THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

Neutral Citation Number [2021] IECA 101

Appeal Record No.: 2020/155

Costello J.

Ní Raifeartaigh J.

Pilkington J.

BETWEEN/

G
(A MINOR SUING BY HER FATHER AND NEXT FRIEND SG)

APPELLANTS

- AND–

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 1st day of April, 2021

Introduction

1. This is a case stated dated 28th February 2020 from the Circuit Court (Her Honour Judge Linnane) to this Court. The issue raised is of systemic importance and the question posed by the case stated is as follows:

> "Where an Assessment Report prepared under the Disability Act 2005 concludes that an applicant has no disability, but nonetheless identifies that the applicant has health needs and requires health services, is that applicant entitled under *inter alia* s. 11 of the Disability Act 2005 to a service statement?"

2. The answer to the question posed lies primarily in the meaning of s. 11(2) of the Disability Act 2005, which deals with a document known as a "service statement". The significance of an entitlement to a service statement is that it is accompanied by an entitlement to avail of the complaints and enforcement machinery within the same Act. A service statement is a document created following an assessment of a child's needs and sets out the health services to be provided and a timeframe for provision of those services. Where those timeframes are breached, the Act provides for an elaborate statutory complaints-and-redress process and ultimately judicial enforcement. This right of personal enforcement is a significant departure from the general scheme for delivery of health services in Ireland which is not provided for in the Health Act 2004. The question is whether this right, which arises under the 2005 Act, is available only to children who have been assessed to have needs arising out of a disability or whether it applies more generally to children with needs who have not been diagnosed as having a disability. The question which arises is one of statutory construction.

The Agreed Facts

3. The referring judge very helpfully set out the agreed facts comprehensively, as follows:

> *"1. The Disability Act 2005 enacts a statutory process for the assessment of needs of children who are suspected of having a disability. This consists, inter alia, of preparation of an assessment report (a report of whether a child has a disability and a resource – blind assessment of the needs engendered by the disability), and a "service statement" setting out the services that will actually be provided to that child having regard, inter alia, to questions such as "practicability", and budgetary constraints.*

2. In the present case, the relevant assessment report (completed outside the statutory timeframe, following the making of a complaint to a statutory complaint officer) assessed at the second applicant ("the child") did not have a disability but nevertheless identified certain needs and services as follows:

> *'Although [the child] does not meet the definition of disability under the Act, certain needs have been identified by the assessment process (see attached reports). The file will be referred to local services as appropriate.*
>
> *List of services to which referral will be made:*
>
> *While [the child] does not meet the definition of disability, she requires the following interventions at primary care level:*
>
> (a) *Primary Care Psychology to support her developing ability to regulate her emotions;*
>
> (b) *Primary Care Speech and Language Therapy to support her on-going play development, pragmatic language skills and monitor fluency as recommended in her AoN SLT report;*
>
> (c) *Primary Care Occupational Therapy to further investigate her sensory processing difficulties as recommended in her AoN Occupational Therapy report.'*

3. In upholding the applicant's complaint, the Statutory Complaints Officer made two recommendations (regarding psychology and provision of an assessment report) which are not in controversy. The difficulty arises in respect of her recommendation as to the provision of a service statement ("the recommendation"): –

> *(iii) should [the child] be entitled to a service statement, it should be issued in conjunction with the final assessment report no later than 4 March 2019.*

4. The HSE has not prepared a service statement for the child, and has indicated that it does not intend to do so. The parties disagree on the question of "entitlement", as set (sic) under the heading overleaf.

5. Insofar as they are relevant, the following dates apply:-

(a) *The application for assessment of needs was received on 4 October 2017, and so an assessment report should have issued on or before 4 April 2018.*

(b) *The applicants submitted a statutory complaint on 13 December 2018 that the Statutory deadline had been breached.*

(c) *The complaint officer's report issued on 10 January 2019.*

(d) *The applicants invoked the Disability Act 2005's redress mechanism to compel the HSE to comply with the Recommendation i.e. to produce a service statement), by way of notice of motion made returnable for 14 October 2019 and adjourned to 5 November 2019 and 28 January 2020 in order for the Circuit Court to be apprised of the progression of the Disability Act test cases in the judicial review list.*

(e) *On the latter date, the Circuit Court agreed to state this case.*

Dispute between the parties

6. On foot of the finding that the child does not have a disability, the HSE did not issue a service statement. The HSE contends that the requirement to issue a service statement arises only on foot of a finding that a child has a disability.

7. The applicants contend that irrespective of that finding, the HSE was obliged to prepare a service statement on foot of the identification of health needs and health services in the assessment report: Section 11(2) of the Disability Act 2005 and regulations made thereunder. (SI No. 263/2007 – Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007).

8. The matter came before the Circuit Court on foot of the applicants' motion to enforce the recommendation."

3. Having set out the agreed facts, Her Honour Judge Linnane then posed the question set out in the opening paragraph of this judgment.

Relevant legislation

4. The **long title** to the Disability Act 2005 says that it is:

> "An Act to enable provision to be made *for the assessment of health and education needs occasioned to persons with disabilities by reason of their disabilities*, to enable Ministers of the Government to make provision, consistent with the resources available to them and their obligations in relation to their allocation, for services to meet *those needs*, to provide for the preparation of plans by the appropriate Ministers of the Government in relation to the provision of certain of those, and certain other services, to provide for appeals *by those persons* in relation to the non-provision of those services, to make further and better provision in respect of the use by those persons of public buildings and their employment in the public service and thereby to facilitate generally access by such persons to certain such services and employment and to promote equality and social inclusion and to provide for related matters". (Emphasis added)

I will return later to the significance of the portions of the title which I have italicised.

5. **Section 2** of the Act defines certain terms and provides the following definition of the term disability.

> "'Disability', in relation to a person, means 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."

6. Part 2 of the Act is entitled "Assessment of need, service statements and redress". **Section 7** provides information about how to interpret certain terms in Part 2. It includes the following:-

> "'Assessment' means 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. (Emphasis added)
>
> "assessment officers" and "assessment report" shall be construed in accordance with section 8.
>
> …
>
> "liaison officer" shall be construed in accordance with s.11".

7. These definitions are reproduced in the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (SI 263/2007), which also provide that "service statement" means a statement prepared by the liaison officer in accordance with section 11(2) of the Act.

8. The key sections for present purposes are ss. 8, 9 and 11 within Part 2 of the Act. I shall deal with them in a different order to the order in which they appear in the Act because it reflects the sequence in which events take place: s. 9 concerns an application for assessment, s. 8 deals with the conduct of the assessment, and s. 11 deals with the service

statement which follows upon an assessment. The difference between “assessment officers” and “liaison officers” should be noted.

9. **Section 9** deals with an application for assessment and provides:-

“9.—(1) Where—

(a) a person (“the person”) is of opinion that he or she may have a disability, or

(b) a specified person (“the person”) is of that opinion in relation to another person and the person considers that by reason of the nature of that other person's disability or age he or she is or is likely to be unable to form such an opinion,

the person may apply to the Executive for an assessment or for an assessment in relation to a specific need or particular service identified by him or her.

(2) In subsection (1)(b), “the person” means—

(a) a spouse, a parent or a relative of a person referred to in subsection (1)(a),

(b) a guardian of that person or a person acting in loco parentis to that person,

(c) a legal representative of that person, or

(d) a personal advocate assigned by Comhairle to represent that person.

…

(5) Where an application under subsection (1) or a request under subsection (4) is made, the Executive shall cause an assessment of the applicant to be commenced within 3 months of the date of the receipt of the application or request and to be completed without undue delay.”

Thus, for example, a parent might make an application that a child be assessed. However, the range of persons who may apply pursuant to s. 9 is a broad one. Further, the three-month time-limit for the commencement of the assessment may be noted.

10. **Section 8** deals with assessment officers and the preparation of assessment reports and provides (in relevant part) as follows:-

> "8.—(1) The Executive shall authorise such and so many of its employees as it considers appropriate (referred to in this Act as "assessment officers") to perform the functions conferred on assessment officers by this Part and every person so appointed shall hold office as an assessment officer for such period as the Executive may determine.
>
> (2) An assessment officer shall carry out assessments of applicants or arrange for their carrying out by other employees of the Executive or by other persons with appropriate experience.
>
> …
>
> (4) An assessment officer shall be independent in the performance of his or her functions.
>
> (5) An assessment under this section shall be carried out without regard to the cost of, or the capacity to provide, any service identified in the assessment as being appropriate to meet the needs of the applicant concerned.
>
> (6) Where an assessment officer carries out or arranges for the carrying out of an assessment under this Part, he or she shall prepare a report in writing of the results of the assessment and shall furnish a copy of the report to the applicant, the Executive, and, if appropriate, a person referred to in section 9 (2) and the chief executive officer of the Council.

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

(a) whether the applicant has a disability,

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

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

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

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

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

11. Article 9 of the 2007 Regulations similarly states that the Executive shall commence the assessment process as soon as possible after the complete application form has been received but not later than three months after that date. Article 10 of the Regulations provides that the Executive shall complete the assessment and forward the assessment report to the Liaison Officer within a further three months from the date on which the assessment commenced, save for in exceptional circumstances, when the assessment will be completed without undue delay.

12. Subsection 11(2) is at the heart of the present case. **Section 11** provides in relevant part: -

"11.—(1) The Executive shall authorise such and so many employees of the Executive as it considers appropriate (referred to in this Act as "liaison officers") to perform the functions conferred on liaison officers by this Part.

(2) 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*." (Emphasis added)

…

"(7) Without prejudice to the generality of subsection (2), in preparing a service statement the liaison officer concerned shall have regard to the following—

(a) the assessment report concerned,

(b) the eligibility of the applicant for services under the Health Acts 1947 to 2004,

(c) approved standards and codes of practice (if any) in place in the State in relation to the services identified in the assessment report,

(d) the practicability of providing the services identified in the assessment report,

(e) in the case of a service to be provided by or on behalf of the Executive, the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year,

(f) 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."

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

14. The distinction between an "assessment report" and a "service statement" may be noted. In the course of submissions, counsel described the assessment report as a "utopian report" by which was meant that the assessment report looks purely to the needs of the child and the services required without regard to the constraints posed by limited resources. It is, as it was described in the Case Stated, "resource-blind". The service statement, in contrast, which comes later in the process, fully takes account of the practical realities caused by limited resources. In more colourful language, counsel described the assessment report as "poetry" when compared with the "prose" of the service statement. Nonetheless, the service statement is a valuable document, not least because of the ss. 14, 15 and 22.

15. Sections 14 and 15 deal with complaints and include the following provisions:

Section **14(1)(e**) provides:

"14.—(1) An applicant may, either by himself or herself or through a person referred to in section 9 (2), make a complaint to the Executive in relation to one or more of the following:

…

(e) the fact, if it be the case, that the Executive or the education service provider, as the case may be, failed to provide or to fully provide a service specified in the service statement."

Section 15 provides for the Executive to authorise complaints officers to deal with complaints and s. **15(8)** of the Act of 2005 provides:

"(8) A report of a complaints officer may contain one or more of the following:

…

(f) if the report contains a finding that the Executive or an education service provider failed to provide or to fully provide a service specified in the service statement, a recommendation that the service be provided in full by the Executive or the education service provider or both as may be appropriate within the period specified in the recommendation."

16. Section 16 provides for the appointment of an appeals officer and s. 18(1) provides:

"An applicant or a person referred to in section 9 (2) may appeal to the appeals officer in the prescribed manner against a finding or recommendation under section 15 (8) or against the non-implementation by the Executive or a head of an education service provider of a recommendation of a complaints officer and, if he or she does

appeal, the appeals officer shall give the parties an opportunity to be heard by him or her and to present to him or her any evidence relevant to the appeal."

17. Section 20 provides for an appeal on a point of law to the High Court. Perhaps more importantly, s. 22(1)(a) provides that the complaint officer's finding and recommendation may be enforced by way of an application to the Circuit Court in the event that the recommendation is not implemented within three months.

18. In *JF v. HSE*,[1] in which there had been significant delays and breaches of the timelines prescribed by statute, Faherty J. described the complaint-redress-enforcement provisions as an *"integral statutory system of redress for complaints about breaches of those timelines, together with an inbuilt mechanism for judicial enforcement*" (para. 16).

The submissions of the parties

The appellant's submissions

19. Counsel on behalf of the appellant relies heavily upon s. 11(2) for the proposition that a child is entitled to a service statement where an assessment report specifies that the provision of health services is appropriate, whether or not the child has a disability. He submits that it cannot have been the intention of the Oireachtas to exclude children such as the applicant, who do not have a disability but who do require services, from the elaborate complaints and enforcement procedure contained within the Act.

20. The appellant submits that the literal meaning of the provisions is clear, unambiguous and not absurd and that the appellant is patently entitled to a service statement on the plain

[1] [2018] IEHC 294

meaning of s. 11(2). He says the argument advanced by the respondent with reference to s. 8(7) is readily disposed of by the application of the rule of *generalia specialibus non derogant.* As explained by Henchy J. in *Welsh v. Bowmaker (Ireland) Limited &Ors.*),[2] this principle means that where a particular situation is dealt with in a document in special terms, and elsewhere in the same document general words are used which could be said to encompass and deal differently with the particular situation, the general words will not, in the absence of a definite intention to do so, be held to undermine or abrogate the effect of the special words. Therefore, counsel maintains, the fact that a person who is the subject of a determination that he/she has a disability is entitled to a service statement pursuant to s. 8(7) does not mean that a person assessed as requiring services but not the subject of such determination is not entitled to a service statement when this is expressly stated to be so under s. 11(2).

21. Counsel for the appellant also refers to s.2 0 of the Interpretation Act 2005 which provides that:

> "Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except in so far as the contrary intention appears in the enactment itself, or the Act under which the enactment is made".

22. Without prejudice to his argument as to the literal interpretation of the statute, counsel for the applicant also submits that the 2005 Act falls into a category of legislation in which a purposive approach takes on a uniquely important role because it is a remedial social statute to address a particular social problem. In this regard he quotes from Dodd, *Statutory Interpretation in Ireland*[3] for the proposition that remedial social statutes and legislation of

[2] [1980] IR 251
[3] Dodd, *Statutory Interpretation in Ireland,* 1st Ed., (Bloomsbury Professional, 2008)

a paternal character should be construed as widely and as liberally as fairly can be done within the constitutional limits of the court's interpretative role. Other statutes which have been considered to be remedial social statutes include the Family Home Protection Act 1976, The Childcare Act 1991, the Adoption Acts 1952-1988, the Equal Status Act 2000 and the Residential Institutions Redress Board Act 2002. Interpretation of such legislation requires a consideration of the purpose of the legislation and the category of persons at whom it is directed. He relies on the comment of Clarke CJ. in *JGH v. Residential Institutions Review Committee*[4] where he said that the underlying principle in such cases is to assume that the Oireachtas:

> *"…did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation"*. (para. 4.5)

23. Counsel contends that the interpretation which he urges upon the Court is supported by the 2007 Regulations where a service statement is defined as a statement prepared by the liaison officer in accordance with s. 11(2) of the 2005 Act. He also points out that Article 17 of the Regulations state that the HSE should arrange for the preparation of a service statement by the liaison officer in accordance with s. 11(1) and s. 11(2) of the Act of 2005. These duties, he says are imposed expressly by reference to s.1 1 and not s. 8(7).

24. The appellant emphasises that the assessment officer and liaison officer are two different officers with different functions. Once the assessment officer has completed his or her role (that of providing an assessment report), the liaison officer has the duty to provide a statement of services. Counsel points out that practicability and resource considerations

[4] [2017] IESC 69

must be taken into account by the liaison officer under s. 11(7) of the Act, which means that there is no automatic right to the services even when they are specified in a services statement, a fact which was confirmed by the High Court (Barr J.) in *C.M. v. HSE*.[5] Sometimes service statements have specified years in advance in some areas because of the significant delays in providing the services. He also points out that not every child who is the subject of an assessment report will require services. Accordingly, he submits, the resource implications of the interpretation contended for is not significant, or as significant as it might otherwise seem.

25. Counsel also pointed out that it can often be the case that a child does not receive a diagnosis of disability immediately and that the diagnosis may be delayed, sometimes for good clinical reasons. This is another good reason, he submits, as to why there should not be an inequality as between children with disability requiring services and children without disability requiring services.

The respondent's submissions

26. The HSE submits that the applicants' interpretation is not supported on either a literal or a purposive reading. The HSE says that the plain language of s. 11(2) makes it clear that an entitlement to a service statement is contingent upon a "determination" which in turn has to be interpreted with reference to s. 8(7) which makes clear that the entitlement arises only where the health needs arise from a disability. The language of s. 8(7) refers to "findings" as well as "determinations". It is submitted that the Court is entitled to presume that the Oireachtas did not use otiose language and what the subsection means is that the author of an assessment report may well record matters relevant to a child, but which do not

[5] [2020] IEHC 406.

automatically trigger an entitlement to use the Act's enforcement mechanisms in relation to such findings. The HSE therefore submits that the matter can be dealt with on the basis of a plain reading alone.

27. The HSE submits that, in any event, a purposive approach to interpretation would yield the same result. It accepts that the Disability Act 2005 is a remedial social statute. Counsel refers to the long title of the Act and say that it may be broken down into a number of aspects as follows:-

(a) To enable provision to be made for the assessment of health and education needs occasioned to persons with disabilities *by their disabilities*.

(b) To enable Ministers of the Government to make provision consistent with the resources available to them and their obligations in relation to their allocation, for services underlined to meet *those needs* [*i.e.* those occasioned to persons with disabilities by their disabilities (see (a))];

(c) To provide for the preparation of plans by the appropriate Ministers of the Government in relation to the provision of certain of those, and certain other services,

(d) To provide for appeals for *those persons* in relation to the non-provision of those services,

(e) To make further and better provision in respect of the use by those persons of public buildings and their employment in the public service and thereby to facilitate generally access by such persons to certain such services and employment and,

(f) To promote equality and social inclusion and to provide for related matters.

28. As is clear from the italicised words above, the reference is to needs "occasioned to persons with disabilities by their disabilities". Likewise, the reference to the use of the appeals process "by those persons" in relation to non-provision of services can only be

consistent with an interpretation that persons with disabilities are entitled to appeal the non-provision of services to them.

29. An additional point made by the respondent is that s. 9 confers a broad entitlement to apply for an assessment, namely where an applicant or, among others, a person *in loco parentis* considers that their child "may have a disability". This is a low threshold which allows assessment of needs to be requested in respect of a large number of persons. Counsel submits that in contrast to the low threshold for applying for an assessment, there is, by reference to s. 2 and s. 7 of the Act, a relatively high threshold in respect of what constitutes a disability (as set out earlier in this judgment), particularly in comparison with the definition in the Equal Status Act 2000 s. 2 where disability is defined as:

> (a) The total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
>
> (b) The presence in the body of organisms causing, or likely to cause, chronic disease or illness,
>
> (c) The malfunction, malformation or disfigurement of the part of a person's body,
>
> (d) A condition or malfunction which results in person learning differently from a person without the condition or malfunction, or
>
> (e) A condition, disease or illness which effects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour.

30. The HSE contends that the deliberate choice by the Oireachtas to apply a high threshold for disability in the 2005 Act would be entirely undermined if the Court were to adopt the interpretation contended for by the applicants. All of the benefits intended to be delivered to the small minority of children with a disability (as defined) would be thrown

open to a far larger cohort, that of all applicants who have a need for a health service, which is defined extremely broadly at s. 2 of the Act as "a service (including a personal social service) provided by or on behalf of the HSE." It would lead to a diversion of resources for children with disabilities to those without disabilities without any specific indication that this was the intention of the Oireachtas.

31. Counsel submits that the maxim *generalia specialibus non derogant* does not apply, unlike the *C.M.* case where it clearly arose in the context an interpretation of s. 8(3) and s. 8(9). Here, the interpretation of s. 11(2), s. 8(7) and s.7 is a situation in which all of the provisions are consistent with each other and application of the maxim simply does not arise. Similarly, the HSE contends that s. 20 of the Interpretation Act 2005 is not relevant because there is no question of a contrary intention appearing, which is when s. 20 applies.

32. Counsel on behalf of the HSE took issue with the appellant's view that there would be little or no resource implications and said that it followed inevitably that expanding the cohort of persons who would be entitled to avail of the complex and sophisticated complaint and appeal mechanism would negatively affect those children with disabilities already availing of it. It would, he said, of course have resource implications in terms of, for example, the number of complaints officers needed and the costs of appeals where enforcement applications were brought.

33. In reply counsel on behalf of the applicant referred to the fact that s. 8(7) uses the word "determinations" in the plural which he said "puts a torpedo" into the HSE's suggestion that the word was only referable to a person who has a disability. He said it was significant that s. 8(7) was silent on the question of service statements and this supported his submission.

Discussion and Decision

34. The provisions of the Disability Act 2005 under consideration in the present case have been examined in a number of previous authorities. The question of the precise age-group of children eligible for assessment of need, having regard to the terms of the Disability Act 2005 (Commencement Order) 2007, was under consideration in *HSE v. Dykes*[6] (Hanna J.). The complaints-appeal mechanism was discussed in *JF v. HSE*, a case in which the High Court (Faherty J.) directed the respondent to complete an assessment of need in respect of the minor applicants within a period of six weeks. She declined, however, to grant a declaration that the statutory complaints process was not adequate or appropriate as a remedy. The HSE had put evidence before the court as to the delays that had attended the complaints process as well as additional resources that had since been allocated to the system in order to prevent such delays arising in the future.

35. I note the use of language at para. 122 of the High Court (Barr J.) judgment in *C.M. (A minor) v. HSE,*[7] a case in which a number of issues were addressed, including whether children could avail of the statutory 'pathway' in s. 8(3) of the 2005 Act (discussed further below). When he was discussing the role of the liaison officer, he said:

> "*When issuing a service statement, the liaison officer is not making a decision which would require reasons in the ordinary sense of the term. By the time the matter has been passed to him or her, on the completion of the assessment of needs stage,* ***all the necessary determinations have been made. A determination has been made as to whether the applicant has a disability within the meaning of the Act and, if so****, an*

[6] [2009] IEHC 540
[7] [2020] IEHC 406

assessment of his or her needs has been ascertained, without any regard to resources or capacity. The papers are then passed to the liaison officer, who has to carry out the much more practical task of stating what services will actually be provided to the applicant in respect of the needs identified in the assessment report". (emphasis added)

36. None of the above judgments, however, directly address the point raised in the present case and the issue falls to be decided with reference to the usual principles of statutory interpretation.

37. In my view, the answer to the question posed by the case stated must be in the negative. It is true that if one read s. 11(2) as a free-standing provision without reference to the rest of the Act, one might reach the conclusion that any child who has been assessed as requiring health services and/or education services is entitled to a service statement, with all the consequences that this entitlement entails. However, I do not think that s. 11(2) can be read as if it were a free-standing provision and terms such as "assessment report" or "determination" were not already used in earlier sections of the Act.

38. Section 7 defines assessment as "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…". Section 8(7) sets out what the assessment officer should address including a statement of the health and education needs and a statement of the services required, but these are all prefaced with the words "in case the *determination* is that the applicant has a disability….", and indeed s. 8(7)(b)(ii) refers to "a statement of the health and education needs (if any) occasioned to the person by the disability". S.8(7) refers to "findings" and "determinations", but determinations are limited

in the manner described. Counsel for the appellant emphasised that the word "determinations" in s. 8(7) was in the plural, implying (I assume) that the word "determination" is not limited to a determination of disability; but the way in which the subsection is laid out makes it clear, in my view, that the determinations in (b)(i) –(iii) inclusive are reached *only* if there has been a prior determination that the applicant has a disability. This is manifestly clear from the opening words of (b) which says, "in case the determination is that the applicant has a disability…". Subparagraph (b)(iii) (" a statement of services considered appropriate…") is clearly limited by those words ("in case the determination is that the applicant has a disability").

39. One then comes to s .11(2) and the use of the word "determination" therein. In my view, it is clear that the term "determination" is intended to have a common meaning across the provisions and that when s. 11(2) speaks of a service statement being prepared when there has been a determination that the provision of health services and/or education services is appropriate, this refers to person in respect of whom there has been both a determination that he or she has a disability and that health and education needs referred to have been occasioned *by the disability*.

40. The appellant has referred to the use of the maxim *generalia specialibus non derogant* in *C.M. (A minor) v. HSE*, when the High Court was interpreting s. 8 of the Act. That was a very different context. The Court was comparing the provisions in s. 8(3) and s. 8(9) of the 2005 Act, each of which concerned a 'pathway' to education (as distinct from health) services within the remit of the National Council for Special Education. Section 8(3) provides that "where an assessment officer is of opinion that there may be a need for an education service to be provided to *an applicant*, he 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". Section 8(9) provides that:

> "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 s. 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".

The Education for Persons with Special Needs Act 2004 (as amended) is the 2004 Act referred to. The National Council for Special Education was charged with carrying out assessments of educational needs of children under ss. 3 and 4 of the Act but these sections had not been commenced and there was no "live" statutory pathway pursuant to s. 8(9) for children to have their educational needs assessed by the Council. The question was whether children could use the s. 8(3) pathway instead. The answer was in the negative.

41. The Court considered it necessary to have regard to the overall framework, which included taking into account another piece of legislation (the 2004 Act). Barr J. held that it was clear from the overall framework that s. 8(9) was the pathway intended to be used for the assessment of children's education needs. Barr J. applied the maxim *generalia specialibus non derogant* to find that s. 8(3) applied to adults and s. 8(9) applied to children, and that the latter was the "sole statutory referral" pathway for children. That was in many ways a classic case in which the maxim would be expected to apply; one provision provided a pathway for an 'applicant', and the other provided a pathway for a 'child'. The latter was

specific whereas the former was general. The application of the maxim is unsurprising in that context.

42. I do not think the maxim applies in the present situation. This is not a situation where s. 11(2) is a "precise" provision while the other provisions are "more general". Instead, this is a situation where a sequential process (a person makes an application; this is followed by an assessment leading to an assessment report; the matter than moves to the liaison officer for a statement of services) which is set out across several provisions of the legislation. In those circumstances, the provisions require to be read as an interlocking set of provisions with terms such as "finding" and "determination" having a common meaning across all of them.

43. I am fortified in my conclusion by the words of the long title to the Act which says that it is "to enable provision to be made for the assessment of health and education needs occasioned to *persons with disabilities* by reason of their disabilities….", and to enable ministers of the government to make provision "consistent with the resources available…" for services "to meet *those* needs" and to provide for "appeals by *those* persons" in relation to the non-provision of services. The link between the appeal mechanism and persons with disabilities is entirely clear from the language of this title.

44. For the same reason, I do not think that s. 20 of the Interpretation Act 2005 is of assistance in the present context. The interpretation favoured by the appellant would be an acontextual interpretation of s. 11(2) rather than an interpretation which is faithful to intentions and contrary intentions in different provisions. There is in my view no "contrary intention" in s. 11(2). At best, there is an absence of repetition of the limitation that the

health/education services being referred to are health/education services for a person with a disability. Alternatively one could say that there was, to put it at its highest, an undefined use of the word "determination" which, were it not for s. 8(7), might be interpreted widely. None of this in my view amounts to a situation where s. 11(2) evinces a "contrary intention" to the intention revealed by the title, s. 7 or s. 8(8), within the meaning of that phrase in s. 20 of the Interpretation Act 2005.

45. I also take into account that the definition of "disability" is much narrower than the definition in other legislation such as the Equal Status Act 2000 (s. 2), which suggests a deliberate decision to keep the category of persons entitled to avail of the complaint and appeal mechanism relatively narrow. It may be noted that the elaborate complaints and enforcement mechanism provided for in the 2005 Act was ushered in for the first time by that Act. It seems to me also that if the Oireachtas had wished to make the appeal and enforcement machinery available to all children with needs, it would have made this clear beyond any doubt in explicit language by reason of the significant resource implications that such a step would involve.

46. The appellant relied on the canon of construction to the effect that remedial statues should be generously interpreted in favour of applicants, referring to such authorities as *Bank of Ireland v. Purcell*,[8] *Gooden v. St Otteran's Hospital*,[9] *A.O'G v. The Residential Institutions Redress Board*[10] and *JGH v. Residential Institutions Review Committee and Residential Institutions Redress Board*.[11] In *Purcell*, which concerned the Family Home Protection Act 1976, Walsh J. described the legislation as a remedial social statute enacted

[8] [1989] IR 327.
[9] [2005] 3 IR 617.
[10] [2015] IESC 41.
[11] [2018] 3 IR 68.

to protect the interest of the non-owning spouse in the family home and said that the statute was not to be construed as if it were a conveyancing statute and that remedial statutes are to be construed as widely and liberally as can fairly be done. In *JGH v. Residential Institutions Review Committee and Residential Institutions Redress Board*, Clarke C.J. echoed this language in accepting this approach to the construction of remedial statutes (para. 4.2).

47. While I accept that the Disability Act, 2005 is a remedial statute, there is a limit to the results which this interpretive approach can yield. As Clarke CJ., who wrote the judgment for the majority, said:

> *"However, in so doing the Court can only adopt an interpretation which can be said fairly to arise on the wording of the legislation itself. To go beyond a meaning which can fairly be attributed would be to impose a liability on the State which it could not properly be said that the Oireachtas intended to accept."*

48. Later at para. 4.5 he said:

> *"The underlying principle behind the proper approach to the interpretation of remedial legislation is that it must be assumed that the Oireachtas, having decided that it is appropriate to apply public funds to compensate a particular category of persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation. On the other hand the Oireachtas is entitled, when deciding to apply public funds in a particular way, to define, within constitutional bounds, the limits of any scheme which it is decided should be put in place. Where that scheme is remedial, Courts should not be narrow or technical in interpreting those* ***bounds but they should not be ignored either****".* (emphasis added)

49. O'Donnell J., albeit that he was in the minority as to the outcome in the case, expressed the limits of this canon of interpretation thus:

> "*It is also said that the Court should adopt a broad purposive interpretation of a remedial statute, relying on Bank of Ireland v. Purcell [1989] I.R. 327 and Gooden v. St Otterans Hospital [2005] 3 I.R. 617. This is of course a purposive approach. Even if this is so, the statute must still be* ***interpreted****. The process of statutory construction cannot be treated as an exercise where the words of the statute are fed into the magician's black box and words of incantation such as purposive, generous or literal or strict are spoken almost at random, before the desired result is extracted from the other side. As Hardiman J. observed in Gooden, the limits of construction are reached when a court is asked to rewrite a statute or supplement it. This echoes the approach of Lord Wilberforce in Royal College of Nursing v. Secretary of State for Health* [12]*:*
>
> > *"'There is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'what would Parliament have done in this current case – not being one in contemplation – if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.'*
>
> *It is not permissible to extend the Act beyond its terms because a limitation deliberately included in the Act is now considered restrictive*".

50. At issue in the *JGH* case was a statutory scheme which explicitly had the aim of providing compensation to a wide category of persons who had suffered abuse in residential institutions. The present case is not a compensation-scheme case, and is, on the contrary, an

[12] [1981] A.C. 800

area in which there are multiple competing interests for a limited pool of resources, and where resource considerations are ever-present. Section 7 of Health Act of 2004 provides that the object of the Executive is "to use the resources available to it in a most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public". As we have seen, the long title to the Disability Act 2005 refers to 'the resources available' to ministers of government and 'their obligations in relation to their allocation' in the same breath as it refers to the provision of the assessment of health and education needs occasioned to persons with disabilities by reason of their disabilities. And, of course, the very distinction between a service statement and an assessment report is that the former is "resource-blind" while the latter is not.

51. It seems to me beyond argument, despite the appellant's submission to the contrary, that making the complaint and appeal mechanism within the Act available to all applicants who have health and/or education needs, whether or not they fall within the Act's definition of "disability", would inevitably incur greater expenditure. It also seems to me that to rely on s. 11(2) in isolation from its fellow-provisions in the same statute and to produce a general right to the appeal-and-enforcement mechanism would smack somewhat of waving the magic wand of "remedial statute" and extracting the desired result from the magician's black box, to borrow the vivid metaphor employed by O'Donnell J. in *JGH*.

52. Having regard to all of the above, I am of the view that the answer to the question posed in the case stated must be in the negative. Where an assessment report prepared under the Disability Act 2005 concludes that an applicant has no disability, but nonetheless identifies that the applicant has health needs and requires health services, the applicant is *not* entitled under s.11 of the Disability Act 2005 to a service statement.

53. With regard to the costs of this application, my provisional view is that there should be no order as to costs. It is true that the respondent was successful in the interpretation it contended for, but I would be inclined to exercise discretion in this manner having regard to the terms of s. 169(1) of the Legal Services Regulation Act 2015 and Order 99 r. 2(1) of the RSC (recast) and the following factors in particular; (a) it appears from the submissions that both parties requested the case stated; (b) the matter was undoubtedly of systemic importance and significant public interest; (c) the parties' conduct of the case was excellent and efficient; and (d) it was reasonable of the appellant to raise the issue, by reason of the wording of s. 11(2) of the Act.

54. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

55. As t*his judgment is being delivered electronically, I should say that Costello and Pilkington JJ have read this judgment and have authorised me to say that they agree with it and with the provisional ruling on costs*.