



Oifig an Cheannaire Oibríochtaí,
Na Seirbhísí Míchumais/An Rannán Cúram Sóisialta,
31-33 Sráid Chaitríona, Luimneach.

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20th July 2022

Deputy Mark Ward,
Dail Eireann,
Leinster House,
Kildare Street,
Dublin 2.
E-mail: mark.ward@oireachtas.ie

Dear Deputy Ward,

The Health Service Executive has been requested to reply directly to you in the context of the following parliamentary questions, which were submitted to this department for response.

PQ: 36320/22

To ask the Minister for Health the cost to the State in defending court cases brought by parents since 2018 whose children did not receive an assessment of need in a timely manner; the number of cases; and if he will make a statement on the matter.

PQ: 36321/22

To ask the Minister for Health the cost to the State in defending the recent High Court case in which the judge ruled that a preliminary process used by the HSE to assess the needs of children with suspected educational and health problems does not comply with the disability laws; and if he will make a statement on the matter

HSE Response

Section 14 of the Disability Act

Section 14 of the Disability Act outlines a number of grounds for complaint in relation to Part 2 of the Act. An applicant may make a complaint in relation to one or more of the following:

- a) a determination by the assessment officer concerned that he or she does not have a disability;
- b) the fact, if it be the case, that the assessment under section 9 was not commenced within the time specified in section 9(5) or was not completed without undue delay;
- c) the fact, if it be the case, that the assessment under section 9 was not conducted in a manner that conforms to the standards determined by a body referred to in section 10; PT. 2 S. 12 [No. 14.] Disability Act 2005 [2005.]
- d) the contents of the service statement provided to the applicant;
- 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 22 provides detail regarding the system whereby an applicant can apply to the Circuit Court for an enforcement order should the HSE fail



- i. to implement in accordance with its terms a determination of the appeals officer in relation to an appeal under section 18, or
- ii. to give effect to a resolution arrived at under section 19, or to implement in full a recommendation of a complaints officer

Section 22 of the Act goes on to describe the statutory enforcement process via the Circuit Court system. For a period prior to 2018 there were delays investigating complaints under Section 14 of the Act. As a consequence, a number of families initiated Judicial Review proceedings in the High Court on the basis that the statutory remedy was inadequate (n = 29 cases). The resulting judgements stated that, in the absence of delays, the statutory remedy presents a viable remedy for applicants. Since 2018, applicants have utilised the enforcement mechanism via the Circuit Court.

Enforcement orders via the Circuit Court system may relate to one or more of the grounds for complaint under the Disability Act (as outlined above). The table below provides information on all of the Court Cases taken in relation to all of the grounds of complaint.

	Enforcement Order, Circuit Court	Judicial Review, High Court
2018	8	9
2019	53	41
2020	63	38
2021	52	27
Total	176	115

With regard to the amount in legal costs paid by the State, the delegation to the State Claims Agency (SCA) of the management function in relation to claims for costs took effect on 29 May 2018 under SI 191 2018.

Prior to that, the HSE discharged claims for costs amounting to €100,103 in 2018.

The SCA has recorded legal costs claims associated with assessment of need obligations under the Disability Act 2005 as a separate legal costs claims category since 3 January 2020.

The HSE's own legal costs are set out below:

	Amount
2018	€ 40,020
2019	€ 274,618
2020	€ 386,177
2021	€418,005
Total	€ 1,118,820

There have been 176 applications to the Circuit Court for enforcement orders under Section 22 of the Disability Act. These cases relate to the grounds for complaint listed above. The HSE does not resist these enforcement orders.

Judicial Review cases in the main address some wider issues relating to the AON process for example the requirement for referral to the National Council for Special Education and the provision of reviews.

Of note, a small number of cases have also been escalated to the Court of Appeal and Supreme Court. These cases reflect the complexity of the legislation and the conflicting interpretations of same.

The management of legal cases relating to the Disability Act (2005) requires on-going engagement with and advice from the HSE's legal advisors.

Assessment of Need

The HSE's Standard Operating Procedure for Assessment of Need (SOP) was implemented for all new applications for AON from 15th January 2020. The SOP was intended to ensure a standardised approach across the state in respect of the operational application of the Disability Act 2005 and aimed to balance or ensure equity in terms of assessment and support interventions for vulnerable children and young people with a disability.



It had been widely acknowledged that compliance with the statutory timelines for Assessment of Need was a significant challenge for all HSE and HSE funded services. During 2017 it was agreed that there was a requirement for a standardised approach to Assessment of Need to facilitate compliance with the HIQA standards for assessment. In addition, the Judicial Review applications submitted throughout 2017 highlighted the requirement for HSE to define an "Assessment of Need".

The HSE prepared an outline of a new process for Assessment of Need and commenced a significant consultation process with various groups of stakeholders regarding same in September 2017.

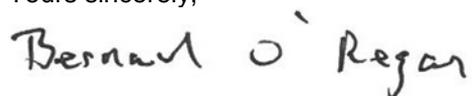
In developing the Standard Operating Procedure for Assessment of Need the HSE consulted on an on-going basis with its legal advisors. This included a request for Senior Counsel opinion that was received in December 2018. Of note, the Fórsa trade union sought an independent opinion from another Senior Counsel. Both legal opinions advised that the approach defined in the HSE's Standard Operating Procedure complied with the requirements of the Disability Act (2005)

The HSE's National Clinical Programme for People with Disability (NCPD) has led the process of developing Interim Clinical Guidance to replace the element of the Standard Operating Procedure which was found to be non-compliant with the Disability Act (2005) – the Preliminary Team Assessment.

The HSE has sought legal opinion to ensure that the revised process complies with the requirements of the Disability Act (2005). Disability Operations, in collaboration with the Clinical Programme, will provide further information to service users and service providers, including a training webinar to support adoption of the Interim Clinical Guidance

The HSE remains committed to the delivery of appropriate services for children with disabilities and will work with families and staff to develop services that meet their needs. Of note, children do not require an Assessment of Need to access health services.

Yours sincerely,



**Mr Bernard O'Regan,
Head of Operations - Disability Services,
Community Operations**

