

UNAPPROVED



THE COURT OF APPEAL

Record No.: 2020/221

Donnelly J.

Neutral Citation Number [2021] IECA 283

Ní Raifeartaigh J.

Binchy J.

BETWEEN/

C.M. (A MINOR) SUING BY HIS MOTHER  
AND NEXT FRIEND SM

APPELLANT

-and-

HEALTH SERVICE EXECUTIVE

RESPONDENT

**JUDGMENT of Ms. Justice Donnelly delivered on the 27<sup>th</sup> day of October, 2021**

**Introduction**

1. In an ideal world, children with disabilities would be able to have their health and educational needs assessed and be provided with the services to meet those needs in a timely manner. The Oireachtas legislated in 2004, through the Education for Persons with Special Needs Act, 2004 (“the EPSEN Act), for such an ideal world in relation to *educational* needs assessment and education provision for children with disabilities. As we do not live in such an ideal world, some seventeen years later crucial parts of the EPSEN Act have not been commenced. The Oireachtas legislated in 2005, through the Disability Act, 2005 (“the Disability Act), for the assessment of health needs and, at least in respect of adults, the assessment of educational needs *and* service provisions. Again, as we do not live in an ideal

world, sixteen years after it was enacted the Disability Act has only been commenced in respect of children under the age of 5 years.

2. In respect of *health* needs, the Disability Act makes provision for, *inter alia*, the assessment of the *health* needs of children and adults *and* the provision of a service statement of what services might actually be available to the adult or child. The Disability Act, if fully commenced, would also apply to an assessment of the *educational* needs of adults with a disability and the provision of a service statement. This case, a test case for many other children with disabilities, addresses whether the Disability Act provisions regarding assessment of *educational* needs *also* apply to *children* with disabilities. This judgment involves the interpretation of s. 8 of the Disability Act and its interaction with the EPSEN Act.

3. The appellant, a child, seeks to determine whether he is entitled to an assessment of his educational needs under s. 8(3) of the Disability Act. The respondent, the Health Service Executive, in turn, submits that, so far as educational needs are concerned s. 8(3) only refers to adults and that the specific reference to children in s. 8(9) provides a separate pathway for children to have their educational needs assessed. At present, this pathway could be described as a *cul de sac* as relevant provisions of the EPSEN Act have not been commenced.

4. The specific facts pertaining to the appellant's situation are not entirely relevant to the question of statutory interpretation upon which this appeal turns. However, the facts do provide a context for the important issues at stake for him and for children and their parents similarly situated. In brief, the appellant is a child now seven years of age who presents with Autism Spectrum Disorder according to the reports exhibited. His mother noticed that he was delayed in attaining certain developmental milestones one would expect a child of his age to reach. She decided to apply for an "Assessment of Need" for her son. She claims that the appellant's assessment report compiled under the Disability Act was incomplete as the assessment officer had failed to address the educational needs of the appellant and had failed to refer the question

of the appellant's needs to the National Council for Special Education (hereinafter, "the Council"), established by the EPSEN Act. It is accepted that the extent of appellant's disability showed that he had an educational need due to the nature of his disability. The issue is whether the assessment of that need is required to be carried out under the Disability Act or whether his needs can only be assessed under the EPSEN Act, which, as it is not yet commenced, leaves him without recourse to such a statutorily mandated assessment at present.

5. It is important to point out that the appellant accepts that even if his needs are assessed under the Disability Act, he would not have an entitlement to have a service statement in respect of those needs. This is because the Disability Act provisions regarding service statements only apply to adults (s. 11) and the relevant provisions of the EPSEN Act concerning students in school and children have not been commenced (s. 3 and s. 4). On behalf of the appellant, it is submitted that an assessment report is nonetheless still of benefit to him as it may provide for the possibility for his mother to supply, through her own resources if at all possible, the appropriate services to him.

6. I will next set out in general terms the legal framework provided for Disability Act assessments and for the EPSEN Act assessments. I would comment at this stage that in so far as the health needs (and the educational needs of adults) of applicants are concerned, the process set out in the Disability Act is relatively straight forward compared with the assessment processes set out in the EPSEN Act. The interpretation of where and how those Acts interlink is made all the more difficult by the inherent complexity of the EPSEN Act provisions.

#### **The Legal Framework under the EPSEN Act 2004**

7. The focus of the EPSEN Act was education. As enacted it covered students (as defined in the Education Act, 1998 as persons in primary or post primary schools) and children (both students and those who are out-of-school). Section 19 of the EPSEN Act established the Council and has been commenced. Under the EPSEN Act as enacted, the Council had a variety

of functions. One of these functions is set out in s. 20(1)(b) as follows “in consultation with schools, the [Health Service Executive] and such other persons as the Council considers appropriate to plan and co-ordinate the provision of education and support services to children with special educational needs”. Its functions included ensuring that the progress of students with special educational needs is monitored and that it is reviewed at regular intervals.

**8.** The Council’s functions were more limited with respect to adults in the EPSEN Act, as enacted. Section 20(h) and (i) of the EPSEN Act provided for the following functions:

- “(h) to review generally the provision made for adults with disabilities to avail of higher education and adult continuing education, rehabilitation and training and to publish reports on the results of such reviews (which reviews may include recommendations as to the manner in which such provision could be improved);
- (i) to advise all educational institutions concerning best practice in respect of the education of adults who have disabilities.”

**9.** Section 7(3) of the Disability Act, however, enlarged the Council’s functions to cater for adults by stating that references in Part 2 to the Council shall be construed as references to the Council with, in addition to the functions conferred by the EPSEN Act, the following functions:-

- “(a) to assist the Executive in the assessment of adults with disabilities and the preparation of service statements;
- (b) to consult with the Executive, education service providers and such other persons as the Council considers appropriate for the purposes of facilitating the provision of education services to persons with disabilities in accordance with this Part;

(c) in consultation with the Minister for Education and Science and the Executive, to plan and co-ordinate the provision of education services to adults with disabilities in accordance with this Part;

(d) to assess and review the resources required in relation to educational provision for adults with disabilities.”

**10.** Sections 3 and 4 of the EPSEN Act, which, *inter alia*, prescribe the circumstances in which, and by whom, assessments of children are to be undertaken, have not been commenced. The subsequent sections which are dependent on those section 3 and 4 assessments, have also not been commenced. The appellant has made certain reference to this being within the knowledge of the Oireachtas at the time of the enactment of the Disability Act, submitting that this adds some force to their argument that s. 8 of the Disability Act is intended to apply to adults and children alike, since the Oireachtas was aware, at the time of the enactment of the Disability Act, that sections 3 and 4 of the EPSEN Act were not in force. I do not understand however, the appellant’s arguments to be *grounded* on that observation. The EPSEN Act was enacted only a short time *prior* to the Disability Act. Part 2 of the Disability Act makes references to the Council established under the EPSEN Act with the additional functions provided by the Disability Act. There is reference to the Council in the relevant sub-sections of section 8 of the Disability Act.

**11.** Section 3 of the EPSEN Act concerned the situation of a student in a school and the steps that must be taken to ensure that the student’s educational needs are being met. Section 4 on the other hand, refers to the situation of an out-of-school student, primarily, but not necessarily, a pre-school child.

**12.** Section 3 of the EPSEN Act provides for the making of an education plan by a school for a student with special needs. A principal must take certain initial practicable measures to meet the educational needs of a student. If, however, despite these measures the principal is of

the opinion that the student is still not benefitting from the education programme provided in the school and that his or her difficulty in doing so may arise from having special educational needs, the principal after consulting the parents, shall, subject to ss. 6, arrange for an assessment to be carried out (see section 3(3)). That assessment is, *inter alia*, to be carried out in accordance with such guidelines relating to persons who are to carry out assessments under this section and the form that those assessments are to take as may be issued from time to time by the Council.

**13.** Section 3(5) provides that where the assessment identifies special educational needs the principal shall, subject to ss. 11, cause an education plan to be prepared for the student.

**14.** Section 3(6) provides that where the principal is of the opinion, having regard to any guidelines issued by the Council, that the arrangement of an assessment under ss. 3 *is not practicable* the principal shall request the Council to arrange for an assessment of the student under s. 4 of the EPSEN Act.

**15.** Section 3(7) provides that if the Council accedes to a request under ss. 6, s. 4, with the necessary modifications and s. 5 shall apply accordingly. Under s. 3(8), the Council may, from time to time, issue guidelines to principals of schools as to the matters they shall have regard to before forming an opinion of the kind referred to in subsection 6.

**16.** Section 3(9) provides for the principal's duties in the preparation of the education plan. If the principal is of the opinion that given the nature and extent of the special educational needs as established by an assessment under the section, the preparation of an education plan will not meet those needs or that the plan already prepared is not meeting or is unlikely to meet those needs, then pursuant to s. 3(11), the principal shall request the Council to prepare an education plan under s. 8 in respect of the child.

17. If the Council accedes to a principal's request under s. 3(11), then subsection (3) to (5) of s. 8 shall apply and the education plan prepared by the Council supersedes that referred to in ss. 11(b) of section 3.

18. An appeal mechanism is made available to parents and/or a principal who is dissatisfied with the Council's refusal to accede to a request under s. 3(6) or s. 3(11) of the EPSEN Act.

19. Section 4(1) provides for the situation where the respondent is of the opinion that a child who is not a student has, or may have, special educational needs. In those circumstances the respondent shall cause an assessment under that section of that child to be carried out.

20. The following subsections (2) and (3) of s. 4 are of particular importance to the interpretation of the EPSEN Act and the provisions of s. 8 of the Disability Act. They provide:-

“(2) Where the Council is of the opinion that a child who is a student has or may have special educational needs it shall, unless an assessment under *section 3* of the child is being or has been carried out, cause an assessment under this section of that child to be carried out.

(3) Where the parents of a child are of the opinion that the child has or may have special educational needs they may request –

(a) the relevant (sic) health service executive, or

(b) in the case of a child who is a student, the Council,

to cause an assessment under this section of the child to be carried out.”

### **The Legal Framework under the Disability Act 2005**

21. The Disability Act was intentionally broader in scope than the EPSEN Act as it also covered health needs. Furthermore, it covered the assessment of the educational needs of an adult (whether the Act included the assessment of the educational needs of a child is of course the issue in this judgment.) The EPSEN Act assessments of educational needs only covered an adult to the extent that they were a student in a primary or post-primary school.

**22.** Part 2 of the Disability Act is headed “Assessment of Need, Service Statement and Redress”. Section 7 is the interpretation section for Part 2 and defines “assessment” as meaning “an assessment undertaken or arranged by the Executive to determine, in respect of a person with a disability, the *health and education needs* (if any) occasioned by the disability and the *health services or education services* (if any) required to meet those needs.” Section 8 of the Disability Act provides for the carrying out by the respondent of an assessment on applicants. Section 9 of the Disability Act provides that a person (or under ss. 2 “a specified person” which definition includes a parent), may apply for an assessment if of the opinion that the applicant person has a disability. Applicant is defined under the Act as meaning the person who is the subject of the application. Disability is defined within the Disability 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.” For the purposes of Part 2 only of the Disability Act, “substantial restriction” is further defined in section 7.

**23.** Under s. 8(5), the assessment must 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. It thus will indicate the “gold standard” of service requirements. Budgetary constraints *etc.* are addressed later in the Disability Act under the heading of “service statement”. The identification of services in the course of the assessment which might meet the needs of an applicant is a utopian position, whereas the “service statement” remains grounded in the reality of what may be available having regard to the resources of the respondent.

**24.** The two sub-sections of s. 8 of the Disability Act which are the primary focus in this appeal provide as follows:-

Section 8(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.” (*Emphasis added*).

Section 8(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.*” (*Emphasis added*).

**25.** Section 8(3) refers to *applicant*, the statutory definition of which is a person who is the subject of an application for an assessment of needs. In the ordinary course that definition includes a *child*. Section 8(9) refers only to a *child*. Whether s. 8(3) therefore excludes a *child* in its use of the word *applicant* is a primary focus of this judgment. Both s. 8(3) and s. 8(9) refer to provision for an “*education service*”.

**26.** Section 8(2) directs assessment officers to carry out assessments of applicants or arrange for their carrying out by other of the respondent’s employees or by other persons with appropriate experience. Section 8(6) provides that where an assessment officer carries out or arranges for the carrying out of an assessment, 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 respondent, the CEO of the Council and if appropriate to a person such as, in this case, a guardian.

**27.** Under s. 8(7), the report compiled under ss. (6), that is the 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.”

**28.** Section 8(8) provides for the manner in which assessments may be carried out, in particular in relation to meeting with the applicant and/or where a child with his or her guardian and the provision of information about the assessment process.

**29.** There is no dispute between the parties that if the Disability Act were fully operational, adults and all children with disabilities would both be entitled to have a full assessment carried out on their *health* and have a “gold standard” report produced on the services identified as being necessary. The respondent submits however that, in the case of children, *educational* needs and services are excluded from this assessment, and submits that when any such *educational* need is identified in the assessment process, the child ought to be diverted into the EPSEN Act assessment of education pathway, pursuant to s. 8(9) of the Disability Act.

According to the respondent, the Disability Act only provides for an assessment of *educational* needs and the provision of a service statement only in respect of adults.

**30.** Once needs are assessed however *in accordance* with the Disability Act, the parties agree the next part of the process therefore is for the provision of a “service statement” within the meaning of that Act. Section 11(2) provides that:-

“Where an assessment report is 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 (in this Act 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.”

**31.** Although this sub-section includes reference to *applicant*, who can be either an adult or a child, s. 11 goes on to provide at s. 11(6) that “[a] service statement shall not contain any provisions relating to education services where the subject of the statement is a child”. Both parties rely on that provision to support their interpretation of s. 8(3) and s. 8(9) of the Disability Act. The respondent submits that the presence of s. 11(6) in the Act supports the view that s. 8(3) does not include children, whereas the appellant submits that if the assessment report was not to apply to the educational needs of children there would be no need to exclude the obligation to prepare a service statement through this particular sub section.

**32.** The liaison officer in providing the service statement must have regard *inter alia*, to the eligibility of the applicant for services under the Health Acts 1947 to 2004, the practicability of providing the services identified in the assessment reports and “to 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”. These requirements limit the service statement to those services which are in practice available to a person with disabilities, unlike the “gold standard” described in the assessment of needs.

**33.** I will discuss in more detail the other relevant provisions of the Acts under the heading “Analysis of s. 8 of the Disability Act” below.

### **The High Court Judgment**

**34.** There were three test cases heard by the High Court (Barr J.) in respect of a number of issues arising out of the Disability Act assessments for children. Only two of these children have pursued their cases on appeal. In his judgment (Barr J.) dealt with three separate applications covering five broad issues. These five issues were then applied to the specific issues arising in the case of each of the three children. A separate judgment is being delivered today in respect of the appeal in relation to one of these issues by another of the child applicants (*JO’S v. Health Service Executive*). Barr J. covered all five issues in the main judgment relating to the within applicant (*CM (A Minor) v. Health Service Executive*).

**35.** Of relevance to the present judgment is the trial judge’s identification of the following issue:-

- a. The s. 8(3) referrals issue – whether s. 8(3) of the Disability 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 who is a child, to request the Council to nominate a person with appropriate expertise to assist in carrying out the assessment, or whether the assessment officer is required to refer child applicants for assessment under s. 3 or 4 of the EPSEN Act, pursuant to s. 8(9) of the Disability Act;

**36.** The trial judge then went through the Disability Act and the EPSEN Act in considerable detail. He summarised the relevant sections of the Acts. The trial judge also set out S.I. No.

263/2007 Disability (Assessment of Needs, Service Statements and Redress) Regulations, 2007 (hereinafter, “the 2007 Regulations”) having particular regard to regulation 18 which provides for the content of a service statement, and regulation 19 which provides that the service statement shall be completed within one month following receipt of the assessment report by the liaison officer. He also referred to regulation 22 which provides that a 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 s. 8(3) Referral Issue***

**37.** The trial judge set out the submissions of both parties. He noted that the appellant submits that the wording of s. 8(3) of the Disability Act was “*very clear*”. The appellant submits that the use of the word “applicant” in s. 8(3) was wide enough to include a child applicant as well as an adult applicant. The duty on the assessment officer was that 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 appellant submits that this obligation on the assessment officer arose at an early stage of the assessment process wherein the assessment officer is of the opinion that there “*may*” be a need for an education service to be provided for the applicant, as set out in s. 8(3). The trial judge referred to the assessment report compiled in respect of another appellant JO’S where it stated that there was a request for an assessment of any need for an education service and that “when the [assessment] report is received, this assessment report will be amended by a letter issued to [the applicant], including the result of the educational assessment.”

**38.** Counsel referred to a *guidance note* which had been issued by the respondent on the 23<sup>rd</sup> July, 2009 which set out that an 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 out to set out various scenarios which included children. The trial judge stated that it was “*noteworthy that [the guidance note] referred to a ‘request for assistance’*” which is the terminology used in s. 8(3). The trial judge also noted that the guidelines stated that a request to the Council should be made at the earliest possible stage especially for children who are diagnosed with autism or visual or hearing impairments and that adequate time should be given to the Council to assist the completion of the assessment process. The appellant submits that this indicated that the Council were to provide assistance during the assessment process prior to the compilation of the assessment report. The appellant submits that this is further bolstered by a circular issued by the Department of Education and Skills in 2011 concerning the assessment of needs process of children under the Disability Act. This specifically dealt with children. The trial judge noted the appellant’s reliance on a Guide to the Disability Act, 2005 (separate to the guidance note referred to above) which was published by the Department of Justice, Equality and Law Reform which provided that, as set out by Barr J., “*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 [Council], or to the Principal of his or her school.*”

**39.** The trial judge recorded the reliance of the appellant on the respondent’s Standard Operating Procedures in respect of assessments of need revised on the 24<sup>th</sup> October, 2019 and the submission of the appellant that it did not accord with the respondent’s interpretation of s. 8 of the Disability Act. He also noted the further submission of the appellant that the first time the respondent argued that there was only one pathway for referral to the Council (that is, under s. 8(9) of the Disability Act) and that children do not fall within s. 8(3) in terms of educational needs assessments, was in the respondent’s statement of opposition filed in these cases. The appellant submits that the respondent’s interpretation was at variance with the plain wording

of s. 8(3), with the practice of assessment officers in the past and, with the guidance notes and circulars and the 2019 SOP issued on this matter. The trial judge dismissed the appellant's reliance on the historical practice of assessment officers and the expressions of opinion of various bodies as being an aid for the court in interpreting s. 8 of the Disability Act. The trial judge held that one must utilise 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*" in circulars, SOP's and guidance notes.

**40.** The appellant submits that s. 8(9) provides an additional statutory pathway for children *i.e.* in addition to s. 8(3), but that it only arises where, having carried out an assessment, the assessment identifies a need for the provision of education services for a child. Then, once the report is finalised and includes the input of the Council by reason of s. 8(3), the matter is then referred to either s. 3 of the 2004 Act if the child is in school, or to s. 4 if the child is not in school. Counsel for the appellant refers to s. 8(7)(b)(ii) of the Disability Act which provides that an assessment report shall contain a statement of the health and educational needs (if any) occasioned to the person by the disability. It was submitted that an assessment of educational needs should form part of the overall assessment and this was provided for by the mechanism set out in s. 8(3).

**41.** Referring only to the principles of statutory interpretation, the trial judge held that he must ignore the fact that sections 3 and 4 of the EPSEN Act had not been commenced and that he must look at the framework that is set out by these interlinking Acts – the EPSEN Act and the Disability Act. The trial judge did not accept the applicants' interpretation of s. 8 of the Disability Act. He noted that the respondent is a health authority and is not involved in the provision of education services. This function is that of the Minister for Education and Skills and/or the Council. He held that s. 8(7)(b)(ii) which provides in part that "a statement of the health and education needs (if any) occasioned to the person by the disability" highlights the

fact that a psychologist in diagnosing ASD would be in a position to say in general terms, the special educational needs a child may have. He held that it is not the function of the respondent to fulfil these educational needs; this is a matter for the Council and it is for that reason that s. 11(6) of the Disability Act provides that a service statement will not contain any provisions relating to education services where the applicant is a child.

**42.** The trial judge accepted the submission of the respondent that the maxim *generalialia specialibus non derogant* applies in this case. He endorsed the *dicta* of Henchy J. in *Welch v. Bowmaker (Ireland) Ltd. & Ors* [1980] I.R. 251 and stated that while the case referred to the construction of a debenture, it is apposite where the dichotomy between the general provision and the specific provision arises not in separate documents, but within the same document. Having applied these principles, the trial judge was satisfied that the correct interpretation of the Disability Act is that s. 8(3) refers to adults and specific provision is made for children in s. 8(9). He held that “[a]ccordingly, I hold that the sole statutory referral pathway for children provided for under the 2005 Act is pursuant to s. 8(9) of the [2005] Act.”

**43.** The trial judge held that this is in line with the overall framework of the two Acts. He observed that s. 7 of the EPSEN Act provides that in the case of a child who is not a student, the respondent shall, subject to s. 7(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 and benefit from education. The trial judge noted that the EPSEN Act confers the function of assessing educational needs of children on the Council and this is further exemplified by s. 7(3) of the Disability Act which gives additional functions to the Council in relation to assessment of educational needs for adults.

**44.** The trial judge held that s. 8(3) does not apply to children. He noted that this led to the conclusion that there is currently no statutory pathway for children to have their educational needs assessed by the Council. He noted that while this is “*not satisfactory for children who*



*have cognitive disabilities*”, parents still have the opportunity to be referred to the Council by going directly to an education service provider (this information was provided to the Court below in an affidavit sworn by a Dr. Morgan on behalf of the respondent).

### **The Appeal**

45. This appeal is taken against those findings of the trial judge. The issue in this appeal is the correct interpretation of s. 8 of the Disability Act; specifically, whether, under the provisions of s. 8(3), an assessment officer who is of the opinion that a child may have a need for an education service, must make a request to the Council to nominate an expert to carry out an assessment.

46. During the course of the appeal, the Court received extremely helpful and detailed written and oral submissions from the appellant and the respondent. At the hearing before this Court, counsel for the appellant suggested that one way in which the matter could be resolved if *applicant* within s. 8(3) was to be understood as including a child applicant. The respondent’s argument was that such a reading was not open to the Court on a proper construction of the relevant sub-sections of the Disability Act and the EPSEN Act.

### **Analysis and Decision**

#### ***Statutory Interpretation***

#### ***In pari materia***

47. The respondent relies particularly on the argument that the EPSEN Act and the Disability Act “are closely interrelated and are in large part to be read *in pari materia*”. The appellant does not take any issue with that. The Interpretation Act, 2005 is silent however, on how to interpret Acts that are *in pari materia*. Dodd, *Statutory Interpretation in Ireland* (1<sup>st</sup> Edn., Bloomsbury Professional, 2008) provides at para. 8.23 that:-

*“The general rule is that when construing a particular word or expression, the provisions of another statute are not normally used as an aid or a guide unless that*

*other statutory provision is in pari materia ('in the same matter'), that is forming part of the same statutory context. Similar words and phrases used in Acts, which are not in pari materia, cannot be taken to control or influence each other."*

**48.** Dodd goes on to state at para. 8.24 that "[w]here Acts are in pari materia, they are to be taken together as forming one system, and as interpreting and enforcing each other." When utilising the literal approach, Acts that are *in pari materia* can be construed as one.

**49.** The Acts at issue in these proceedings do not have a collective citation, but they cover the same subject matter albeit that the Disability Act has a wider reach in so far as it also concerns the health needs of both adults and children, and also addresses matters such as access to employment opportunities in the public service and better use of public buildings, the first of which is clearly directed towards adults rather than children. There is commonality in the long title to each Act in the references for example to a) the assessment of education needs occasioned to persons with disabilities and b) consistent with the common good to provide for those needs where possible and consistent with resources available. I am satisfied that it is correct, by virtue of their interconnectivity, to consider both Acts together as enacted (and not simply commenced) in the construction of their provisions.

**50.** I will address further under "literal interpretation" the fact that both Acts interact with one another is part of the context in which the provisions must be interpreted. In the present case however, there may be a limit to the extent that certain words or expressions can be construed as one. For example, the word "assessment" in Part 2 of the Disability Act has been given a particular meaning which includes reference to "health needs", yet the word "assessment" already existed in the EPSEN Act which dealt only with educational needs. Moreover, certain sub-sections within the EPSEN Act, refer to an assessment being carried out in accordance with the provisions of that Act (for example, the reference to s. 4(1) of the EPSEN Act refers to the carrying out by the respondent of "an assessment *under this section*")

(*Emphasis added*). What constitutes the real meaning of assessment in both Acts is a central factor in this appeal and there is no particular assistance to be derived from a simple statement that they are to be read *in pari materia*. Indeed, the respondent has recognised that the entirety of the Acts cannot be read *in pari materia*.

**51.** In my view, the failure to ensure that words in sections which interact have consistent meanings is indicative of a failure on the part of the Oireachtas to ensure that the clearly intentional interlinking of these Acts was done in an express and direct manner. This would have ensured that each Act is fully in harmony with the other. Instead, we are left with the situation where numerous resources of the State (financial and judicial) have been expended in seeking to decipher the intention of the Oireachtas in enacting these provisions. This is not a criticism that certain sections of the EPSEN Act have not been commenced; that is not challenged in these proceedings. It is simply an observation that when the Oireachtas enacts legislation which is clearly intertwined with previous legislation, the citizens of this country would be better served if the linkage or non-linkage were made in direct, express and patently harmonious terms.

### ***Literal Approach***

**52.** Having stated the foregoing about the lack of express linkage between the Acts, it is a feature of this case that the parties are in agreement about the approach to be taken to interpretation. Both parties urged a literal interpretation upon the Court but they differ as to what is the literal interpretation of the relevant provisions. No purposive or teleological approach is necessarily required, although the respondent urges that its interpretation is the correct one as otherwise there would be an absurdity by way of duplication of assessments if the appellant's view is correct.

**53.** The literal approach to statutory interpretation has been described in numerous judgments (See for example: *Howard v. Commissioners of Public Works*, [1994] 1 IR 101 cited

with approval in the Supreme Court in *DPP v. Moorehouse* [2006] 1 I.R. 421 and more recently in *AWK v. The Minister for Justice and Equality* [2020] IESC 10). The purpose of the literal approach is to determine, upon plain reading of the statute, the objective intention of the Oireachtas. McKechnie J. in *AWK v. The Minister for Justice and Equality* sets out the literal approach and it is worthwhile quoting him at length here: -

*“[34] [...] The text published is the basic material involved because it is the most pre-eminent indicator of intention. As stated by the Law Reform Commission, in a publication later referred to (para. 45 infra), this approach remains the primary method of construction. Regard to alternative means, by reference to the various and multiple subsidiary rules, which collectively are called aids to interpretation, are resorted to only where this primary approach lacks the capacity to resolve the issue or is otherwise found wanting. This method of construction is variously described as the literal method or, as giving the words their original meaning or their ordinary and natural meaning. There is no difference in effect between any of these descriptions. They all entail the same substantive drivers in the exercise undertaken.*

*[35] As part of this approach however, it has always been accepted that context can be critical. It is therefore perfectly permissible to view the measure in issue by reference to its surrounding words or other relevant provisions and, if necessary, even by reference to the Act as a whole. Furthermore, it is presumed that the legislature did not intend any provision enacted by it to produce an “absurd” result. That rule, admittedly in a different context, was put as follows in *Murphy v. G.M.; Gilligan v. Criminal Asset Bureau* [2001] 4 I.R. 113. “A construction leading to so patently absurd and unintended a result should not be adopted unless the language used leaves no alternative: see *Nestor v. Murphy* [1979] I.R. 326” (Keane C.J. at 127 of the report). Accordingly, whilst not in any way trespassing upon a purposive approach, certainly*

*not that as provided for by s. 5 of the 2005 Act, I believe that it is permissible to have regard to the underlying rationale for the provision(s) in question. On this basis, I propose to examine meaning.”*

**54.** The primary objective of the literal approach is to view, not only the section(s) in dispute, but the Act as a whole. The construction adopted by the Court should not be adopted if it would produce an absurd result. In order to avoid such an absurd construction, the Court can have regard to the underlying rationale for the section(s) in question. It is by engaging in this analysis that the Court can extract the objective intention of the legislature. It is only if the literal meaning of an Act would lead to an absurd result that a purposive or teleological approach is required. Section 5 of the Interpretation Act, 2005 provides for that as follows:-

“(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –

(i) in the case of an Act to which paragraph (a) of the definition of “Act” in section 2(1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.”

**55.** As noted in *AWK v. Minister for Justice and Equality*, context can be critical. While *AWK v. Minister for Justice and Equality* did not touch on the literal approach with respect to

Acts *in pari materia*, such Acts form part of the same statutory context. Therefore, in construing the meaning of a particular provision, one must have regard to both Acts as a whole in order to determine the meaning of the provision within the context of those Acts. This means that when construing the meaning of s. 8(3) of the Disability Act, the Court must have regard to its literal interpretation taking into account the context of this provision as against provisions of the EPSEN Act addressing the same subject matter.

***The Maxim Generalia Specialibus Non Derogant***

56. This means that a general provision does not derogate from a special one. This was the principle relied upon by the trial judge. Dodd, cited above, at [4.77] also describes that:-

*“Where a provision deals with a particular situation in special or specific terms, and the language of a more general provision could be taken to apply to the same particular situation, the general provision will not be held to undermine, amend or abrogate the effect of the special words used to deal with the particular situation. An application of the maxim arises where, having dealt with a matter in a specific way, the legislature passes a later enactment in general terms capable of repealing or superseding the earlier provision. Thus, the maxim is often stated to apply where the general statute is later in time to the specific earlier one.”*

***Analysis of s.8 of the Disability Act***

57. In the test cases that were before the High Court, different assessment officers took different approaches to the interpretation of the relevant part of s. 8 of the Disability Act. What is happening throughout the system is apparently that some assessment officers, who by statute are independent of the respondent, appear to accept the respondent’s view of the limited applicability of s. 8 to the educational needs of children, while others accept the view put forward by the appellant. The respondent has over time put out various guidance documents (as have other agencies) which reflect the confusion over the interpretation of these provisions

in the two Acts. This again reflects badly on the clarity of the drafting of the Disability Act in particular. The opinions of others can play no part in this Court's interpretation of these Acts. The question of statutory interpretation is a question of law correctly asked of the High Court. It is now this Court's duty on appeal to decide if the High Court was correct to accept the interpretation proffered by the respondent before the courts and not the interpretation they have given to it on other occasions.

**58.** The context for any interpretation must be the fact that there are two intertwined Acts dealing with assessment of the educational needs of those with special needs, and the meeting of those identified needs. I do not think that either side has contended for an approach that ignores sections 3 and 4 of the EPSEN Act simply because they have not been commenced. In the absence of a clear expression to the contrary contained within the later Act, such an approach would not be a correct one to statutory interpretation. The Court must strive to give an interpretation to the Acts which respects the fact that they were enacted within a short space of time of each other, and deal, to a substantial degree, with the same issue (educational needs of children), and furthermore have clearly interlinked provisions *i.e.* that they are *in pari materia*.

**59.** The respondent has urged upon the Court to take into account that the Disability Act amended the functions of the Council for the purposes of Part 2 of the Disability Act in so far as it applied to adults. I do not consider that to be decisive or even helpful in terms of the interpretation of the relevant subsections of s. 8 of the Disability Act. Providing a statutory basis for the Council to engage in the assessment of adults with disabilities and the provision of service statements was a function that had to be specifically granted to the Council under the Disability Act because it had no such specific role with regard to adults under the EPSEN Act. The Council's role in relation to adults with disabilities under the EPSEN Act was limited to advice, consultation and general review of existing provision in higher education. It has an

assessment role and a service provision role under the EPSEN Act for children. The respondent's submission is that the absence of an express reference to assisting the respondent in the assessment of *children* with disabilities indicates that there was no role for the Council in that assessment under s. 8(3) of the Act. I do not consider this to be correct. Section 8(3) makes it mandatory for the Council to nominate a person to assist with that provision. The Council already had as a function under the EPSEN Act to plan and co-ordinate the provision of education and support services to a child with special educational needs in consultation with schools, *the respondent and such other persons as the Council considers appropriate*. Nominating a person to carry out the assessment is a direct statutory duty granted to the Council which fits neatly into its statutory functions as aforesaid.

**60.** I consider it appropriate to start with the provisions of the Disability Act. We have seen that in respect of a child under five years a parent may make an application for an assessment. Under s. 8(2) that assessment may be carried out by the assessment officer by other employees of the respondent or *by other persons with appropriate experience*. The next following subsection is s. 8(3) and is, in my view, crucial to setting the context for all that follows. The subsection says that where an assessment officer is of the opinion that there may be a need for an education service, he or she *shall request the Council* in writing to *nominate a person with appropriate expertise* to assist in *the carrying out of the assessment* under this section and the *Council shall* comply with the request.

**61.** Section 8(3) refers to "an applicant". It is important to note that s. 7 of the Disability Act provides for a definition of "applicant" as meaning "the person who is the subject of an application." On the face of s. 8(3) therefore, an applicant is an adult *or* a child. A literal interpretation of s. 8(3) clearly permits an assessment officer who is of the opinion that there is a need for an education service to be provided to a child, to request the Council to nominate



a person with appropriate experience to assist in carrying out the assessment. The Council is obliged to comply with that request.

**62.** The respondent emphasises however that s. 8(9) is the pathway for a referral to the process under the EPSEN Act for assessment of educational needs and argues that there is to be no such assessment of the educational needs of children under s. 8(3) *i.e.* that s. 8(9) is the *sole* pathway for children. The respondent submits that the plain language of s. 8(9) talks of referral for the *purposes of an assessment* under either s. 3 or s. 4 of the EPSEN Act. The respondent's case is that the subsection expressly envisages that the assessment of the educational needs of a child is to be carried out under the EPSEN Act and that is consistent with the scheme of the EPSEN Act which, by virtue of the contents of s. 3 and s. 4, is directed towards the assessment of the educational needs of children.

**63.** The respondent's criticism of the appellant's interpretation of s. 8(9) of the Disability Act is multipronged, but three issues are of central concern. The first is the criticism that the appellant is interpreting "assessment" in the subsection as "assessment report"; the second is that any other interpretation gives rise to a duplication of assessments; and the final one is that the plain and ordinary words are that the referral is *for the purposes of an assessment* and not just for service provision.

**64.** The respondent also stands over the High Court judgment in so far as it applied the maxim *generalia specialibus non derogant* to s. 8(3) and s. 8(9) respectively. To support this argument, the respondent also relies on the maxim *generalia specialibus non derogant*.

**65.** The respondent also relies upon the *obiter dicta* of Ní Raifeartaigh J. in *G (a minor) v. HSE* [2021] IECA 101 where, having cited the decision of Barr J. in the judgment under appeal in this case, she stated that the situation created by s. 8(3) and s. 8(9) was "*a classic case in which the maxim would be expected to apply*". The respondent accepted that this case was not authoritative of the interpretation of the relevant sub-sections because the point was not argued

in that case. The respondent relies on the case in aid of its submission that this is exactly the type of situation where the maxim would apply. In their written submissions, the respondent, in relying on the maxim, says “[h]ere, the Oireachtas has provided specifically for the manner in which children’s education needs are to be assessed in the very same section as it has provided for general “applicants” education needs to be assessed.”

**66.** The problem with that submission of the respondent is that it is entirely circular. The respondent is in effect submitting that the children’s needs are to be assessed separately because s. 8(9) says so. Section 8(9) is differently worded to s.8(3) of the Disability Act. That difference in wording of itself compels the Court to engage in consideration of whether in fact s. 8(9) was dealing with the post-assessment duties of the assessment officer in contrast with the mid-process powers of the assessment officer under s. 8(3) of the Disability Act. Put in another way, if the two sub-sections were worded similarly except that “applicant” was used in one and “child” in another, the maxim would be relevant as it would demonstrate that adult applicants were to be assessed in a separate way to child applicants. I consider that to accept the respondent’s deployment of the maxim in this simple sense would not be an *aid* to interpretation of each of the sub-sections but would lead to the avoidance of considering what precisely was intended by the Oireachtas by the use of different language in each section.

**67.** The respondent also relies upon the wider argument that the Oireachtas has specifically provided for the manner in which children’s educational needs are to be the assessed under the EPSEN Act and that the Disability Act does not derogate from that because there is no express provision to do so. The respondent submits that the appellant is incorrect to interpret the s. 8(9) referral process as being a “fast-track” route to service provision. The appellant’s argument is that when one begins the assessment process under s. 3 or s. 4 of the EPSEN Act *instead of* s. 8(9), the process is a longer one. Whereas, where one begins under the Disability Act by reason of an education assessment under s. 8(3), the process is quicker because the child

is then “fast tracked”, to having either an education plan being drawn up with the assistance of the s. 8(6) assessment report or, the Council providing service provision under s. 4(6) of the EPSEN Act where the child is out-of-school. The respondent submits that there is no “fast track” process. The two separate sections providing for an educational needs assessment under the EPSEN Act, are, in the submission of the respondent, the only two avenues available for a child to have educational needs assessed and s. 8(3) does not in any way provide for an education assessment for a child.

**68.** The respondent submits that the maxim of *generalalia specialibus non derogant* is precisely apt for what occurred with the Disability Act. According to the respondent, the earlier EPSEN Act provided in specific terms for the pathway for assessment of educational needs for a child. The generalised, subsequent provision which touches on education assessments (s. 8(3) of the Disability Act) could not apply to children notwithstanding the generic reference to “applicants” even without any express exclusion in s. 8(3) in relation to children. That children do not fall within the ambit of s. 8(3) of the Disability Act only becomes clear when referring back to the EPSEN Act. The respondent argues that the appellant’s interpretation would lead to duplication of assessments. There would first, be an assessment under s. 8(3) and then, there would be further assessments under either section 3 or section 4.

**69.** In my view there are a number of problems with the respondent’s reliance on the maxim. The first is the reference by the trial judge to the decision of Henchy J. in *Welch v. Bowmaker (Ireland) Ltd* where he stated at pp. 254-255:

*“The relevant rule of interpretation is that encapsulated in the maxim generalalia 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...*" (Emphasis added).

**70.** The appellant accepts, as he must, that the above can apply, in the appropriate circumstances, to general words that are found in two Acts dealing with the same particular situation. The appellant submits however, that the maxim is premised on the same specific situation where special terms will not be abrogated by general terms elsewhere. The appellant submits that the provisions of s. 8(3) and s. 8(9) are not dealing with the same situation at all. Section 8(9) can only be utilised *after* the receipt of the assessment of need report issued in conformity with the Disability Act. In other words, it is only engaged at the conclusion of the process that is commenced by section 8(3).

**71.** There is considerable merit in that submission by the appellant. Indeed, if the respondent's argument is correct that the general wording of s. 8(3) cannot abrogate the earlier special wording of the EPSEN Act then there would have been no reason to enact s. 8(9) because an applicant child would have already been precluded from having his or her educational needs assessed under s. 8(3) of the Disability Act. Moreover, there would have been no need to exclude children, as per s. 11(6), from the entitlement to a service statement regarding education if they were not entitled to an assessment of educational needs under s. 8 of the Disability Act. The Oireachtas did however legislate through enacting s. 8(9) and did so in terms which, as I shall demonstrate, literally refer to the assessment identifying needs and thus deal with a situation which occurs *after* the assessment has been carried out.

**72.** Reliance on the maxim also presupposes that the generic provision (s. 8(3)) is abrogating, undermining, superseding or even amending the earlier specific provision for assessment of children's educational needs in the EPSEN Act. But that is not what is occurring in the relevant provision. There is no obvious "derogation" in the second Act *i.e.* the Disability Act, from the EPSEN Act. Assuming both sets of provisions were commenced, a parent of a

child may well decide to apply for an assessment under the EPSEN Act *or* the Disability Act. There is no reason in principle why the Oireachtas could not have decided that an assessment carried out under s. 8 of the Disability Act should be a holistic one dealing with both health and educational needs. It was entitled to legislate in this fashion. The respondent's principal argument is that this would amount to duplication of assessments. For the reasons dealt with more fully below, I do not accept that there would necessarily be duplication of the assessments. I would also observe that there is nothing prohibiting the Oireachtas in legislating for duplicate assessments. The argument against interpreting legislation as so providing would be to have recourse to the principle that where a literal interpretation leads to an absurdity, then a purposive approach to the legislation should apply. That is not a reliance on the maxim *generalia specialibus non derogant*, but rather a reliance on the absurdity principle.

**73.** Even without considering s. 8(9), there is nothing in s. 8(3) that directly affects the educational assessments carried out under the EPSEN Act. Any person nominated by the Council under s. 8(3) to carry out the assessment would have access to the assessment (if any) already carried out under the EPSEN Act. On the other hand, if a s. 8(3) assessment has already been carried out, as we shall see, the provisions of s. 5(6) of the EPSEN Act requires those carrying out an assessment under s. 4 of the EPSEN Act to have regard to any relevant assessment already carried out. It seems to me that the s. 8(3) assessment and the s. 3 and s. 4 assessment processes run parallel to each other. An assessment under s. 8(3) of a child's educational needs does not undermine the assessment pathways under s. 3 or s. 4 of the EPSEN Act. It is merely a different route to achieving the same objective. They are separate pathways and I will address that further below.

**74.** For the foregoing reasons which are further expanded below, I consider that the maxim *generalia specialibus non derogant* is not a principle that is helpful to deploy in this exercise of statutory interpretation.

75. The overall wording of the two relevant sub-sections is quite different and there must be a reason for that. Section 8(3) mandates an assessment officer who is of the opinion that there *may be a need* for an education service to request assistance from the Council. Section 8(9) specifically states that “[w]here 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....”. The positioning of the reference to “carries out or arranges for the carrying out” prior to the reference to the “assessment identif[ying] the need”, signifies that an assessment *has already occurred* with respect to the child’s educational needs. Therefore, s. 8(9) refers to the assessment already having been made and which has been reduced to writing in accordance with s. 8(6) and s. 8(7) as a result of the assessment of educational needs under s. 8(3).

76. I do not see any reason in principle that this difference in wording necessarily arises because one is dealing with a child rather than an adult. Undoubtedly, the most direct wording which could have been used if two entirely separate pathways to the assessment of educational needs of adults and children was intended to apply would have been to add the word “adult” before applicant in s. 8(3) and to start s. 8(9) in a similar manner to s. 8(3) as follows: “Where an assessment officer is of opinion that there may be a need for an education service to be provided to a child applicant, he or she shall....”. The Oireachtas did not draft in that fashion, instead it used other words. Indeed, if the Oireachtas had not put the word “adult” before applicant in s. 8(3) but had used almost the same words at the beginning of s. 8(9) as it had in s. 8(3) (regarding the opinion that there *may be a need*), then there would have been a clear indication by the Oireachtas that separate pathways for assessment were to take place. The general reference to “applicant” in s. 8(3) would be overtaken by the specific reference to “child” in s. 8(9) as reworded.

77. It is legitimate to take into account as part of the context for interpretation that the Oireachtas chose not to legislate using this type of express provision. It suggests that s. 8(3) applies, as it plainly says, to all applicants (adult or child) at some point in *the carrying out* of the assessment and that s. 8(9) applies, as it apparently says, as to a point in time where the assessment has *identified* the need.

78. The respondent claims that the appellant is in fact interpreting “assessment” in s. 8(9) as “assessment report”. The respondent’s argument appears to be that the assessment process and the assessment report are two distinct matters. In principle that is probably a correct distinction to make. But the two sub-sections are specifically worded and s. 8(9) has the particular reference to the *assessment identifying* the educational needs. Therefore, while it is true to say that the word “assessment” is used in s. 8(9) instead of “assessment report”, regard must be had to the word “assessment” and the meaning assigned to it in s. 7 of the Disability Act. As indicated above, such an assessment is one “undertaken or arranged by the Executive to determine, in respect of a person with a disability, the health and education needs (if any) occasioned by the disability and the health services or education services (if any) required to meet those needs” (Emphasis added). Section 8(9) expressly states that the procedure it calls into play arises where the assessment identifies the need for the provisions of the education service to the child. The language of the subsection in a plain and natural sense speaks of the assessment already having identified that need. The subsection therefore in a plain and natural sense, contemplates the situation where the assessment has already taken place and that the child is then referred for assessment under one or other of s. 3 or s. 4 of the EPSEN Act.

79. It is also notable that s. 8(8) deals with procedural matters which are to occur *during* the carrying out of an assessment and that this subsection comes *after* the two subsections (6 and 7) which deal with the creation and content of the assessment report which is to set out the findings of the assessment officer. I do not accept however that this must mean that s. 8(9) is

dealing with the *assessment process*. In the first place, s. 8(9) does not say that; I repeat again that this is unlike in s. 8(3) where the referral is to assist in the *carrying out* of the assessment, meaning to assist in the course of the assessment process. Instead, s. 8(9) plainly states that it is the assessment itself which has identified the educational need for the provision of an educational service. The assessment has at that point been carried out. The assessment officer is obliged pursuant to s. 8(6) to prepare a report in writing of the results of the assessment and to furnish that report to the persons set out in the subsection. The Disability Act therefore envisages that the findings of the assessment are to be recorded in written form. Therefore, there is no tension between those subsections and s. 8(9) as the assessment will have been made and by law have been reduced to writing. In the circumstances, the respondent's interpretation is not in accordance with the common meaning of assessment; assessment is broad enough to incorporate a report without the necessity to add that word at the end of each reference to assessment. For example, in common usage a person may say "I am handing in my assessment of the situation" meaning the person is handing in a report containing his or her assessment of the situation. Moreover, I think that the respondent's submission that the appellant's interpretation can only hold true if "assessment" is read as "assessment report" does not linguistically make sense. It is not the *assessment report* that identifies a need, it is the *assessment* that does so. For all these reasons, the respondent's submission that the appellant's interpretation involves reading into s. 8(9) the phrase "assessment report" is therefore rejected.

**80.** A crucial element of the respondent's submission is that the Oireachtas cannot have intended a full assessment, including educational assessment, under the Disability Act and then another educational assessment under the EPSEN Act. The respondent submits that such an interpretation would be manifestly incorrect. I would observe at this point, that if that is what the Oireachtas, on a proper interpretation of the Act, has provided then there is no question of it being "manifestly incorrect". It is simply a reflection of what the Oireachtas has enacted.



As stated above, the respondent's argument is not that the interpretation they assert is a purposive one but that it is *the* literal interpretation when the context of the two Acts is taken into account. As I have indicated in the foregoing, it does appear on a literal interpretation of s. 8(3) that the assessment officer is required to ask the Council for assistance with the assessment where he or she is of the opinion that there may be a need for an education service to be provided. Furthermore, the referral under s. 8(9) appears, on the face of the subsection, to only take effect after the assessment has identified the education need. Having made those observations, it is important not to simply isolate a part of a sub-section but to have regard to the sub-section as a whole and to its place in the context of the Act. To that extent it is of considerable importance to address the issue of duplication of assessments.

**81.** The first observation I would make about s. 8(9) is that unlike the request to the Council for a nomination of a person to carry out an assessment under s. 8(3), there is no express provision that the principal *shall* comply with the request for an assessment under s. 3 of the EPSEN Act. It seems to me however that neither party is contending for anything other than that this is a direction to a principal to carry out duties imposed under s. 3 of the EPSEN Act. The issue is how, if at all, that requirement on the principal would fall to be carried out. In other words, the principal would not have a discretion but would be required to carry out the referral once it is made. Similar type wording in respect of the referral to the Council for the purposes of an assessment under s. 4 of the EPSEN Act is used. This can be contrasted with the duty imposed on the Council to comply with the request for a nomination under s. 8(3) of the Disability Act.

**82.** Under the provisions of the EPSEN Act however, the Council (and principals) are already obliged to do certain things in relation to carrying out assessments on children. The reason for the difference in language appears to be that the duty under s. 8(3) was newly provided by the Disability Act and therefore required a specific direction. The Council already

has duties to carry out the assessment under s. 4 of the EPSEN Act and the principal already has duties under s. 3 of that Act. The direction under s. 8(9) amounts to another pathway to activate the same or substantially the same duties already imposed in either s. 3 or s. 4 of the EPSEN Act. The nature of that imposed duty is at issue here. Therefore, I do not consider the fact that these referrals do not carry with them express direction to the principal or Council to comply with them is necessarily relevant to the interpretation contended for by both parties.

**83.** The respondent submitted also that the High Court was correct to have regard to its function set out in s. 7 of the Health Act, 1947 to 2004 to manage and deliver “health and personal social services”. The respondent relied upon the division of responsibilities between those services and “education related services” to support its interpretation of the divergent pathways for assessments. The respondent referred to its function (and therefore its expertise and resources) not extending to the “provision of education needs or services”. That submission does not, in my view, advance matters. The phrase “provision of education needs or services” is infelicitously worded to begin with; it makes sense to speak of provided services for a person’s needs, but in ordinary language one would not speak of “provision of need”. On a substantive basis, it is noteworthy that there is no strict division under the Act as between the Council and the respondent in terms of the assessment function; both are to some degree involved in the assessment of need. Although the Council has responsibility in respect of in-school children, it is the respondent who has that responsibility for *assessments of education needs* under the EPSEN Act for out-of-school children. To that extent the respondent has experience of the carrying out of educational needs assessments. I take from the foregoing that there is no assistance as to the interpretation of the relevant sub-sections to be had from a simplistic consideration of the division of expertise between the respondent *qua* expert on health and the Council *qua* expert on education. Moreover, the respondent’s assessment officer must carry out (or arrange to be carried out) an *assessment of education needs* in respect of an

adult applicant under the Disability Act. Therefore, the respondent is quite involved in assessments of educational needs already and the reference to the respondent's statutory functions is not of any particular relevance to the interpretation of the relevant sub-sections of s. 8 of the Disability Act.

**84.** No matter what interpretation is given to the nature of the referrals for the purpose of the EPSEN Act assessments as indicated in s. 8(9), it is clear that at some point in the Disability Act process there is to be an interaction with the EPSEN Act processes. In the course of the oral hearing, the image of “landing” into the EPSEN Act provisions was used. If one conceives of pathways from the Disability Act to the EPSEN Act, the question arises as to where each pathway starts and ends, the ending being the point in time in the EPSEN Act process where the referral ‘lands’. At what point therefore in either s. 3 or s. 4 does the referral under s. 8(9) land? Counsel for the appellant was specifically asked by the Court where his interpretation of s. 8(9) might fit into the EPSEN Act provisions. In answering that question, he also observed that the respondent's submissions were silent on that aspect. It is indeed surprising that there is little engagement by the respondent with that issue because it is central to their contention that the Disability Act contemplated that the EPSEN Act processes for the assessment of a child's educational needs would be the only route for an educational needs assessment of a child with a disability. The referral must, even on the respondent's view of the interpretation, *land* somewhere in the EPSEN Act. It is therefore for the Court to determine how the “referral” under s. 8(9) could commence such an educational needs assessment (on the respondent's case) or otherwise fit into the assessment processes under the EPSEN Act for the real purpose of providing for the services identified by the Disability Act assessment (as per the appellant's case). As I will demonstrate, neither interpretation of s. 8(9) leads to a straightforward point of landing in the EPSEN Act provisions.

**85.** The first example of how this is not straightforward is to consider the issue of the assessment of an out-of-school student if the respondent's interpretation of s. 8(9) is correct. The respondent's submission is that s. 8(9) requires the assessment of educational needs of a child to be carried out under the provisions of s. 3 or s. 4 of the EPSEN Act and by no other method. There is something of an anomaly however created by the specific terms of the referral in s. 8(9) itself in so far as the referral of an out-of-school student ("*in any other case*") is made to the Council for assessment under s. 4 of the EPSEN Act. In fact, pursuant to s. 4 of the EPSEN Act it is *the respondent* and *not* the Council who has the responsibility for the assessment of the out-of-school student. There are two parallel streams of assessment under s. 4 of the EPSEN Act. The first is by the respondent for an out-of-school child. There is also one carried out by the Council for a school-going child ("student"). Section 4(1) of the EPSEN Act places the onus on the respondent to "cause an assessment under [s. 4]" to be carried out where it is of the opinion that the out-of-school child has or may have special educational needs. How does such an onus fit with the referral to the Council pursuant to s.8(3) of the Disability Act for assessment of an out-of-school student under s. 4 of the EPSEN Act? There can be no suggestion of the respondent "causing" *i.e. directing* the Council to perform an assessment; the respondent and Council are separate statutory bodies with functions provided by law. The respondent has no power to direct the Council to do anything unless of course such a power is given by law. Indeed, s. 4(1) and s. 4(2) use similar wording except one refers to the duty of the respondent to cause an assessment of an out-of-school child to be carried out and the other to the duty of the Council to cause such an assessment to be carried out for a student. If the Council was to be responsible for the "carrying out" of both assessments under the EPSEN Act, the legislation would have said so. Instead, the respondent and the Council must individually cause assessments to be carried out for the children for whom they are given responsibility, that is the out-of-school child and the student respectively. It is noteworthy that

s. 5 of the EPSEN Act refers to the assessment under s. 4 being carried out with the assistance of persons possessing such expertise/qualifications as the respondent *or* the Council considers appropriate.

**86.** If one considers s. 4(3) of the EPSEN Act, which refers to the right of a parent to request either the respondent *or* the Council to carry out an assessment under the section, the entity charged with carrying out that assessment is dependent upon whether the child is in school or out-of-school. Most importantly, even within s. 4 there is no “referral” by the respondent to the Council for the purposes of the carrying out of an assessment under the section. Either the respondent *or* the Council causes the assessment to be carried out. There is therefore, on this most fundamental of issues, no clear “landing” point for the referral under s. 8(9) of an out-of-school student for the purposes of the carrying out of an assessment. At the very least one would have to engage in a more creative interpretation of the EPSEN Act provisions to permit such a point *e.g.* first by equating the assessment officer under s.8(9) with the respondent and by saying that the respondent is entitled under s. 4(1) to direct the Council to carry out an assessment in reliance on the word “cause” in the sub-section. Overall, I consider it improbable that the Council was now to be given this responsibility simply because an assessment of an applicant had been commenced by the Disability Act pathway rather than the EPSEN Act pathway.

**87.** I consider this an important flaw in the respondent’s reasoning. It is difficult to view the requirement to take such a leap in interpretation as one which sits easily with the respondent’s contention that the Acts together are to be read as totally separate pathways for the educational assessment of a child. The respondent has argued for a literal interpretation on the basis that s. 8(9) says that the referral is for the purpose of an “assessment”, but the landing point within the EPSEN Act for that assessment in respect of an out-of-school child is, on their submission, somewhat obscure.

**88.** On the other hand, there is a certain logic to the appellant's submission that the referral under s. 8(9) is in reality for service provision under the EPSEN Act. The appellant submits that s. 7 of the EPSEN Act, with a marginal heading of "Provision of Services", is significant in so far as it imposes a mandatory obligation on the respondent in respect of an out-of-school child. The appellant submits that it is only by getting into the stream of s. 3 and s. 4 that an applicant ultimately receives the benefit of the mandatory obligation placed by s.7 on the respondent to provide the services identified in the s. 4 assessment for an out-of-school child.

**89.** Section 7 of the 2004 Act provides in part that:-

"(1) In the case of a child who is not a student, the relevant health board [the respondent] shall, subject to *subsection (2)*, provide to the child such of the services identified in the assessment carried out under *section 4* in relation to the child as are necessary to enable him or her to participate in and benefit from education.

(2) Where, in performing its functions under *subsection (1)*, a health board [the respondent] is of the opinion that particular services can most effectively be provided for by the Council, it shall inform the Council of that opinion by notice in writing and, upon being so informed, the Council shall, subject to *subsection (5)*, provide those services to the child concerned.

(3) In the case of a child who is a student the Council shall, subject to *subsection (4)*, ensure that there are provided to him or her such of the services identified in the education plan prepared in relation to the child as are necessary to enable him or her to participate in the benefit from education.

(4) Where, in performing its functions under *subsection (3)*, the Council is of the opinion that particular services can most effectively be provided for by the relevant health board [the respondent], it shall inform the health board [the respondent] of that opinion by notice in writing and, upon being so informed, the health board [the

respondent] shall, subject to *subsection (5)*, provide those services in respect of the child concerned.”

**90.** Section 7(7) mandates the Council or the respondent to provide the services outlined in s. 7(1) or s. 7(3) (as may be the case) as soon as practicable after the completion of the assessment or the education plan (whichever is the applicable pathway, under s. 3 or under s. 4 of the 2004 Act). Section 7(7) provides:-

“The provision of services under *subsection (1) or (3)* by a health board or the Council shall be made as soon as practicable after the completion of the assessment or, as the case may be, the preparation of the education plan in respect of the child concerned.”

Section 7(8) then deals with the obligations of the respondent and the Council where an appeal is brought in respect of an assessment under s. 6 of the EPSEN Act or under s. 12 in relation to an education plan.

**91.** According to the appellant, the point of the referrals process under s. 8(9) is to get to the crucial service provision requirements under s. 7 of the EPSEN Act. In principle the appellant’s interpretation of the s. 8(3) and s. 8(9) provisions is consistent with a view that it was tailored to dovetail with the EPSEN Act which makes the pathway to service provision dependent on an assessment under that Act. I deal with the issue of whether there would be a duplication of assessments in paras. 94 to 104 below.

**92.** There is some difficulty however, with the appellant’s version of where the referral under s. 8(9) “lands” into s. 3 or s. 4 of the EPSEN Act. For a child who is a school student, the referral is to the school principal for the purposes of an assessment under s. 3 of the EPSEN Act. Even without the added issue of a s. 8(9) referral, the provisions under s. 3 are complex. I have touched on these in the section dealing with the legal framework under the EPSEN Act. The assessment of needs only commences when in accordance with s. 3(3), the principal of the school, having taken such measures as are practicable to meet the educational needs of the

student, is of the opinion that the child is not benefitting from them and that his or her difficulty may arise from having special educational needs. Thereafter s. 3(3) provides that the principal, after consulting with the child's parents that the child "shall, subject to *subsection (6)*, arrange for an assessment of the student to be carried out."

**93.** As s. 3(3) is the starting point for an assessment under s. 3, then it seems on the argument of each of the parties, this can only be the "landing" point for the referral made under s. 8(9) by the assessment officer in relation to a student. It was clearly the intention of the legislature that there was an interlinking with the assessment provisions under s. 3 of the EPSEN Act. I consider therefore that in effect the referral under s.8(9) requires s. 3(3) to be read as follows:-

"(3) Where the principal of a school, having taken the measures referred to in *subsection (2)*, 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 educational needs, the principal, after consultation with the parents of the student, [or pursuant to a referral by an assessment officer under s. 8(9) of the Disability Act,] shall, subject to *subsection (6)*, arrange for an assessment of the student to be carried out." (Additional wording underlined)

**94.** On the respondent's submissions however, if the appellant is correct and the referral is made subsequent to a full assessment of educational needs in accordance with s. 8(3), then the assessment process will start again and will therefore lead to duplicate assessments; one carried out under s. 8(3) and one carried out under section 3(3). In effect, the respondent is submitting that the appellant's view is not logical and would lead to an absurdity. In order to assess whether this is correct it is necessary to take into account the other provisions of the EPSEN Act which deal with taking other assessments into account. It is important therefore to look at how the appellant's interpretation of the process may work under the EPSEN Act.



**95.** Section 3(4) provides that the assessment under s. 3(3) must be carried out in accordance with guidelines issued by the Council under s. 3(4)(c) of the EPSEN Act. Those guidelines, which of course have not been drafted as these provisions are not in operation, could direct the person carrying out the assessment required by s. 3(3) to have regard to the assessment already carried out under s. 8 of the Disability Act. That would avoid duplication. Furthermore, ss. 6 of s. 3 also expressly provides that, where a principal is of the opinion, having regard to any guidelines issued by the Council under s. 3(8), that the arrangement of such an assessment is not practicable then the principal must request the Council to arrange the assessment for the student under sub-section 4. The issuance of those guidelines, which could incorporate guidance having regard to the fact that an assessment under s. 8 of the Disability Act had already taken place, would lead directly to the Council carrying out the assessment under s. 4 of the EPSEN Act. Section 5(6) of the EPSEN Act provides that where the respondent or the Council are carrying out an assessment under s. 4, they shall have regard to any relevant assessment of the child concerned that is available to it at that time. Such an assessment would include that carried out under s. 8(3) of the Disability Act. Therefore, on the plain and ordinary meaning of s. 4, no duplication of assessments would necessarily be required because there is a duty to have regard to a previous assessment.

**96.** Therefore, for the purposes of a s. 3 referral, the Act provides for a pathway to the access to the provision of services without duplication because there is a logical path to

(i) mandating the person carrying out the s. 3(3) assessment by guidelines to be published under s. 3(4)(c) to have regard to the assessment already carried out or,

(ii) requiring, by virtue of s. 3(6) and s. 3(8), that the principal, pursuant to such guidelines, must request the Council to carry out the assessment and, under s. 5(6) the Council is obliged to have regard to any relevant assessment of the child that is available to it at that time.

**97.** That provision of service is provided by the following subsections of s. 3 and the subsequent sections of the EPSEN Act. Section 3(5) requires the principal to cause an education plan to be prepared within one month from the date of receipt of the assessment carried out in accordance with s. 3(4) of the EPSEN Act (which by virtue of the foregoing can be the s. 8 Disability Act assessment report). Ultimately, this would lead into the provision of services mandated by s. 7 of the EPSEN Act which, if the Act were commenced in its entirety, would have made available a stream of dedicated funding. If the Council has carried out the assessment under s. 4, then, pursuant to s. 8 of the EPSEN Act, the Council must cause an education plan to be prepared. This again leads into the dedicated funding stream available for education service provision under the Act if implemented fully.

**98.** The appellant also points out that, if the child is in school, the Council is limited in its functions if a s. 3 assessment has been arranged by the principal. If this has occurred, then the Council do not conduct the assessment under section 4. For a s. 3 assessment as set out above, the Council's involvement is only invoked whereby the principal is of the view that drawing up the education plan would not be practicable and he or she would therefore require the Council to carry out an assessment. This is provided for in s. 3(6). The appellant submits that by virtue of s. 4(3) a parent is entitled to "leapfrog" the s. 3 assessment and decide that they want their in-school or out-of-school child to have an assessment to be conducted by the Council or respectively by the HSE. If this request is declined by the Council or the HSE, then there is a right of appeal from that refusal. The request may be refused where the Council or the respondent, as the case may be are, *inter alia*, of the opinion 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.

**99.** As for a referral under s.8(9) (of the Disability Act) to the Council, the appellant makes the case that s. 4(6) of the EPSEN Act is important in the overall consideration of where the EPSEN Act fits with the mechanism provided by s. 8(9) of the Disability Act. It provides:-

“(6) An assessment for the purposes of this section shall include an evaluation and statement of the nature and extent of the child’s disability (including in respect of matters that affect the child overall as an individual) 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.”

Therefore, according to the appellant, a referral under s. 8(9) fits into the assessment under s. 4(6) of the 2004 Act. The reason why the appellant submits that this is the correct interpretation of the two Acts is due to the fact that both s. 8(9) and s. 4(6) refer to “assessment”. Rather than having to undergo duplicate assessments, the Council now have in their armoury the “gold standard” assessment report under s. 8(3) of the Disability Act which, by reason of s. 8(9) then travels to s. 4(6) of the 2004 Act for, *inter alia*, a statement of the services that the child will need to be able to participate in, and benefit from, education and generally to develop his or her potential.

**100.** I consider that s. 4(6) is of importance. It fits with the exclusion of the educational needs of a child from the service statement as provided by s. 11(6) of the Disability Act. This is because that service statement will otherwise be provided through the EPSEN Act. There was no need to expressly exclude a child’s educational services from such a service statement under the Disability Act if the respondent’s interpretation of s. 8(9) was correct; there would be no assessment of the child’s educational needs under that Act and therefore there could never have been a need to exclude them from the service statement.

**101.** Furthermore, I accept that the landing place of a referral for assessment by the Council

under s. 4 would appear to be section 4(6). This fits more easily with the referral to the Council for assessment of the out-of-school child under section 8(9). That is an extra duty imposed on the Council by the Disability Act provision and this is where it would appear to land. As stated above, the Council is obliged to have regard to any relevant assessment and that will be the s. 8 assessment under the Disability Act as to educational needs. The provisions under s. 4(6) of the EPSEN Act require the assessment to be carried out by the Council pursuant to s. 4 (having been referred under s. 8(9)) to concentrate on the statement of services.

**102.** Therefore, I agree with the appellant that the “non-duplication” of assessments provision in s. 5(6) of the EPSEN Act takes away the “absurdity” of this referral for the purposes of, in the words of the respondent, “another” assessment. This is because the respondent or the Council are obliged to have regard to any relevant assessment of the child that is available at the time, which includes the s. 8 Disability Act assessment.

**103.** The appellant also relied upon s. 5(7) of the EPSEN Act which provides that:-

“A statement of the findings in relation to an assessment that has been carried out under *section 4* and any relevant documents relating to that assessment shall be made available immediately to the parents of the child concerned after that statement has been prepared.”

The appellant submits that the statement of findings referred to in s. 5(7) are the equivalent to a service statement compiled by a liaison officer with respect to an adult’s educational needs. For a child, it is the report of the Council that is determinative, in the same way as the liaison officer’s report is for an adult.

**104.** I accept that the above presents a logical interpretation of how the Oireachtas intended the Acts to work together. It is certainly a workable interpretation with no overall duplication of assessments and does not amount to an absurdity. It is entirely in keeping with the natural and ordinary meaning of the provisions of s. 8(3) and s. 8(9) that indicate that the referral made

under s. 8(9) is made after the assessment has been completed and has identified the need for the provision of an educational service to a child.

### **Conclusion**

**105.** In the course of this judgment, I have highlighted the complexity in the existing provisions for the assessment of educational needs of children as set out in the EPSEN Act as enacted. To that complexity there has been added the provisions of the Disability Act which indisputably provide for the assessment of the health and educational needs of adults and for the assessment of the health needs of children with disabilities. Section 8(3) refers to an assessment officer who has an opinion that an applicant (the definition of whom includes a child) may have educational needs to request the Council (established under the EPSEN Act) to nominate a person to assist in the carrying out of the assessment. The Council's functions were extended under the provisions of the Disability Act to include the assessment of adults with disabilities and the provision of service statements. Section 8(9) also makes provision for the assessment officer to make referrals for an assessment under the EPSEN Act where the assessment identifies the need for the provision of an education service to a child.

**106.** On a literal interpretation of s. 8(3) it applies to all applicants, adults or children. The wording in s. 8(9) is clearly different to that of s. 8(3) and on its plain and ordinary meaning discusses what is to occur after the assessment of a child has identified an educational need. This will provide a pathway for the child either to an education plan under s.3 of the EPSEN Act, or to have access to a statement of services (s. 4(6) the EPSEN Act), which would be otherwise denied to a child (s. 11(6) of the Disability Act).

**107.** The manner in which that intersection with the EPSEN Act is to take place is not without problems in interpretation. I am however satisfied that the literal meaning ascribed to s. 8(3) and s. 8(9) of the Disability Act would not lead to the absurdity of a duplication of assessments because the s. 5(6) of the EPSEN Act makes express provision that the Council

must take into account any relevant assessment, and so far as s. 3 is concerned, it is possible for a principal conducting an assessment to do likewise, and the respondent may direct him or her by drafting guidelines to do so. In interpreting the Acts together, the context means that a relevant assessment that must be taken into account includes one which has taken place in accordance with s. 8 of the Disability Act.

**108.** The High Court finding in favour of the respondent's submission, that s. 8(3) does not cover children because of the application of the maxim *generalia specialibus non derogant* must be overturned because it does not take into account that s. 8(9) in its literal meaning is dealing with a different situation; namely, the post-assessment situation as regards the child's educational needs which have been identified in the course of the assessment itself.

**109.** For these reasons, I would allow this appeal.

**110.** I would propose that the Court hear from counsel again concerning the finalising of the orders to be made consequent upon the reasoning set out in this judgment. The Court should also be addressed on the issue of costs.

**111.** *In circumstances where this judgment is being delivered electronically, Ní Raifeartaigh and Binchy JJ. have authorised me to record their agreement with it.*