

**THE HIGH COURT**

**[2024] IEHC 11**

**[Record No. 2022/1032 JR]**

**BETWEEN**

**C.D (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND J.D.**

**APPLICANT**

**AND**

**THE HEALTH SERVICE EXECUTIVE**

**RESPONDENT**

**AND**

**NATIONAL COUNCIL FOR SPECIAL EDUCATION**

**NOTICE PARTY**

**[Record No. 2023/146 JR]**

**BETWEEN**

**L.E. and D.E (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND L.E.)**

**APPLICANTS**

**AND**

**THE HEALTH SERVICE EXECUTIVE**

**NATIONAL COUNCIL FOR SPECIAL EDUCATION**

**MINISTER FOR EDUCATION**

**RESPONDENTS**

**JUDGMENT of Ms Justice Marguerite Bolger delivered on the 12<sup>th</sup> day of January**

**2024**

**Background**

**1.** The CD case relates to a child, C, born on 29 August 2017, who has been diagnosed with autism. C's parents applied for an assessment of needs pursuant to the Disability Act

2005 in June 2020. They seek to challenge the assessment of needs report issued on 17 September 2022 which was completed after a referral by the assessment officer to the National Council for Special Education (hereinafter referred to as the NCSE) pursuant to s. 8(3) of the Act. The NCSE contacted C's school to complete an education needs report which was returned to the assessment officer who then prepared the impugned assessment of needs report.

**2.** A similar but more extensive challenge is brought in DE with the child D, born 30 April 2013, who has a diagnosis of Autism Spectrum Disorder. His parents applied for an assessment of needs on 1 July 2020 and an assessment report issued on 21 December 2020 and was, on the request of his parents, reviewed by report dated 13 June 2022 which stated in respect of his education needs, that a referral had been made to the NCSE on the same date as the report, 13 June 2022. D's challenge is more extensive than that in CD in that he seeks declaratory reliefs arising from what is claimed to be the NCSE's inflexible policy of nominating persons pursuant to s. 8(3) and a claim that the NCSE's administrative rules for the application of the s. 8(3) process should have been made by Regulations pursuant to the Disability Act.

**3.** At the outset of the hearing it was, wisely, confirmed by the HSE and NCSE that the arguments made in their Grounds of Opposition about (1) delay and (2) the availability of an alternative statutory remedy were no longer being pursued.

**4.** For the reasons set out below, I find for the applicants.

### **The parties' submissions**

**5.** The applicants claim that their assessment of needs reports do not comply with the Act, in particular s. 8(3) and seek an order of *certiorari* quashing that report and an order of *mandamus* compelling the HSE to complete the assessment of needs report in accordance with the Act and Regulations made thereunder.

**6.** The applicants' challenge relies in substantial part on the process followed by the NCSE in its communications with the school including the contents of an Information Note and other Department of Education documents utilised by the NCSE to inform the school personnel of how the assessment of needs report should be completed by them. The applicants condemn this process and how the assessment officer utilised the information provided by the school in completing the impugned assessment of needs report. The

applicants say the assessment of needs report failed to incorporate the assistance contemplated and required by s. 8(3) which in turn has led to the assessment of needs report failing to set out certain matters which are required by s. 8(7) of the Act. They claim that the HSE and the NCSE have conflated the terms "*education service*" and "*education need(s)*" and in consequence have failed to correctly and appropriately implement the obligations imposed by s. 8(3) of the Act.

**7.** The applicants criticise the nomination of a school principal or teacher rather than a SENO (Special Education Needs Organiser) who was the person nominated in the past or an educational psychologist. Finally they claim that the HSE failed to fulfil its statutory obligations under the Act to ensure the assessment report was completed to Health Information and Quality Authority (HIQA) standards required by s. 10 and by Regulation 16 of the Disability (Assessment of Needs, Service Statements and Redress) Regulations S.I. 263 of 2007.

**8.** The HSE denies any breach of s. 8(3), disputes that s. 8(3) requires an assessment officer to independently evaluate the information provided by the NCSE's nominee and says that the assessment officer was entitled to deploy that assistance as they saw fit, as they say occurred here. The HSE dispute that the assessment of needs report was deficient or failed to meet HIQA standards.

**9.** The NCSE submit they complied with the obligations imposed on them by s. 8(3). They rely on s. 7 of the Education Act 1998 that allows the Minister for Education to determine national education policy, set out in the Continuum of Support, which requires a school to identify students' additional education needs and teachers are trained to do that. Those needs are recorded in a student's individual Student Support File (SSF) which contains the Student Support Plan (SSP). The NCSE say that teachers are qualified to be an appropriate person with expertise pursuant to s. 8(3) and are best placed to do so.

**10.** The NCSE have developed a process for assessing educational needs where they are asked to assist with an assessment of needs, which involves asking the child's school to complete an education needs report from the information contained in the child's SSF. The form sent by the NCSE to the school says that only data contained in the student's current SSP should be included, but the NCSE say that information from additional external reports contained in the SSF could also be included.

**11.** The NCSE disputes that a teacher and/or a school principal is not a suitable person to provide assistance pursuant to s. 8(3) and they rely on the provisions of ss. 4 and 5 of the Education for Persons with Special Educational Needs Act 2004 and s. 7 of the Education Act 1998. In relation to any distinction between education needs versus education services, the NCSE says that a person's education needs must be identified before the education services they require can be identified, which is what they say happened here.

### **The Disability Act 2005**

**12.** The Disability Act 2005 is an innovative, far reaching remedial Act which was, *inter alia*, "intended to provide for an assessment of the health and education needs of persons with disabilities" (Dunne J., *J.N. and T.M. v. J.H.* [2023] IESC 9). The Act provides a statutory framework for the assessment of the health and education needs of a person with a disability. There is a distinction drawn in the Act between health needs and education needs for a child in that s. 11(6) provides "[a] service statement shall not contain any provisions relating to education services where the subject of the statement is a child." However, I do not see that as impacting on the applicants' challenge to the assessment of needs process as the exclusion of education needs from a service statement does not limit the application of s. 8 to the preparation of the assessment of needs report, which report is clearly required to include education needs where applicable.

**13.** A number of important definitions are provided at s. 7. "Assessment" is defined 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 and the health services or education services (if any) required to meet those needs".

"Education service" is defined as,

"a service provided by a recognised school or centre for education (within the meaning in each case of [the Education Act 1998](#)) or by a person or body specified by the Minister for Education and Science who provides a programme of education, training or instruction and "education service provider" shall be construed accordingly".

**14.** Subsections 8(2), 8(3), 8(5), 8(7)(ii)(iii) and 8(9) provide that:

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

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

*(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...*

*(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,*

*(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."*

Section 8(5) is a particularly important provision which is one of the features of the legislation that make it so radical and was described by Donnelly J. in *C.M. v. HSE* [2021] IECA 283 as "the 'gold standard' of service requirements".

**15.** Section 10 of the Act provides:

*"Where an application is made under [section 9](#), the Executive shall ensure that the assessment is carried out in a manner which conforms to such standards as may be determined from time to time by a body standing prescribed by regulations made by the Minister."*

The standards in question are confirmed by Regulation 16 of the 2007 Regulations to be HIQA standards:

*"The Executive shall ensure that the assessments are carried out in accordance with the standards for the assessment as determined and approved by the Health Information and Quality Authority."*

#### **Education for Persons with Special Needs Act 2004**

**16.** Some provisions of the 2004 Act are also relevant, albeit they have not yet been commenced. Sections 4(1), 4(2), 4(6) and 5(1) provide:

*"4.—(1) Where the F2[Health Service Executive] is of the opinion that a child who is not a student has or may have special educational needs it shall cause an assessment under this section of that child to be carried out.*

*(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...*

*(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...*

*5.—(1) An assessment under [section 4](#) shall be carried out with the assistance of persons possessing such expertise and qualifications as F7[the Health Service Executive] or the Council considers appropriate; those persons may, in the discretion of F7[the Health Service Executive] or the Council, include one or more of the following:*

*(a) a psychologist;*

*(b) a medical practitioner;*

*(c) the principal of the school which the child is attending or a teacher of that school nominated by the principal;*

*(d) an appropriately qualified social worker; and*

*(e) a therapist who is suitably qualified to provide support services in respect of the special educational needs of the child.”*

**Does a teacher have the appropriate expertise required by s. 8(3)?**

**23.** The applicants contend that a school principal or classroom teacher is not a person with appropriate expertise to provide the assistance required by s. 8(3) and suggest that a SENO is such a person. I understand that the practice in the past was for the NCSE to nominate one of its own SENOs to provide the assistance that was required. The applicants contend that such a person has a greater and more appropriate expertise around special education needs and services. It was also suggested that an educational psychologist could also be such a person with appropriate expertise. There was no evidence put on affidavit about the qualifications or training of a SENO, or indeed of an educational psychologist, such as would establish an expertise superior to that of a qualified teacher, who is a member of a profession regulated by statute. The HSE and the NCSE exhibited evidence of the training on special education needs and service that is provided as part of a teacher’s professional education. That was not challenged by the applicants other than a general submission that a SENO is more suitable because of their apparent knowledge of special education services.

**24.** In DE the applicants rely on an affidavit sworn by the deputy principal, SD, who was one of three teachers (the other two being the principal and the special education teacher in D’s school) who completed the assessment of education needs report of 19 October 2022, following which the HSE issued a reviewed assessment report of 28 October 2022. The deputy principal set out in his affidavit that he had been delegated the task of completing the report by the school’s principal and whilst he was of the view that he was not qualified to do what he referred to as a “*true assessment*” because he said he was not qualified to run certain tests on D that he considered to be necessary, he did complete the report out of

compliance and because he did not want to let D down. In his affidavit he set out his concern about the short period of time he was given to complete the report which he described as a 'box ticking exercise' with no real engagement with D's educational needs or the educational services required to meet those needs. He said he considered that D's needs are not reflected by his SSP and that they must be supplemented by the input of a multidisciplinary team. The recommendations in that affidavit were not recorded in the assessment of education needs that the deputy principle completed (and which was signed off by two of his colleagues) as it was not contained in the SSP.

**25.** Section 8(3) places responsibility on the NCSE to nominate a person with appropriate expertise. Donnelly J. in *CM* said that s. 8(3) "*made it mandatory for the Council to nominate a person to assist with that provision*" (at para. 59). The subsection renders it a matter for the NCSE to assess the expertise of their nominee, which is of course subject to that assessment not being irrational or unreasonable. D's deputy principal has said that he believes he is not qualified to carry out certain assessments on the child. However the assessment that D's school was asked to assist with is an assessment of the child's needs, not an assessment of the school's services. I accept the NCSE's submission that a professionally qualified teacher has the appropriate expertise to be nominated by the NCSE pursuant to s. 8(3) and is suitably qualified to assess a child's educational needs. I find support for that in provisions of ss. 4 and 5 of the 2004 Act, set out above. Section 5(1)(c) specifies both a principal and a teacher as suitable persons to carry out a s. 4 assessment of a child who may have special education needs. Neither section has yet been commenced but Donnelly J. in the Court of Appeal found in *C.M.* that they are relevant to the interpretation of s. 8(3). She described (at para. 59) the statutory duties granted to the Council under the 2004 Act as one that "*fits neatly*" into its statutory functions under s. 8(3). In addition, whether or not s. 5 has yet been commenced, it provides for a principal, or teacher nominated by the principal, to carry out an assessment of a child's education needs and therefore it is difficult to see how the application of a similar arrangement in the NCSE's exercise of their s. 8(3) discretion could be viewed as irrational.

**26.** The absence of an employment relationship between the NCSE and the principal or a teacher in the child's school does not preclude their nomination. Section 8(3) uses the word "*nominate*" rather than appoint or direct. Every word used in a statute must have a meaning. To nominate someone is to propose them for appointment rather than to actually



appoint them. It is not necessary for the NCSE to have the power to compel a person whom they choose to nominate. A teacher might legitimately decline to provide the assistance that the assessment officer requires or might indicate an ability to provide some but not all it. Counsel for the NCSE acknowledged that if school personnel refused to complete an assessment of education needs report, they could not be compelled to do so. That did not arise here as the teachers in both schools completed the assessment of education needs reports without raising any concerns at that time (albeit the deputy principal in D's school subsequently expressed his concerns to this Court), but the NCSE recognised the possibility of having to deal with such a situation in that Brendan Doody, the NCSE's deponent, states, at para. 33 of his affidavit:

*"In rare cases where it is not possible to have the principal of the school, or another nominated teacher, assist with the review of education need, the NCSE and Department will work to find a solution so that the process can operate in line with the agreed procedures. Based on the experience of the extended trial and the co-operation of stakeholders to date, the Department and NCSE believe that any issues in such cases can be resolved quickly and collaboratively with stakeholders."*

Despite Mr. Doody's confirmation of a possible alternative to the nomination of a principal or teacher in the child's school, there is nothing in the documentation he has exhibited that advises a principal or teacher that it may be possible for them to decline their nomination to assist the assessment officer with the assessment of their pupil's educational needs.

### **The s. 8(3) process that was applied here**

**27.** The assessment officer, in preparing the assessment of needs report that had been requested, was of the opinion that there may be a need for an a education service to be provided and so they made a request of the NCSE in accordance with s. 8(3) and the NCSE nominated the principal of the child's school pursuant to s. 8(3). Mr. Doody, identifies the following as the steps for processing referrals from the HSE in respect of an assessment of education need at para. 32 of his affidavit in CD:

*"In practical terms, the following are the steps for processing referrals from the HSE in respect of an assessment of education need:*

*Stage 1 – The HSE forward a request to the NCSE for assistance in an AON;*

*Stage 2 – The NCSE send the agreed record of education need template to the school requesting information on the applicant’s education needs for inclusion in the AON Report. The template is completed by the school and returned to the NCSE;*

*Stage 3 – The NCSE reviews and records the completed template;*

*Stage 4; The NCSE returns the completed template to the HSE.”*

This same point was made in Mr. Doody’s affidavit in DE. All affidavit references of Mr. Doody’s henceforth will be taken from CD, but similar points are made in his affidavits in DE.

**28.** Mr. Doody exhibited some of the documents that are utilised where an assessment officer invokes s. 8(3). He gave an account of the Continuum of Support framework developed by the National Education Psychology service, which is used to identify pupils with special or additional education needs in schools and which supports teachers to gather relevant data to plan intervention and review students’ progress. That data is recorded in an individual SSF which he described, at para. 15 of his affidavit, as *“a tool for assessment in identifying a student’s education needs within the context of the Continuum of Support problem-solving framework used nationally in Irish schools”*. He also referred to the Special Education Teacher allocation model and to 2022 Guidelines for teachers on the provision of education for children with autism, which note the importance of school-based assessments in responding to the needs of students. He concluded (at para. 20 of his affidavit) that:

*“Schools have been provided with a range of resources to ensure that the education needs of all students, including those with a disability or other special education needs, are identified and supported”.*

**29.** Mr. Doody also exhibited the Special Education Needs Continuum of Support resource pack for teachers which seeks to set out how teachers should identify and cater for special education needs of individual pupils. Those guidelines refer to the need to consider the feasibility of intervention on the basis of resources available to the school (at p. 4) and concludes that *“schools need to develop realistic interventions, depending on the availability of resources and services (both within the school and within the community)”*. The guidelines for supporting pupils with special education needs in mainstream schools, that Mr. Doody exhibits, also refers to school resources and has a section (at p. 18) on *“How can schools allocate special education teaching resources to effectively meet needs?”*. It is not surprising

to see those references to allocation of resources as the State expects the resources it makes available to a school will be allocated in a transparent and policy-based manner.

**30.** It is clear from Mr. Doody's detailed account that these arrangements have been put in place for schools to identify and cater for the special education needs of individual pupils. They were not specifically designed for the 2005 Act's assessment of needs process even though they are now used for it. The applicants suggested that this was an impermissible delegation of authority, but I do not see any legal impediment with using those arrangements as long as the assessment of needs process is conducted in accordance with the requirements of the Act. Section 21(a)(v) of the Act does allow the Minister to make regulations for the purpose of, *inter alia*, matters relating to the NCSE's nomination pursuant to s. 8(3), but the making of such regulations is not mandatory and does not prevent a nomination pursuant to s. 8(3) from taking effect as long as it is done in accordance with the statutory provisions. Section 8(3) clearly gives the NCSE a statutory role in the assessment of needs process and it is a matter for the NCSE how they discharge that role, as long as they do so within the parameters of the provisions of the Act. I do not consider the manner in which the NCSE nominates a school principal pursuant to s. 8(3) to fall so far outside the applicable statutory authority as to be *ultra vires* as occurred in *O'Neill v. Minister for Agriculture* [1998] 1 IR 539 where the purported exercise of a power lacked any legislative basis. Here the Oireachtas has provided for the s. 8(3) process and it is therefore "*the application of the power that the Oireachtas had implemented*" (as per my judgment in *McGrath and Mulreany v. DPP & ors* [2023] IEHC 347.; at para. 32). This situation comes within the type of arrangement approved of by Barr J. in *G.F. & anor v. Minister for Education and Skills* [2022] IEHC 379 where, similar to here, the Minister was permitted, but not required, to make regulations when setting out a certain policy. Barr J. upheld the Minister's decision to implement the policy by circular rather than by regulation. The situation is neither distinguishable nor rendered *ultra vires* simply because the framework that was applied by the NCSE here was formulated by the Minister for Education rather than by the Minister with responsibility for the Disability Act, particularly given the role the Oireachtas gave to the NCSE in s. 8(3) and the fact that the NCSE is a body that itself comes under the responsibilities of the Minister for Education.

**31.** The first of the documents exhibited by Mr. Doody that seems to have been drawn up specifically to cater for the s. 8 assessment of needs process is an Information Note on

the Assessment of Needs Process which was issued to schools on 20 October 2022, following on the decision of the Court of Appeal in *C.M* which confirmed that s. 8(3) applied to children as well as to adults. This Information Note seems to postdate C's assessment of needs report, but it is useful in considering both cases as it confirms the basis on which the NCSE operated in providing the assistance to the HSE that was required of it by s. 8(3). An updated Information Note issued in February 2023 reiterated that the information required of the school is limited to what is already in the student's support plans, and expressly states that schools "*are not required or expected to undertake additional assessments for the purpose of completing an AON form*" and that the form is typically '*completed quickly*' where the SSP is to hand.

**32.** There are a number of factual inaccuracies in the 2022 Information Note which are relevant as they seem to show the NCSE's misunderstandings of the legal requirements of s. 8(3) which were applied in completing the assessment of education needs report and the assessment of needs report rendering both inherently flawed. Those inaccuracies are as follows:-

- (i) The note says its aim is to inform schools "*of the recent changes to the AON process*". That is suggestive of a statutory change. No such statutory change occurred. Rather, the Court of Appeal confirmed that the HSE was required to comply with the obligations of s. 8(3) in relation to children as well as to adults.
- (ii) The note states:-

*"Following a legal judgement in 2021, the NCSE now has the responsibility to nominate an appropriate person to carry out an assessment of education needs on behalf of the HSE under the AON process."*

In fact, the NCSE always had a statutory responsibility under s. 8(3) which is not to nominate a person to "*carry out*" an assessment of education needs on behalf of the HSE but to "**assist** *in the carrying out of the assessment under this section in relation to the applicant*" (my emphasis).

This same error is repeated in the Information Note where it states:

*"Under the Disability Act (2005), the NCSE is now legally obliged to assist the Assessment Officer if requested, and is required to*

*nominate a person with the appropriate expertise to **carry out** an assessment of education needs” (my emphasis).*

- (iii) The Information Note states: *“The AON assessment of education need is informed by school-based information”*. The statutory assessment of needs process set out in s. 8 does not impose any such limit on the information to be used. It is difficult to understand how a gold standard assessment of needs that s. 8(5) requires to be conducted *“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”* can or should be limited to school-based information.

The same error is continued in the next sentence which advises schools *“that the data required to complete the Report of Education Needs for the purpose of AON (Disability Act 2005) is contained in a Student Support Plan, which details a student’s education needs as identified by the school”*.

- (iv) The Information Note claims a non-existent statutory basis for imposing an obligation on the school to return the form by a date to be specified by the NCSE by stating: *“Since this is a statutory process, there is a requirement for schools/nominated person to return the form to the NCSE within this stated time frame.”*

The NCSE contends that the Education Act, in allowing the Minister for Education to determine policy, allows her to require schools to comply with the request for information that was imposed here. It is incorrect to claim that the NCSE has a statutory power to compel a school to return the form within a stated timeframe. Not only has no such power ever been conferred on the Minister (or, indeed, the NCSE) by the Oireachtas, but in requiring a school to comply with a timeframe that, in these cases, only allowed a few short days to complete an important form and actually advised the school that it could be done in a very short time (albeit I accept that the files from which the data was to be taken may have taken much longer to complete), denotes a less than serious sense of the task the school is being asked to do. The important statutory entitlements that the assessment of needs process involves for this disabled student are undermined.

**33.** The applicant also criticised the NCSE process for not making any reference to HIQA standards as required by s. 10 and Regulation 16. There is no mention in any of the documents furnished to the school of those standards. There is nothing to suggest a principal or a class teacher would have been aware of such standards as they do not fit into the Continuum of Support framework designed by the Department of Education.

**Where is s. 8(5) in this application of s. 8(3)?**

**34.** Nowhere in the information furnished to the school by the NCSE is the school informed of the resources blind requirement of s. 8(5) that “*shall*” be part of the s. 8 statutory assessment of the student’s education needs. If a principal and/or class teacher is to advise on their student’s education needs and the services that are required to meet those needs against the benchmark of a resources blind, gold standard of that student’s needs (as required by s. 8(5)), they cannot be limited to considering the child’s education needs that have been identified by the school within a framework that is expressly constrained by the resources available to the school. The framework on which the NCSE relies in standing over their s. 8(3) process (*i.e.* the Continuum of Support and other documents referred to above that have been exhibited by Mr. Doody) is part of a policy that requires a school to identify needs and provide services within the resources available to it. Nowhere in the Continuum of Support framework is there any mention of the gold standard of the s. 8 assessment of needs process or the need to assist with an assessment that s. 8(5) says “*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*” (my emphasis). That is because the Continuum of Support framework was not designed for the s. 8 statutory, gold standard assessment of needs process but, rather, is part of the Minister for Education’s wider policy of providing for the education needs of children with special or additional education needs which is expressly required to fit within the constraints of resources that are made available to a school.

**35.** The NCSE have sought to graft a framework designed for the provision of special education in schools within that school’s available resources, onto the requirements of a very different, radical statutory provision that precludes the usual prudent requirement that services should be allocated within the finite resources available to the service provider. In trying to fit the round peg of the special education / Continuum of Support framework into

the square hole of the s. 8(3) statutory requirements, the NCSE have failed to comply with their statutory obligations and have denied the applicants' access to the information about the applicants' education needs to which they are entitled.

**36.** The impugned process applied by the NCSE in purporting to comply with s. 8(3) makes no provision for the identification of education needs that might not be addressed by services available in the school or of education needs that may not yet have been identified by the school in its assessment of how that student's education needs can or should be addressed within the resources the school has available to it. Section 7 defines "education service" as a service provided by a recognised school or centre for education. It is possible that a particular education service may not be available in the school that has been asked to complete the child's assessment of education needs by reference solely to the contents of their own files, even though that service might be appropriate for that child's education needs. Section 8(3) makes it clear that the person with appropriate expertise is nominated "to assist in the carrying out of the assessment **under this section**" (my emphasis). A s. 8 assessment of a child's education needs is exactly that, an assessment of their education needs, not an assessment of the education services available in that child's school. The child's education needs may include a need for an education service that is not provided by their school and not provided by another recognised school or centre of education. The impugned s. 8(3) process applied by the NCSE here is limited to information the school principal or teacher has available to them from the student's files and therefore deprives the child of any assistance that the principal or teacher might be able to provide from a consideration of the child's needs for services that are not available either in their own school or in another recognised school or centre for education, but which that teacher may consider to be part of that child's education needs. The point is well illustrated by the view expressed by D's deputy principal in his affidavit that D should have had a cognitive test and that his educational needs must be supplemented by the input of a multidisciplinary team. Those views were not expressed by him in D's assessment of education needs, but only because he was told to limit his comments to what was already in D's SSP, which the deputy principal believed was not reflective of D's needs and which he believed was nothing more than a box ticking exercise. Had he been given the opportunity to set out his view of D's needs within the gold standard assessment required by s. 8(5), it would then have been open to the

assessment officer to have considered them in carrying out the assessment and setting out their findings and determinations in the report, as is required by s. 8(7).

**37.** An affidavit sworn by the principal officer of the NCSE refers to the current advice to schools that external reports can also be relied on as well as the SSF, but that does not neutralise the absence of any information, advice or support given to the school so that the teacher filling out the assessment of needs report will understand that they are being asked to assist with an assessment of education needs that is not limited by the availability of resources or the cost of or capacity to provide any service that the assessment of needs might identify as appropriate to meet this student's needs, as is required by s. 8(5), or that they are free to give their views, if any, of the child's education needs that they consider could be met by the provision of education services that are not available in their school or even in another recognised school or centre of education.

#### **Decision**

**38.** The process applied in this case to purportedly comply with s. 8(3) whereby the child's school was instructed to complete an assessment of education needs within a very short timeframe and by reference only to the child's SSP/SSF (and insofar as relevant, any external reports available to the school) was not in compliance with the requirements of s. 8(3) "*to assist in the carrying out of the assessment under this section*", i.e. a resource and capacity blind assessment in accordance with s. 8(5) for the purpose of an assessment of the child's education needs such as will enable the assessment officer to set out the services that they consider to be appropriate to meet the child's education needs. The use of the Continuum of Support framework, the guidelines for provision of education to children with autism and the other material referred to and relied on by the NCSE for a school to complete an assessment of education needs by reference to material in the school's possession is not and could not suffice for the unique, resources blind, gold standard assessment of needs processes of s. 8. A teacher will not be able to fulsomely or properly assist with that assessment if they are never told of the unique, resources blind nature of the assessment process but, instead, are expressly advised to provide information from the student's existing files that has been assembled by reference to the resources available to that school. It may be that a school, particularly one endowed with good resources for their students with additional education needs, would end up with the same information in the child's assessment of education needs, but that does not alter the shortcomings of the process that



was applied to the applicants' assessment of education needs that did not inform the school of the fact that it could and should identify needs and services that would provide for the child's education needs without being constrained by the cost of or capacity to provide any such service or the availability of a service that might meet the child's education needs in their own school or another recognised school or centre of education.

**39.** The assessment of education needs in CD repeatedly refers to C's "goals" which was transcribed by the assessment officer in completing his assessment of needs. C's education goals are not the same as his needs, albeit there may be some or even complete overlap. Advising the assessment officer of the goals the school has for C does not, in itself, tell them what C's education needs are or assist in identifying appropriate services. Identifying education goals may be part of the process but it not the sum of it.

**40.** It is clear from both assessment of needs reports that the assessment officers transcribed what the schools had furnished in their assessment of education needs reports, to which they added some references to external reports and in relation to C, referred to the possibility of a trial with alternative communication devices. The assessment officer should treat the assistance of the person nominated pursuant to s. 8(3) with respect but it is not an expert opinion which the assessment officer can or should simply transcribe. It is assistance for the assessment officer to carry out the assessment, the results of which are to be set out in a report that must include the assessment officer's findings and determinations of the matters set out at s. 8(7). That requires more of the assessment officer than simply transcribing the school's assessment of education needs report which in turn has been transcribed from the school's own files and completed in a prescribed, short period of time without the school having been advised of the full nature of the statutory process with which they are assisting.

**41.** Once the assessment officer decides to invoke s. 8(3), the NCSE must nominate a person with appropriate expertise (who can be a qualified teacher) to assist in the carrying out of the assessment of the child's education needs 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*". That assessment of the child's education needs can then be used by the assessment officer in carrying out an assessment of needs and in setting out their findings and determinations of the matters set out at s. 8(7). This has not yet happened in relation to these applicants.

**42.** I find for the applicants. I will hear counsel further on the appropriate orders that should be made.

**Counsel for the Applicants:** Feichín McDonagh SC (for CD), Derek Shortall SC (for DE),  
Brendan Hennessy BL

**Counsel for the Respondent:** David Leahy SC, Hugh McDowell BL

**Counsel for the Notice Party:** Eileen Barrington SC, Eoin Coffey BL