carried out.

29. Section 3(6) provides that where the principal of a school is of opinion that the arrangement of an assessment of a student is not practicable, he or she shall request the Council to arrange for an assessment of the student under s.4 of the Act. Where the principal does consider an assessment to be practicable, s.3(4) provides that the assessment shall be commenced as soon as practicable, and in any case not later than one month after the principal has reached the opinion referred to in that subsection; it shall be completed as soon as practicable and in any case not later than three months after the principal has reached that opinion and shall be carried out in accordance with such guidelines as may be issued by the Council.

30. Section 3(5) provides that where an assessment has been carried out in accordance with s.3(4) and it establishes that the student concerned has special educational needs, the principal shall subject to subs. (11), within one month from the receipt by him or her of the assessment, cause a plan to be prepared for the appropriate education of the student (in the Act referred to as an *"education plan"*).

31. Section 3(9) provides that in relation to the preparation of an education plan under subs. (5), the principal shall ensure that the parents of the child, the special education needs organiser with responsibility for the school concerned and such other persons as the principal considers appropriate, are consulted and in the case of the parents of a child, their involvement in the preparation is facilitated and that all necessary guidelines are complied with.

32. Section 3(10) provides that immediately after an education plan has been prepared under subs. (5), the principal of the school shall furnish to the parents of the child concerned and the special education needs organiser with responsibility for the school, a notice in writing of that fact, together with a copy of the plan.

33. Section 3(11) provides that where the principal is of the opinion that the preparation of an education plan will not meet the child's special education needs, or an education plan prepared under subs. (5) in respect of a child is not meeting those needs of the child and the taking of any steps by a special education needs organiser under subs. (11) is unlikely to result in those needs being met, the principal shall request the Council to prepare an education plan under s.8 in respect of the child. Section 3(12) provides that if the Council accedes to the request made by the principal under subs. (11) any plan prepared by them shall supersede any other plan already in existence. Subsection (13) provides that if the Council refuses to accede to a request under subs. (6) or (11) then the principal, or the parents of the child concerned may appeal against that refusal to an Appeals Board.

34. Section 4 of the 2004 Act, applies to a situation where a child is not in a school. It provides that where the Health Service Executive (hereinafter referred to as *"the Executive"*) is of the opinion that a child, who is not a student, has or may have special education needs, it shall cause an assessment under s.4 of the child to be carried out. Section 4(2) provides that where the Council is of the opinion that a child may have special education needs it shall cause an assessment under s.4 of the child to be carried out.

35. Section 4(3) provides that where the parents of a child are of the opinion that the child has or may have special education needs, they can request the Executive, or in the case of a child who is a student, the Council, to cause an assessment under the section to be carried out. Section 4(4) provides that the assessment shall be commenced within one month from receipt of a request and shall be completed without undue delay.

36. Section 4(5) provides that the Executive, or the Council, may refuse to accede to a request under s.4(3) if it is of the opinion that there are insufficient grounds to support the requester's opinion that the child has special needs, or that an assessment under the Act has been carried out in respect of the child in the twelve months prior to the date of the request. Section 4(6) provides that an assessment for the purposes of the section shall include an evaluation and statement of the nature and extent of the child's disability and an evaluation and statement of the services which the child will need so as to be able to participate in and benefit from education and generally, to develop his or her potential. Section 4(7) provides for an appeal where the Executive or the Council refuses to accede to a request for the carrying out of an assessment of the child.

37. Section 5 of the 2004 Act contains elaborate provisions for the carrying out of assessments under ss. 3 and 4 of the Act. Section 6 provides for appeals in relation to assessments and s.7 concerns the provision of services by the Executive to a child who is not a student.

38. Section 8 provides that the Council upon being informed by the Executive or the principal of a relevant school that a child has special educational needs, shall, unless an education plan has been or is being prepared under s.3 in respect of the child, direct the relevant special educational needs organiser to cause an education plan to be prepared for the child. Section 9 sets out provisions in relation to the content of the education plan.

Section 10 contains provisions in relation to designation of a school and s.11 provides for review of the education plan. Section 12 concerns appeals in relation to the education plan and s.13 has provisions in relation to the duty of the Minister for Education and the Minister for Health and Children to make resources available. However, it is worth repeating that while many of the provisions of the 2004 Act have been commenced, ss. 3-13 inclusive thereof have not as yet been commenced.

39. Finally, s.19 provides for the creation of a body known as the National Council for Special Education. The establishment day for the Council was 1st October, 2005, established by virtue of S.I. 508/2005. Section 20 of the Act sets out the functions of the Council. It is worth noting that the Council has a wide range of functions, many of which concern children, but some of which also concern the education of adults with special needs. In this regard it is worth noting that s.7(3) of the 2005 Act, conferred certain additional functions on the Council. Section 26 of the 2004 Act provides for the appointment of special educational needs organisers, who carry out the functions specified in the 2004 Act.

40. It is against that somewhat complex statutory background, that the issues raised in these test cases fall to be determined.

The Alternative Remedy Issue

41. There were two issues under this heading. The first was the submission put forward by the respondent that the court should exercise its discretion by refusing to grant the reliefs sought by the applicant by way of judicial review, due to the fact that under the 2005 Act there was an adequate statutory remedy for the complaints raised by the applicants. It was submitted that under s.14 of the Act, there was specific provision which would enable an applicant, or a person acting on their behalf, to make a complaint where there was delay on the part of the Executive in processing their application for an assessment of needs. Counsel for the respondent submitted that where there were very strict timelines set down in both the Act and the Regulations for the commencement and completion of the assessment of needs process and where the Executive fell outside those timelines, there was no good reason why the applicants did not proceed by way of the statutory redress avenue that was available to them under the Act.

42. Counsel submitted that the statutory complaints procedure provided that a complaint could be lodged with a complaints officer, who would then issue a recommendation. Where the Executive was clearly out of time in relation to completion of the assessment, that recommendation would invariably be to the effect that the assessment should be completed within a specified time. The Act further provided that if the recommendation was not complied with by the Executive within a period of three months, the applicant could then apply to the Circuit Court for an order directing the respondent to comply with the recommendation. Once such orders were made by the Circuit Court, the Executive could then comply with those orders by giving the applicant priority in relation to the carrying out of the assessment. Accordingly, it was submitted that the applicants had been provided with a very cheap and fast mechanism for having their complaints in relation to delay addressed.

43. Counsel submitted that where the Oireachtas had gone to great lengths to enact an elaborate statutory mechanism for the enforcement of the requirements of the Act, it was not open to the applicants to choose to simply bypass that mechanism by seeking judicial review.

44. Counsel further submitted that while there had been significant delays in the statutory complaints mechanism in the past, it was apparent from the affidavits sworn by Dr. Morgan and Ms. Hanley, that resources had been made available to the Executive to enable the complaints mechanism to be operated much more efficiently. They had deposed to the fact that there were now no substantial delays in getting complaints dealt with, or in getting the matter before the Circuit Court for an enforcement order. Furthermore, it was submitted that in *JF v. HSE* [2018] IEHC 294 and in *KG v. HSE* (unreported High Court, 26th July 2019) in both cases it had been held that the statutory complaints procedure was working reasonably well.

45. It was further submitted that the judgments in *Koczan v. The Financial Services Ombudsman* [2010] IEHC 407 and *EMI Records v. The Data Protection Commissioner* [2013] 2 I.R. 669, clearly established that where a statutory mechanism for obtaining redress was provided, it was intended that people seeking such redress should have to go by that avenue, rather than by instituting judicial review proceedings.

46. In response, counsel for the applicant, submitted that what in effect was happening, was that the respondent was buying itself extra time by forcing the applicants to proceed by the statutory redress avenue, which would involve lodgement of a complaint with the complaints officer, waiting for that investigation to be completed and the issuance of a recommendation by the complaints officer, followed by a delay of three months in which the Executive could comply with the recommendation and when it was not complied with, the applicant's parents were forced to bring an application before the Circuit Court. Based on the affidavit sworn by Mr. Rogers on behalf of the applicant in the *CM* case, it was submitted that the timelines for the processing of complaints and in particular, the delay in getting a return date before the Circuit Court, were not as short as had been averred to by Ms. Hanley in her affidavits.

47. It was submitted that it was essential for the court to bear in mind that where the applicants were suffering from autism spectrum disorder, every day that there was a delayed diagnosis and/or delay in intervention, was critical and could have significant adverse effects in relation to the child's level of functioning in the long term. In this regard counsel referred to dicta of Faherty J. in *JF*, where the judge having referred to the decision in *O'C v. Minister for Education* [2007] IEHC 170 and to the evidence given before that court and having regard to the evidence that was given before her from a Chartered Psychologist, Ms. Rita Honan, she came to the conclusion that early intervention in cases of ASD was vital. Faherty J. stated as follows at para. 73:

> *"This is particularly so when one has regard to the evidence of Ms. Honan as to the need for early intervention when autism is suspected, something which has already*

been recognised by the courts, as is evident from the judgment of Peart J. in O'C v. Minister for Education."

48. Counsel also referred to the decisions in the *Koczan* and *EMI* cases, where it was recognised by Hogan J. in the *Koczan* case, that there are circumstances where an applicant for judicial review should not be forced to go down the statutory redress route. This was particularly so where there may be a lack of subject matter jurisdiction in the decision making body provided for under statute, or where the complaint relates to the integrity or basic fairness of the decision making process, or where there were issues touching on the constitutionality of legislation or the validity of statutory instruments: see paras. 19 and 20. Similarly, in the *EMI* case, Clarke J. stated that while the overall approach was clear; that the default position was that a party should pursue a statutory appeal rather than initiate judicial review proceedings, there would be cases where it was appropriate to allow parties to proceed by way of judicial review: see paras. 41 and 42.

49. It was submitted on behalf of the applicant that having regard to the nature of the issues raised in the judicial review proceedings herein, the complaints procedure provided for under the 2005 Act was not appropriate. In the present case, significant and far reaching questions were raised in relation to statutory interpretation and to other matters, going beyond the simple issue of delay, which was provided for under the statutory redress mechanism. Furthermore, the claim as presented contained a claim for damages, although by agreement that had been left over for determination on another occasion, nevertheless, that was a relief which it was not possible for the applicant to obtain by way of the statutory redress mechanism. In these circumstances, it was submitted that the court should exercise its discretion to permit the applicant to proceed by way of judicial review.

50. The second question which arose for determination under this issue, was whether the statutory redress mechanism was fit for purpose at all. In this regard, it was submitted on behalf of the applicant that having regard to the periods of delay as averred to in the affidavit sworn by Ms. Hanley, and having regard to the statistics concerning the level of delays across the HSE generally in carrying out assessments, it could not be argued that the statutory redress mechanism was operating in a satisfactory manner. Furthermore, as noted previously, the timelines given by Ms. Hanley were disputed in the affidavit sworn by Mr. Rogers, who maintained that there were considerable delays of varying lengths in getting return dates for applications before the Circuit Court.

51. In response, counsel for the respondent submitted that there was cogent evidence before the court in the affidavits sworn by Ms. Hanley, that while there had been somewhat lengthy delays in obtaining enforcement orders before the Circuit Court in the past, considerable resources had been allocated to both the assessment of needs process and the complaints process and as a result, waiting times had been reduced considerably. It was submitted that in the *JF* case and in the *KG* case, it had been found on two occasions by the High Court that the complaints mechanism provided for under the Act was working

satisfactorily. It was submitted that the court should decline to make any declaration to the effect that the complaints procedure provided for under the Act was unfit for purpose.

Conclusion

52. The court is satisfied on the basis of the decisions in *Koczan v. Financial Services Ombudsman* and in *EMI Records v. Data Protection Commissioner*, that the general rule is that where a statutory mechanism is provided for applicants to seek redress under a particular Act, ordinarily the court should exercise its discretion to decline to grant relief by way of judicial review and the applicant should be forced to proceed by way of the statutory mechanism. However, as was pointed out in those cases, that is not an inflexible rule. There are situations where an applicant will not be forced to go down the statutory redress route, if it can be established that the statutory appeal process or complaints process would not have jurisdiction to deal with the issues raised by the complainant. Similarly, as was noted by Hogan J. where a complaint relates to the integrity or basic fairness of the decision making process, that may not be something that could be adequately dealt with by the complaints procedure, or appeals procedure provided for under statute. Similarly, where the constitutionality of legislation, or the validity of statutory instruments was called into question, that may not be suitable for determination within the statutory process. Or as pointed out by Clarke J. in the *EMI* case, there may be cases where the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues, such that confining them to an appeal would be in truth, depriving them of their entitlement to two hearings.

53. In *Petecel v. Minister for Social Protection, Ireland and the Attorney General*, [2020] IESC 25, O'Malley J. delivering the judgment of the court, adopted the dicta of Hogan J. in *Koczan* and Clarke J. in the *EMI* case and held that in the case before the court, the appellant was entitled to bring judicial review proceedings, because the issue he had raised as to the validity of the classification of disability allowances, was one that could not be decided in the internal appeals structure and would for that reason, not have been appropriate to an appeal to the High Court on a point of law: see paras. 79, 99 – 106 and 113.

54. The court is satisfied that in this case, the existence of the statutory complaints procedure provided for under s.14 of the 2005 Act, is not a bar to the bringing of these judicial review proceedings by the applicants. The court reaches that conclusion for two reasons. Firstly, having regard to the nature of the complaints mechanism provided for under the Act, and having regard to the complexity of some of the issues raised by the applicants in these test cases, the court is of the view that the statutory complaints procedure was not the appropriate forum to ventilate those issues. In particular, the issue in relation to the correct statutory interpretation of s.8 of the 2005 Act, was one of immense complexity and was not one which could be determined within the relatively simple complaints structure provided for under the Act. Secondly, the court accepts the point made by counsel on behalf of the applicant that one of the reliefs sought in the proceedings was a claim for damages. That was not a remedy which would have been available to the applicant under the statutory complaints mechanism. Accordingly, the applicants are not

prevented from maintaining these judicial review proceedings by the existence of the statutory complaints mechanism provided for under the 2005 Act.

55. Turning to the second question raised in relation to the statutory complaints mechanism, namely whether it is fit for purpose at all, the court finds with the respondent on this aspect. While not doubting the averments made by Mr. Rogers in his affidavits, it seems to me that the averments made by Ms. Hanley in her affidavit sworn on 27th July, 2019 constitute very strong evidence as to the current capacity of the statutory complaints procedure. It is stated that the HSE has devoted significant resources to ensure that the statutory complaints process runs smoothly. The complaints office dealing with complaints regarding assessments of needs has been fully staffed since October 2018. She has stated that a backlog which once existed in dealing with such complaints, has now been completely cleared. Between January and April of 2019, the complaints office received 291 complaints, of which 246 were completed (meaning that recommendations were made, or complaints were rejected) within 30 working days and on average these files took 22 days to resolve. She states that that was achieved notwithstanding a 17% increase in complaints made year on year for the same period in 2018. She went on to state that in straightforward cases, recommendations have been made within as short a time as seven days.

56. In relation to return dates for applications to the Circuit Court, she stated that these were coming on for hearing between two and three weeks after the relevant motions were issued. Those averments were supported by the affidavit sworn by Ms. Cliona Kenny, a solicitor in the firm of Comyn Kelleher Tobin, who act for the respondent, which affidavit was sworn on 15th November, 2019. At para. 9 of that affidavit she gave the actual length of time it took to obtain return dates before the Circuit Court in fourteen cases that had been lodged in the period September – October 2019, wherein the average delay between issuing the motion and obtaining a return date was in or about three weeks.

57. The court was impressed by the evidence set out on affidavit by Ms. Hanley and Ms. Kenny in this regard. In addition, the court had regard to the fact that in the *JF* case and in the *KG* case, both judges effectively found that the statutory redress mechanism was working reasonably well. I am satisfied that the complaints procedure that has been established by the Act of 2005, constitutes a reasonable and efficient means of dealing with the majority of complaints that are likely to arise in connection with an assessment of needs, or a service statement. It provides a relatively fast and cheap mechanism for having these matters resolved. I am satisfied having regard to the matters averred to by Ms. Hanley and Ms. Kenny, that resources have been applied to the complaints mechanism, such that there are not appreciable delays at present in having such complaints dealt with. Accordingly, the court declines to make the declaration sought by the applicant in this regard.

58. Finally, a point that was not strenuously pursued by the respondent at the hearing, but which was raised in its written submissions, was to the effect that where an order of *mandamus* is sought, the court should not grant same unless there has been a prior

request or demand by the applicant that the person addressed should carry out their statutory duty. While the respondent did complain in the written submissions that it was not given any pre-litigation correspondence raising issues in connection with the assessments, I am satisfied having regard to the overall evidence contained in the affidavits sworn by the applicants' next friends, that the concerns of the parents of the applicants and in particular concerns in relation to delays in obtaining the assessments, was sufficiently ventilated prior to the institution of the proceedings.

The "Geographical Lottery" Issue

59. The applicants submitted that the statutory regime provided a mandatory provision whereby applications for assessment of needs had to be dealt with in strict chronological order. This was clearly set down in regulation 5 of the 2007 Regulations, which provided that the Executive shall process applications for assessment in order of the date on which they are received by the Executive. Where two or more applications are received on the same date, they shall be processed in alphabetical order of the surname of the applicant. The applicant submitted that this clearly mandated that each application had to be dealt with in strict chronological order, even to the point where applications received on the same day had to be put on the list in alphabetical order. It was submitted that this was a very clear direction as to what should be done by the respondent.

60. It was submitted that in breach of this statutory obligation, the respondent had divided the country into nine separate regions and it processed applications in strict chronological order, but within each region separately. Due to the fact that there were considerable variations in the waiting time between the various regions, this had the effect that while an application may be submitted earlier in time, it may fall behind other later applications, due to the fact that it was in an area where there was a longer waiting time to be assessed. It was submitted that that was an impermissible procedure and was in breach of the obligations placed upon the respondent by the statute to process all applications in strict chronological order, which of necessity meant that this should be done on a national basis.

61. It was submitted that having regard to the very long waiting times that were experienced by some of the applicants and having regard to the irrefutable evidence that early intervention was vital in relation to the successful treatment of ASD, the parents of the applicants were more than willing to travel to whatever part of the country was necessary in order to have the assessments of their children carried out at the earliest possible opportunity.

62. Reference was made to data which was contained in the Joint Committee on Health Report in relation to the number of applications for assessment of needs under the Act that were overdue for completion on the last day of each quarter in 2018 and quarter one in 2019, broken down by CHO area. It was submitted that the data contained in that report, which was exhibited to the affidavit sworn by the applicant's next friend, proved that there were considerable inconsistences in the waiting lists for the completion of the assessments of needs depending on what part of the country one resided in. It was submitted that this *"post code lottery"* was at odds with the wording and the spirit of the

2005 Act. It ignored the fact that applicants under the Act were not just persons with disabilities, they were citizens with rights. They should not be expected to give up their rights in exchange for services, nor should they be treated primarily by reference to their status as people with disabilities based upon where they lived.

63. It was pointed out that while under the Act, the time envisaged for commencement of an assessment was within three months of the lodgement of the application and the time for completion of the assessment, was three months after its commencement, thereby giving a maximum completion period of six months from date of lodgement of application; the average time taken for completion of an assessment of needs in the area CHO4 was 28.98 months according to the HSE for Q2 of 2018. The national average for completion was 18.48 months. It was submitted that it was an absurdity that the respondent would then require the applicants to go through the complaints procedure, with all the delays that were inherent therein, so as to obtain an order from the Circuit Court, which would enable them to obtain priority in relation to the assessment of needs for their child.

64. Counsel submitted that where there was a clear statutory obligation, the body to whom that obligation was directed, could not decide to carry out the procedure in a way that defeated the obligation that was placed upon it. In this regard counsel referred to the decision in *O'Neill v. Minister for Agriculture and Food and Ors.* [1998] 1 I.R. 539 where the court held that in dividing the country into nine regions and only allowing for the licensing of one person to carry out artificial insemination of cattle within each region, the Minister had impermissibly gone beyond its powers as provided under the Livestock (Artificial Insemination) Act, 1947, notwithstanding that there may have been good reasons justifying the implementation of that policy.

65. Counsel submitted that the 2005 Act required that each application should be assessed in strict chronological order. This meant that it had to be done on a national basis. That was the only fair way that each child could be assessed at the earliest possible opportunity and in the order dictated by the lodgement of an application on his or her behalf. The applicants sought a declaration that the respondent was acting *ultra vires* in operating the procedure whereby assessments were done on a chronological basis but within each geographical area.

66. In response, counsel for the respondent accepted that the assessment of needs process was run on the basis that it was administered and delivered within each Local Health Area; that applications for assessment of needs were submitted to the HSE in each Local Health Area and were processed in accordance with the scheme of chronological ordering enacted in regulation 5 of the Regulations. It was submitted that this was entirely within discretion delegated to the HSE to decide how best to carry out its function of managing and administering the assessment of needs process. It was further submitted that there was nothing in regulation 5 to preclude the carrying out of the assessment of needs as close as geographically possible to an applicant child. As set out by Dr. Cathal Morgan in his affidavit, there were good clinical reasons why that was done. In particular, Dr. Morgan had stated in his affidavits that ASD assessments are multidisciplinary and can

take up to ninety hours to complete. They require observation of the child in situ in different contexts, such as in his or her home, or school. Counsel pointed out that the exact basis on which a national ordering of assessments should be provided, had not been set out by the applicants. Nor had they contradicted the averment by Dr. Morgan that to carry out such assessments otherwise than on a geographical basis, would be virtually impossible, if not counter-therapeutic to operate.

67. It was submitted that the HSE as a specialist body in the provision of health services, should be afforded considerable discretion by the courts in relation to the manner in which it carries out its statutory duties. In particular, it was submitted that the court should not attempt to micromanage how the HSE carried out its various duties, as long as it was complying with the letter and spirit of the Act. It was submitted that in dividing the area into different regions and assessing the applications on a strict chronological basis within each region, that was within both the spirit and the letter of the duty placed upon it by the 2005 Act. In support of the submission that the court should exercise deference towards a specialist body in its choice of the manner in which it exercises its functions, counsel referred to the judgment of Finlay J. in *Meadows v. Minister for Justice* [2010] IESC 3 at para. 449; see also *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 and *M. & J. Gleeson & Co. v. Competition Authority* [1999] 1 I.L.R.M. 401.

Conclusion

68. In an affidavit sworn on 15th November, 2019, Dr. Cathal Morgan, Head of Operations, Disability Services of Dr. Stevens Hospital, Dublin, who is not a medical doctor, but has a PhD in Psychology, stated at para. 68 that the duration of an ASD assessment can vary significantly from area to area, but a time of up to ninety hours is indicated by certain professionals. He stated that these assessments are subtle and complex and often require observation of a child across a number of different settings, including in the clinic, at school and at home. In such circumstances it is not viable to propose conducting such assessments *"out of area"*. The court can readily understand that where a child either has, or is suspected of having, ASD, they will require a multidisciplinary assessment, which will involve observing the child both at home and in his school setting.

69. While the applicant put forward the simple proposition that each assessment should be undertaken in strict chronological order on a national basis, they did not elaborate as to how that would take place in practice. There were averments by the next friends of the applicants, that given the desirability of early assessment in ASD cases, they would be willing to travel to whatever part of the country was necessary to obtain such an assessment. However, it seems to the court that this misses the point entirely that such assessments in order to be comprehensive, need to be carried out in the home and school environment of the child. Furthermore, it seems to me that if one were to apply the national chronological order of assessing children, this would require the medical professional or therapist, who was going to carry out the assessment travelling from whatever part of the country they may be in to the place of residence of the applicant. This could mean that for example, a psychologist based in Cork, might be asked to travel

to assess a child in Sligo or Leitrim on one day and then have to travel on another day to assess a child in Meath or Louth. It seems to the court that that would lead to a huge waste of time and resources in having therapists travel all over the country to deal with assessments on a strictly national basis. It makes much more sense for the assessments to be carried out within the region where the child resides. This would mean that the psychologist or other therapist, would only have to travel within their own region to carry out assessments, thereby possibly enabling them to carry out a number of assessments within a single day. It would certainly maximise the use of their time by reducing travel and thereby increasing the amount of time that they had to actually carry out assessments.

70. The statutory regime provides that the assessments must be done in strict chronological order. The purpose of that is probably twofold. Firstly, to prevent people seeking to exercise influence to jump the queue and gain priority, so that everyone, rich or poor, well connected or otherwise, is treated in a fair manner; rather than having the person with power or influence gaining priority in terms of obtaining an initial assessment. Secondly, it avoids the HSE being put in the invidious position of having to decide priority on the basis of disability or needs, when that has not been established at the time that the application is lodged. In other words, it prevents the HSE having to make a decision as to which child applicants should be seen first, when no assessment of their disability or needs has at that time been carried out. It seems to me that these two aims are achieved by the system which has been put in place by the respondent. The court is also satisfied that it should not micromanage the respondent in how it chooses to carry out its specialist functions. The court is satisfied that in adopting the procedure which it has, the respondent has complied with both the letter and the spirit of the obligation which was placed upon it to carry out such assessments in strict chronological order.

71. Furthermore, where such assessments are multidisciplinary involving assessments by psychologists, physiotherapists, speech and language therapists and occupational therapists, it makes sense that these are carried out on a regional basis, rather than having such people crisscrossing the country to carry out assessments, perhaps many miles from their base. It is much more sensible that such assessments be organised on a regional basis.

72. The court does not consider that the *O'Neill* case is authority for the proposition that the respondent cannot decide how best to carry out its statutory function. The *O'Neill* case concerned a system that was set up by the respondent whereby they divided the country into separate regions and more importantly, provided that only one person would be licensed to carry out artificial insemination of cattle within each region. That meant that other people who were suitably qualified for such work, were effectively prevented from having the opportunity to do such work due to the exclusivity of the licence regime. The court held that that was *ultra vires* the powers given to the Minister under the 1947 Act. It does not seem that that case has any relevance to the circumstances of this case, which merely provides for a sensible, reasonable and fair ordering of the manner in which the respondent carries out the assessments in question.

73. While not perhaps strictly germane to the issue for determination, there was evidence in the affidavit sworn by Dr. Morgan which provides a basis for believing that the assessment of needs system generally throughout the country has been improved. In particular, at para. 31 he stated that the sum allocated for disability services is €1.9bn, an increase of €130m on the previous year (2018), which was itself an increase on the previous year. This reflected the priority afforded by the National Service Plan for 2019 to improving the assessment of needs process. He stated that in 2019 one hundred additional posts were recruited on a phased basis resulting in an additional allocation to the disability service budget of €6m for 2020, which is specifically targeted at the assessment of needs process.

74. He went on in that affidavit to describe the revised standard operating procedure which has been implemented to streamline the assessment of needs processes throughout the country, with a view to ensuring that there is not a divergence of practice in relation to assessments of needs from one region to another. He exhibited a copy of the revised SOP, which came into existence in January 2020. It provides detailed step-by-step instructions for the carrying out of assessments and in particular for keeping the parents of applicants informed at each stage of the process. Obviously, with the onset of the covid-19 pandemic, it was not possible to assess whether the revised SOP is operating satisfactorily, however, there is evidence which supports the belief that significant improvement has been made in the whole area of assessment of needs, which will be of benefit to the applicants and to others in a similar position.

75. Accordingly, for the reasons set out above, the court refuses to make a declaration that the respondent is acting in breach of its statutory duties in processing applications for assessment of need on a chronological basis but within each regional area.

The s.8(3) Referral Issue

76. It was submitted on behalf of the applicant that the wording of s.8(3) of the 2005 Act was very clear. It provides that where an assessment officer is of opinion that *"there may be a need for an education service to be provided to an applicant"*, he has to take certain steps. Counsel submitted that the use of the word *"applicant"* was clearly wide enough to include a child applicant. He stated that the duty that was placed upon the assessment officer was very clear, once he had the required opinion that there may be a need for education services, then he or she shall as soon as may be, request the Council to nominate a person to assist in the carrying out of the assessment under the section and it is provided that the Council shall comply with the request. The applicant submitted that there was a clear duty placed upon the assessment officer to make the request once he or she had the requisite opinion.

77. Counsel stated that it was also noteworthy that the obligation to request the assistance of the Council, arose at an early stage when the assessment officer formed the opinion that there *"may"* be a need for an education service to be provided to the applicant. This indicated that the request for assistance could be made at a very early stage after the application had been submitted, but before any reports had been submitted from the assessors. This would allow for the early involvement of the Council.

78. Counsel submitted that the practice of assessment officers in the past had supported the interpretation put forward by the applicant herein, which was to the effect that a request for assistance could be made pursuant to s.8(3) in respect of child applicants. Indeed, in the *JO'SS* case, which was one of the test cases heard alongside the present case, the assessment report dated 28th January, 2019 stated as follows:

> *"In line with s.8(3) of the Disability Act, I wrote to the Special Educational Needs Organiser, National Council for Special Education today requesting them to assist in the carrying out of the assessment and, in particular, the assessment of any need for an education service. When the report is received, this assessment report will be amended by a letter issued to you, including the results of the educational assessment."*

79. Counsel submitted that the argument put forward on behalf of the respondent, to the effect that a referral *"in line with s.8(3)"* was somehow different to a referral *"under s.8(3)"*, was simply semantics and was without any meaning.

80. Counsel stated that the interpretation put forward on behalf of the applicants to the effect that requests for assistance could be made pursuant to s.8(3) in respect of children, was not a novel interpretation and indeed appeared to be an interpretation which was adopted by the respondent itself and by other bodies charged with the implementation of the legislation, down through the years. In this regard, counsel referred to a guidance note which had been issued by the respondent on 23rd July, 2009. The document was headed *"Part 2 – Disability Act 2005. Assessment in respect of need for education services".* Having quoted the relevant sections of the Disability Act 2005, being ss. 8(3); 8(9); 7 and 8(7)(b)(ii) and (iii), it went on to indicate that extensive discussions had been ongoing both before and following commencement of the 2005 Act, with the Council and the Department of Education and Science. Those discussions had resulted in agreed working arrangements which were set out on the second page under the heading *"Proposed Interim Working Arrangements between education and health sectors for assessment of needs under the Disability Act for under-fives"*. It set out that the assessment officer should request the Council in writing to make arrangements for a person with the appropriate education expertise to assist in carrying out the assessment of needs under Part 2 of the Disability Act in the following instances and it then went on to set out various scenarios in which the request should be made. These scenarios all involve children. It is noteworthy that it referred to a *"request for assistance"*, which is the terminology used in s.8(3). The document went on to state that the request to the Council should be made at the earliest possible stage, in particular for children with a diagnosis of autism or visual or hearing impairment. It went on to state that adequate time (ideally 3 – 4 weeks from receipt of all reports) should be allowed for the Council to assist the completion of the assessment process. Counsel submitted that this clearly indicated that the involvement of the Council was to involve the provision of assistance in the carrying out of the assessment leading to the assessment report and as such the referral referred to therein must be one that was made pursuant to s.8(3).

81. Counsel submitted that this interpretation of s.8(3) was further supported by the content of a circular issued by the Department of Education and Skills in 2011, which was a circular to management authorities of national schools on the assessment of needs process under the Disability Act 2005. It was a circular specifically dealing with children. In section 3 of the document it set out the provisions that would apply where there was a need for an assessment of the educational needs of the child as follows:

> *"3. Education and the Disability Act.*
>
> *Under s.8(3) of the Disability Act, the assessment officer may request assistance from the NCSE in identifying the educational needs of the child. A process has been agreed for timely contact and response to the HSE by the NCSE to these requests.*
>
> *The assessment officer (HSE) contacts the relevant SENO (NCSE) when an educational need is identified as part of the assessment process. The SENO informs the assessment officer of the education services which will be made available to the child. These services will be based on the relevant criteria applying at the time, with regard to provision for the education of pupils with special educational needs, including assessment and intervention and using the approach outlined in the NEPS Guidelines – a Continuum of Support – the general allocation and resources allocated to schools by the NCSE, on the basis of criteria set out by the DES."*

82. Counsel also referred to a Guide to the Disability Act, 2005 published by the Department of Justice, Equality and Law Reform, which stated that if a special educational need was identified as a result of an assessment of a child under the 2005 Act, that aspect of the assessment must be referred to the NCSE, or to the Principal of his or her school.

83. Counsel stated that even the revised SOP dated 24th October, 2019, did not seem to bear out the interpretation of s.8 which was put forward on behalf of the respondent in these proceedings. In particular, under the heading *"Onward Referral"* it provided as follows at paras. 7.2.3(a) and 7.2.3(b):

> *"(a) Reports accompanying the application may indicate the need for a referral to the NCSE under s.8(3) or to another public body. Such an indication may become apparent at various stages of the process and referral will be made at the earliest possible opportunity.*
>
> *(b) Where a referral to the NCSE is indicated, the applicant will be advised, in writing, that they must contact the school principal to request the necessary assessment. A copy of this letter will be sent to the school principal. Such assessments will be completed outside of the assessment of need system (refer to Appendix 1 – standard letter 007.)"*

84. Counsel submitted that the first time that the respondent had ever raised the argument that they could only make a referral to the council in respect of children under the provisions of s.8(9) and that s.8(3) only related to adult applicants, was in the statements

of opposition filed in the cases currently before the court. This seemed to mark a departure from both their practice and their stated understanding of the interpretation of the section, which had been in existence for a number of years.

85. Counsel submitted that the interpretation now being put forward on behalf of the respondent in respect of the interpretation of s.8 of the 2005 Act was at variance with the plain wording of the section, was at variance with the practice of assessment officers in the past and down to the present time, even in one of the test cases before the court and was at variance with guidance notes and circulars issued by stakeholders in relation to the operation of the 2005 Act and was also at variance with the revised SOP issued on 29th October, 2019, which became operational from January 2020.

86. It was submitted that s.8(9) provided an additional statutory pathway whereby the matter could be referred by the assessment officer to the Council. It provided a specific statutory referral pathway for children, but it only arose where, having carried out an assessment, *"the assessment identifies the need for the provision of an education service to the child"*. In such circumstances the assessment officer refers the matter to the school principal for onward transmission to the Council under s.3 of the 2004 Act, or, if the child is not in school, the assessment officer refers the matter to the Council for the purpose of an assessment under s.4 of the Act of 2004. It was submitted that this was an additional statutory pathway that was available in addition to that provided for in s.8(3).

87. Counsel stated that the interpretation of s.8 put forward on behalf of the applicants was supported by the provisions of s.8(7)(b)(ii), which provided that an assessment report shall contain a statement of the health and education needs (if any) occasioned to the person by the disability. That indicated that an assessment of education needs should form part of the overall assessment and this was provided for by the mechanism provided in s.8(3).

88. In conclusion, counsel stated that the case being made by the applicants was a simple one which was based on the clear wording of s.8(3). The fact that there was another pathway provided for under s.8(9) did not alter the plain meaning of s.8(3). It was clear from the documentary evidence that had been referred to, that both the understanding and practice of the respondent for a number of years had been to make referrals to the Council under s.8(3), as had been done in the *JO'SS* case herein. It was submitted that there was no basis for the interpretation put forward on behalf of the respondent, to the effect that the only statutory pathway available for children was that provided for in s.8(9).

89. In response, counsel for the respondent accepted that different approaches had been taken to the issue by various assessment officers. That had been specifically conceded in the affidavits sworn by Ms. Hanley. It was also conceded that informal referrals had been made to the Council using the phrase *"in line with s.8(3)"*.

90. Counsel accepted the content of the guidance note of 2009, which had been referred to in argument by counsel for the applicants. However, he pointed out that that guidance note had been superseded by subsequent guidance notes issues in 2014 and 2019. He further submitted that the circular issued by the Department of Education and Skills in 2011, could not dictate the proper interpretation of the section in the 2005 Act. That was a matter solely for the Court.

91. In relation to the revised SOP, counsel submitted that para. 7.2.3(a) referred to the referral of applicants under s.8(3), which related to referrals of adults. Whereas, para. 7.2.3(b) related to referrals pursuant to s.8(9) concerning children.

92. It was accepted that the effect of the respondent's submission on the interpretation of s.8, would mean that there was in effect no statutory pathway for a referral to the Council for children, because the avenue of referral provided for by s.8(9), was not available due to the non-commencement of ss. 3 and 4 of the 2004 Act. However, it was important to note that the absence of a statutory pathway, did not mean that a child was without access to necessary services. As had been averred to by Dr. Morgan in his affidavit sworn on 15th November, 2019 at paras. 40 and 41, in many instances access to educational or health related services was not dependent on the existence of an assessment of needs report and/or a service statement. Services could be accessed through direct referral by parents, health professionals or education professionals. Thus, while the preparation of assessment reports and service statements was very important in terms of identifying needs and seeking to tailor a response to those needs, that process did not operate as a form of exclusive gateway.

93. Counsel agreed with counsel for the applicant that the core issue in this case was the correct interpretation of s.8 of the 2005 Act. It was a pure question of statutory interpretation. In this regard, counsel stated that the legal maxim *"generalia specialibus non derogant"* applied in this case. That principal had been explained in *Halsburys Laws of England*, 4th ed. at para. 875 in the following terms:

> *"General and particular enactments.*
>
> *Whenever there is a general enactment in a statute which, if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative, and for general enactment must be taken to effect only the other parts of the statute to which it may properly apply. This is merely one application of the maxim that general things do not derogate from special things."*

94. That maxim had been applied in Irish law in *National Authority for Occupational Safety and Health v. Fingal County Council* [1997] 2 I.R. 547 and in *Hutch v. The Governor of Wheatfield Prison* (unreported, Supreme Court, 17th November, 1992). In his judgment in the *National Authority for Occupational Safety and Health* case, Murphy J. also referred to the decision of the Supreme Court in *Welch v. Bowmaker (Ireland) Ltd & Ors* [1980] 1 I.R. 251, which concerned the interpretation of provisions contained in a debenture,

where there were both general and specific provisions in the same document. Murphy J. held that that case was helpful with a very clear explanation of the maxim given by Henchy J. (at p. 254):

> *"'The relevant rule of interpretation is that encapsulated in the maxim generalia specialibus non derogant. In plain English, when you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation. This is but a common sense way of giving effect to the true or primary intention of the draughtsman, for the general words will usually have been used in inadvertence of the fact that the particular situation has already been specially dealt with.'"*

95. It was submitted that when one looked at s.8 as a whole, it was clear that when s.8 (3) referred to an *"applicant"* it was in fact referring to adult applicants, because s. 8 (9) makes a separate specific provision for child applicants. It was submitted that it was clear that s. 8 (9) created a specific referral pathway for children and s. 8 (3), established a referral pathway for applicants generally. It was submitted that the only statutory referral pathway available under the 2005 Act for children to the council, was the s. 8 (9) pathway, notwithstanding that that pathway was not available due to the non-commencement of ss. 3 and 4 of the 2004 Act. However, the fact that those sections of the 2004 Act have not been commenced as yet, did not affect the correct interpretation of s. 8 of the 2005 Act.

96. Counsel submitted that the provisions relating to the functions that were conferred on the council by s. 20 of the 2004 Act and in particular having regard to subparas. (b) and (f), made it clear that their role was in relation to the education needs of children. Their role in carrying out educational assessments was provided for under ss. 3 and 4 of the 2004 Act. These functions had been enlarged to encompass the assessments in respect of adults under the provisions of the 2005 Act.

97. In summary, counsel submitted that in the absence of the commencement of the relevant sections in the 2004 Act, the HSE was precluded from making a referral in respect of child applicants using either of the pathways provided for in s. 8 (9). Insofar as that may render an assessment report incomplete, in that a report is required by s. 8 (7) to include a *"statement of the health and education needs"* of an applicant, an assessment officer can address the question of health needs, but cannot, as matters stand, address an applicant's education needs due to the fact that the framework provided for such assessment under the 2004 Act, has not yet been commenced. That was an unfortunate consequence, but it was the inevitable result of the true interpretation of s. 8 of the 2005 Act, coupled with the non-commencement of the relevant provisions of the 2004 Act.

Conclusion

98. In approaching the issue of the correct interpretation of s. 8 of the 2005 Act, the court is of the view that it is necessary to look at the framework that was intended to be put in place by a combination of the 2004 Act and the 2005 Act. They are clearly interlinked. Therefore, in interpreting the 2005 Act, one must have regard to the provisions of the 2004 Act. The court must look at what the Oireachtas had put in place by virtue of the two Acts. The court has to ignore the fact that significant parts of the 2004 Act have not yet been commenced.

99. Looking at s. 8 of the 2005 Act, it is difficult to understand exactly what the assessment report is supposed to contain. The respondent is, as its name indicates, a health authority. It has an expertise in the assessment of the health needs of various classes of people. It is not involved in the provision of education services; that is the function of the Minister for Education and Skills and/or the National Council for Special Education. However, s. 8 (7) (b) (ii) provides that the assessment report must contain *"a statement of the health and education needs (if any) occasioned to the person by the disability"*. The reason for that provision, is probably because psychologists in diagnosing ASD, will be in a position to say in general terms what special education needs the child will have. However, it is not the function of the respondent to fulfil these needs, or to provide the necessary education services. For that reason, s. 11 (6) provides that a service statement will not contain any provisions relating to education services where the subject of the statement is a child. That is clearly left to the Council under the 2004 Act.

100. Looking at the historical operation of s. 8 of the 2005 Act, it is undoubtedly the case that assessment officers have made referrals to the Council under s. 8 (3) over the years. Indeed, that has been expressly conceded by Dr. Morgan at para. 62 of his affidavit sworn on the 15th November, 2019. It appears to the court that the practice of making such referrals may have been because the assessment officers believed in accordance with the guidance note of 2009, that they could make referrals under s. 8 (3), or because due to the unavailability of the referral pathway under s. 8 (9), due to the non-commencement of ss. 3 and 4 of the 2004 Act, they made such referrals on an informal basis *"in line with s. 8 (3)"* as the only means of getting a child's education needs assessed by the Council. Indeed, the documentation referred to by counsel on behalf of the applicants, including the 2009 guidance note and the 2011 circular, certainly indicated that there was a belief abroad that such referrals could be made under s. 8 (3).

101. However, the practice adopted by certain assessment officers in the past and the expressions of opinion of various bodies, as set out in various documents as to their interpretation of s. 8 (3), cannot bind this court when it is called upon to interpret the relevant provisions. This court must apply the well-known rules of statutory interpretation and leave aside whatever practices may have been followed in the past, or whatever opinions may have been expressed by various stakeholders over the years.

102. It seems to me that I must look at s. 8 as a whole and look at it in the context of the entire framework established by both the 2004 Act and the 2005 Act. As noted earlier I must ignore the fact that parts of the 2004 Act have not yet been commenced.

103. The court is satisfied that when one looks at s. 8 as a whole and in the light of the framework provided for under the 2004 Act and the 2005 Act, it is clear that s. 8 (9) is the pathway intended to be used for the assessment of children's education needs.

104. I accept the submission made by counsel on behalf of the respondent that the maxim *generalia specialibus non derogant* applies in this case. That maxim was applied by the Supreme Court in the *Hutch* case and by Murphy J. in the *National Authority for Occupational Safety and Health* case. The dicta of Henchy J. in the *Welch v. Bowmaker* case, albeit referring to construction of a debenture, are apposite where the dichotomy between the general provision and the specific provision arises not in separate documents, but within the same document.

105. Applying that maxim and the principles laid down in the cases mentioned, I am satisfied that the correct interpretation of the 2005 Act, is that s. 8 (3) refers to adults and specific provision is made for children in s. 8 (9). Accordingly, I hold that the sole statutory referral pathway for children provided for under the 2005 Act is pursuant to s. 8 (9) of the Act.

106. I am satisfied that this interpretation is consistent with the overall framework provided for under the 2004 Act, whereby the Council was charged with carrying out assessments of educational needs of children under ss. 3 and 4 of the Act. This is in line with s. 7 of the 2004 Act, which, under the heading *"Provision of Services"* provides that in the case of a child who is not a student the Health Service Executive shall, subject to subs. (2), provide to the child such of the services identified in the assessment carried out under s. 4 in relation to the child as are necessary to enable him or her to participate in and benefit from education.

107. That the 2004 Act confers on the Council the function of assessing the educational needs of children is further exemplified by the fact that in s. 7 (3) of the 2005 Act, the Council is given additional functions including: assisting the Executive in the assessment of adults and in planning and in coordinating the provision of educational services to adults and to assess and review the resources required in relation to education provision for adults with disabilities. Accordingly, their remit is widened by the 2005 Act in relation to adults.

108. The court is satisfied that the reference in s. 8 (7) of the 2005 Act to the assessment report containing a statement of the health and educational needs (if any) occasioned to a person by their disability, is explicable by the fact that in cases of cognitive disability, such as in children with ASD, the psychologist's report will invariably set out a general statement of how the disability will affect the child generally in his or her life, including in the educational aspects thereof and may well contain recommendations in respect of his/her general requirements in the education field, such as, that the child may benefit from particular supports within a school setting, or may require additional tuition in various areas, or subjects.

109. This subsection is simply stating that where such recommendations or observations have been made, these should be stated in the assessment report. However, the assessment

of the child's specific educational needs, such as the number of hours that he/she may need with a specialist teacher and the practical question of whether such a service can be provided for the child, is a matter for the Council, which will rely on the advice of a SENO in the relevant area.

110. The court is conscious that in arriving at this decision on the correct interpretation of s. 8 as outlined herein, the inevitable consequence is that there is no statutory pathway for children to have their educational needs assessed by the Council. Due to the non-commencement of ss. 3 and 4 of the 2004 Act, parents or school principals cannot make a referral directly to the Council. If the parents of a child make an application to the respondent for an assessment of needs under the 2005 Act, and if the assessment identifies the need for the provision of education services to the child, the respondent also cannot make a referral to the Council, due to the non-commencement of ss. 3 and 4 of the 2004 Act. When one considers that the Council has been in existence since 1st October, 2005, that is an extraordinary state of affairs.

111. The children concerned are not completely without redress, because as stated by Dr. Morgan at paras. 40 and 41 of his first affidavit, they can get referrals directly to an education service provider. However, it is not satisfactory that children who have cognitive disabilities, such as ASD, which can benefit greatly from early intervention, are left without any statutory pathway to have their educational needs assessed by the Council, when such assessment was clearly envisaged at the time of the passing of these Acts in 2004 and 2005.

Section 13 Reports

112. It is not necessary to say a great deal on this topic, in view of certain admissions which were made by Dr. Morgan on behalf of the respondent in his affidavit sworn on 15th November, 2019. Section 13 of the 2005 Act, provides that the Executive shall keep records of a range of matters concerning the number of persons who applied for assessment of needs and the number of such assessments actually carried out, together with records in relation to the number of persons to whom services identified in the assessment reports have not been provided, including the ages and the categories of disabilities of such persons, together with certain other information. Of more particular relevance are the provisions of s.13(2) which provide that the Executive shall within six months after the end of each year submit a report in writing to the Minister in relation to the aggregate needs identified in assessment reports prepared, including an indication of the periods of time ideally required for the provision of the services, the sequence of such provision and an estimate of the cost of such provision. Section 13 (3) provides that a report under the section shall include such other information in such form and regarding such matters as the Minister may direct and shall be published by the Executive within one month of the date of its submission to the Minister.

113. It was submitted on behalf of the applicants that the respondent had failed to produce any reports pursuant to s.13 from 2014 onwards. Relying on the decisions in *Hoey v. Minister for Justice* [1994] 3 I.R. 329 and *Brady v. Cavan County Council* [1999] 4 I.R. 99, it was submitted that once a clear statutory duty was placed upon a body, it had to

comply with that statutory imperative, notwithstanding that it may be difficult or onerous for it to do so. If the body wished to be relieved of that duty, it could not simply stop complying with its statutory obligation, but had to lobby the relevant Minister for a change in the legislation.

114. In his affidavit, Dr. Morgan has stated that the HSE has in fact provided s.13 reports to the Department of Health up to and including the year 2014. He concedes that the applicants are correct that the reports for those years have not been published. He went on to state that from 2015 onwards however, the HSE has not provided s.13 reports to the Department. He stated that the HSE had experienced consistent difficulty in seeking to report to the Department on the more qualitative assessment of *"aggregate needs"*. This was due to the nature of the information that was required pursuant to s.13 and the nature of the records kept by the respondent.

115. In a further affidavit sworn on 24th January, 2020, Dr. Morgan repeated the admission that the HSE had not from 2015 onwards, been in a position to comply with the precise requirements imposed upon it by s.13 regarding reporting. However, he went on to state that the Minister had been apprised of the operation of the assessment of needs regime by way of regular and ad hoc reporting and briefing, including through the provision of a series of reports such as the Quarterly Management Report exhibited to the affidavit of Ms. Hanley sworn in the proceedings. He repeated his averment that the Service Plan exhibited to his first affidavit, made clear that significant extra funds had been voted and assigned to improve the future functioning of the assessment of needs process, with a view to addressing the gaps that were frankly admitted to exist in the area. In addition, the entire operation of that process had been revised and modernised through the rollout of the revised SOP, as described earlier in this judgment. He stated that the HSE and the department were working closely together through the reforms identified and referred to in his first affidavit to address the future requirements of the assessment of needs process and to institute the necessary reforms to improve its future functioning.

Conclusion

116. The respondent has accepted that there were no s.13 reports produced after 2014. That is in clear breach of the duty placed upon the respondent by s.13 (2) of the 2005 Act. While it may be argued that such breach of statutory duty is not justiciable at the suit of the present applicants, due to the fact that the duty is owed by the respondent to the Minister, the court is of the view that having regard to the frank admissions made on behalf of the respondent by Dr. Morgan in his affidavits, it is appropriate that the court should make a declaration that the respondent has been in breach of its statutory duty in respect of the years 2015 to 2019 inclusive.

117. The applicants are right in their submission, that the respondent cannot unilaterally elect to disregard a statutory duty placed upon it, simply because it is inconvenient or onerous for it to comply with that duty. If the respondent wishes to be relieved of the obligation to provide the reports as set out in s.13 (2) of the 2005 Act, they will have to lobby the Minister for a change in the legislation. Until such change is enacted, the respondent must comply with its statutory duty.

Lack of Reasons in the Service Statement and/or Provision for Onward Referral therein

118. In two of the test cases, primarily in the *DB* and *JO'SS* cases, complaint was made that there was a lack of reasons given in the service statements issued in each case. In this portion of the judgment, I am only going to address the general issue as to whether there is an obligation on the liaison officer to provide reasons in a service statement. I will deal with the specific issues arising in each of the other cases in the judgments specifically dealing with those cases.

119. The provisions relating to service statements are set out in s.11 of the 2005 Act and in reg. 18 of the 2007 Regulations. The provisions of s.11 of the 2005 Act have been described earlier in this judgment. For present purposes, it will suffice to note that s.11 (6) provides that a service statement shall not contain any provisions relating to education services where the subject of the statement is a child. Section 11 (7) sets out the matters to which the liaison officer shall have regard when drawing up the service statement.

120. Regulation 18 of the 2007 Regulations provides that the service statement shall be written in a clear and easily understood manner and it shall specify: the health services which will be provided to the applicant; the location(s) where the health service will be provided; the timeframe for the provision of the health service; the date from which the statement will take effect; the date for review of the provision of services specified in the service statement and any other information that the liaison officer considers to be appropriate, including the name of any other public body that the assessment report may have been sent to under s.12 of the Act. Section 19 provides that the service statement shall be completed within one month following receipt of the assessment report by the liaison officer.

121. It is well established in Irish law that where decisions are made by a person or body concerning the rights or interests of a person, they are entitled to a statement of reasons from the decision maker as to why he, she or they, reached the decision that they did. The reason for this requirement is so that the person whose interests or rights are affected by the decision, may know whether they have any grounds to appeal the decision, or to seek a judicial review of it: see generally *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59; *Christian v. Dublin City Council* [2012] IEHC 163; *EMI Records (Ireland) Limited & Ors. v. The Data Protection Commissioner* [2013] IESC 34 and *Connolly v. An Bord Pleanála* [2018] IESC 31.

122. When issuing a service statement, the liaison officer is not making a decision which would require reasons in the ordinary sense of the term. By the time the matter has been passed to him or her, on the completion of the assessment of needs stage, all the necessary determinations have been made. A determination has been made as to whether the applicant has a disability within the meaning of the Act and, if so, an assessment of his or her needs has been ascertained, without any regard to resources or capacity. The papers are then passed to the liaison officer, who has to carry out the

much more practical task of stating what services will actually be provided to the applicant in respect of the needs identified in the assessment report.

123. In carrying out this function, which must be done within the tight timeframe provided for under the Act of one month, the liaison officer is not adjudicating on any interests or rights of the applicant child, but is merely ascertaining whether any particular health services are available in the region and whether there are any places available within those services to cater for the applicant. The liaison officer is not adjudicating on the person's entitlement to receive the services, but is merely indicating what services are available to the applicant at that time.

124. The function carried out by the liaison officer in this regard is a very practical one. It depends on the number of places available at any given time. If there are no places available for a person of the applicant's age on a particular course or programme, the liaison officer cannot create extra places; he has to tell the applicant's parents that there are no places available at that time.

125. The liaison officer does not refer in the service statement to the provision of educational services. That is specifically precluded by s.11 (6) of the Act. The provision of educational services comes under the remit of the National Council for Special Education, rather than the remit of the respondent.

126. Whether places will become available within specialist health services in the future, may depend on whether existing service users move away from the area, or more likely, whether additional funding may become allocated to that service in that area in the future, which may allow for an expansion in numbers. Accordingly, it may not be possible for a liaison officer to give a firm time within which a particular service will or may, become available to an applicant.

127. If places are not available in particular health services, that is not the fault of the respondent, or of the liaison officer. If an applicant is dissatisfied with the level of funding for a particular disability in a particular area, that is something that they must take up with the Minister for Health, or with their local representatives.

128. The applicants have been critical of the level of reasoning or explanation provided by the liaison officers in the service statements issued in these cases. They maintain that the service statement should set out what enquiries had been made by the liaison officer in relation to the availability of places, what response was given by each of the service providers and should state when such services may become available to the applicant. I do not think that the liaison officers are obliged to give that level of detail in the service statements produced by them. The requirements of regulation 18 are simple and straightforward. They provide that the service statement shall be written in a clear and easily understood manner and they set out the matters which must be specified in the service statement, to include: the health services which will be provided to the applicant; the location(s) where the health service will be provided; the timeframe for the provision of the health service; the date from which the statement will take effect; the date for

review of the provision of services specified in the service statement and any other information that the liaison officer considers to be appropriate.

129. The court appreciates that the parents of children who are in receipt of service statements will be most anxious to obtain as much information as possible in relation to the services that they may be provided with in respect of the health needs of their children. The court is wary of being too prescriptive in relation to the amount of information that has to be given in a service statement. The regulations provide the information that must be furnished to the applicant's parents in the service statement. In essence, it provides that they must be told what health services the child will get, the location where the health service will be provided and the timeframe for the provision of the health service. However, if it is the case that the best that can be done for a particular child at a particular point in time is that they be put on to a waiting list for a particular health service, then that is all that the liaison officer can state in the service statement, together with furnishing an estimate of the timeframe within which they are likely to be seen by that service.

130. In the event that specific health services are either not available in the area, or not available at that particular time, all the liaison officer can do is state that fact and state when such services may become available in the future. If that cannot be stated with accuracy, then so be it. If a service is unlikely to become available in the area in the future, the applicant should be told that and perhaps they should be told the nearest place where such health service may be available. However, the court cannot micromanage every aspect of the information that is given by a liaison officer in every case. All one can say in general terms, is that the content of the service statement must comply with the provisions of regulation 18 of the 2007 Regulations.

131. Insofar as there was a complaint in some of the test cases, that the service statement did not set out what services would be provided, but merely made an onward referral for further assessment of the applicant, I do not think that there is any substance to this complaint. It may well be that the assessment of needs recommends a referral to the Early Intervention Team. If that referral is made, it is then up to that body to assess the needs of the child and assess how best to cater for those needs within its own framework. I do not see that there is anything wrong in the service statement referring to an onward referral to another body, which in connection with the provision of services by it, will carry out a further assessment for their own purposes. So I do not see that there is anything wrong with that.

PART 2

132. As noted earlier, the three test cases herein were heard together. At the end of the hearing counsel for the applicants produced a document headed *"At the request of the respondents, the applicants now provide revised updated and amalgamated grounds for judicial review/issue paper."* This document set out the general issues that arose to a greater or lesser extent across the three cases. At the hearing of the action, these issues were further refined down to the five broad issues dealt with above.

133. This part of the judgment will set out briefly the circumstances pertaining to the applicant in this case. However, to the extent that issues raised on his behalf were encompassed in the general issues determined above, the findings thereon will not be repeated. In this part of the judgment, the court is simply going to comment on certain discreet aspects that were particularly germane to this applicant.

134. By way of background, the applicant was born on 26th March, 2014. An application for an assessment of needs was lodged on his behalf on 18th February, 2017. An assessment report was issued on 23rd August, 2018, followed by a service statement dated 27th September, 2018.

135. The applicant's next friend was concerned by what she regarded as the defective nature of the assessment report and the service statement issued in respect of her son. An application seeking leave to seek judicial review was made on 10th December, 2018 on the basis that the documents were defective and incomplete. The applicant sought relief by way of *mandamus* and damages.

136. By letter dated 8th February, 2019, the respondent informed the applicant's solicitor that the respondent was in the process of redrafting the assessment report and the service statement. A second assessment report was issued on 8th February, 2019, which was based on assessments that had been carried out on the applicant by a clinical psychologist, a speech and language therapist and an occupational therapist. The decision was reached that the applicant presented with autism spectrum disorder in line with DSM5 and also presented with global developmental delay. It recommended that the applicant should be referred to a multidisciplinary team which has experience in working with autism, namely the Early Intervention Team, in light of his complex needs involving psychology, speech and language therapy and occupational therapy. It also recommended that the applicant's parents should access social work supports via the Early Intervention Team and that the applicant would benefit from genetic testing to screen for Prader – Willi syndrome. They were informed that the referral to the genetic department at Crumlin Children's Hospital should be made by the applicant's GP.

137. A second service statement issued on 19th February, 2019 by an unknown liaison officer as the signature portion merely stated *"post vacant"*. In the section headed *"Services to be provided in respect of assessed needs"*, it stated that the applicant should be referred to a multidisciplinary team which has expertise in working with autism, namely the Early Intervention Team, in light of his complex needs involving psychology, speech and language therapy and occupational therapy. The service provider was identified as the Early Intervention Team in the applicant's area. The address of the service provider was given. The statement also noted that the applicant had been referred to that service on 18th April, 2017 and had been re-referred there on 12th September, 2018. It stated that he would be seen by the team in December 2019.

138. By letter dated 4th March, 2019 the applicant's solicitor wrote to the respondent informing it that it was going to bring an application to amend its statement of grounds in the within proceedings. On 26th March, 2019, the respondent consented to the filing of

an amended statement of grounds. Following delivery of an amended statement of grounds, a statement of opposition was filed on behalf of the respondent on 29th July, 2019.

139. Insofar as the applicant complains of delay in the provision of the initial assessment report and service statement and the redrafted versions thereof, it is undoubtedly correct that both were furnished outside the time limit provided for under the Act and the regulations. However, there are two points to note in this regard. Firstly, the applicant did not engage the statutory complaints mechanism when the assessment of needs was not commenced within three months from the date of lodgement of the application, or when the initial assessment report was not delivered within three months thereafter. The court does not criticise the applicant's next friend for not immediately engaging in that statutory process, as it can readily understand that where people are desperately seeking the provision of services for their disabled children, they are unlikely to take a step that may be regarded as antagonistic to the body that is charged with deciding both the level of the child's needs and what actual services will be provided for him or her. However, it must be stated that where delay was the initial complaint, that could have been addressed within the statutory mechanism, which provided a relatively quick and certainly a cheap method of obtaining the necessary relief.

140. After the initial assessment report and service statement were received by the applicant's next friend, an application seeking leave to seek judicial review was made on 10th December, 2018. This effectively brought about the issuance of the redrafted assessment report and service statement in February 2019. While the applicant has complained of a delay in dealing with both the assessment reports and the service statements in this case, the court notes that having regard to the matters averred to by Ms. Hanley in her affidavits, that there was in fact no delay in the referral of the applicant to the EIT, because the referral which had been recommended in the service statement of 19th February, 2019, had in fact already been made by the assessment officer on receipt of the application on 18th April, 2018 and following the first assessment report, a further referral had been made to that body on 12th September, 2018. Thus, I am satisfied that while there was undoubtedly delay in providing both the initial assessment report and service statement and the redrafted versions thereof in February 2019, no prejudice was occasioned to the applicant by this delay, as the necessary referral had already been made.

141. Insofar as the applicant complains that such a referral was made in the service statement, rather than being provided with a statement of what actual services the applicant would receive, that has been dealt with in the earlier part of this judgment. Accordingly, the court does not find that the service statement of 19th February, 2019 was defective on the basis that it stated that the service that would be provided was a referral to the EIT, which body would then assess the applicant as part of a multidisciplinary team and would decide on how best to provide the necessary services to him. The statement specified which precise EIT was going to provide the service and when the applicant would be seen by them. The court is satisfied that the service

statement complied with the statutory requirements set out in s.11 of the 2005 Act and in the Regulations, in relation to its content.

142. The applicant also challenged the service statement on the basis that it was not signed by any particular liaison officer, but was merely stated as "post vacant". The court is satisfied, having regard to the averments contained at para. 5 of the first affidavit sworn by Ms. Hanley, to the effect that the service statement was sworn by a Mr. Jarleth Tunney, who was at the time when the service statement was signed, a disability manager within the respondent having responsibility for the area in which the applicant resides. She went on to state that the post of liaison officer as defined in the Act was vacant at that time and while recruiting for the said post, Mr. Tunney had been authorised to draft the service statement pursuant to the 2005 Act. Accordingly, the court is satisfied that the service statement was issued by a competent person.

143. In her second affidavit sworn on 18th November, 2019, Ms. Hanley gave an update in relation to the applicant's case. She noted that the services identified in the service statement, which issued following completion of the assessment report in respect of the applicant, were all available via the EIT. As of November, 2019, it remained the case that the applicant was awaiting access to those services. However, as stated earlier, his position on the waiting list for those services was not affected by any delay in his assessment of needs process. In fact, she stated that he had been placed on a waiting list for the EIT earlier than he would have been entitled according to the timeline provided for in the Disability Act. She further noted that the applicant was attending the autism unit of a particular school in his area, which was oriented to meet the educational needs for children who present with needs such as in the applicant's case. She went on to note that the applicant's parents had been invited to an intake assessment meeting on 21st November, 2019 with a clinical psychologist. Services and appointments would be arranged for the applicant following that initial meeting. The court is not aware whether the applicant has in fact been assessed by the EIT by now and, if so, whether he has commenced receiving services from them. It is possible that that may have been delayed due to the onset of the Covid-19 Pandemic.

144. In the event that the applicant remains on the waiting list to be seen by the EIT, or in the event that he has been seen by them but after a considerable delay, it may well be frustrating for the applicant's mother that there is, or has been, such a delay; however, the existence of such a delay in progressing up the waiting list is not a defect in the provision of the service statement. The liaison officer can only say what services are available to meet the needs of an applicant in his area and put the child on a waiting list for those services. If there is a waiting list that is regarded as being unduly long, or if the applicant's parents are of the view that inadequate resources have been made available for services in their area, those are matters that will have to be raised with the Minister for Health, or the Minister for Education and Skills or with the Minister for Children, Disability, Equality and Integration, with a view to securing more funding, but it is not evidence of a breach of statutory duty in relation to the provision of the assessment report or the service statement as required under the 2005 Act.

145. Accordingly, in this case, having regard to the findings made in this judgment, the court refuses all of the reliefs sought by the applicant, save for the declaration in relation to the failure to provide the s.13 reports, as outlined earlier in the judgment. The court will receive submissions from the parties as to the precise terms of the order to be made in this case.