

**THE HIGH COURT**

[2022] IEHC 379  
[Record No. 2021/634JR]

**BETWEEN**

**G.F. AND L.F.  
(A PERSON OF UNSOUND MIND, NOT SO FOUND,  
SUING BY HIS MOTHER AND NEXT FRIEND, G.F.)**

**APPLICANTS**

**AND**

**THE MINISTER FOR EDUCATION AND SKILLS,  
THE NATIONAL COUNCIL FOR SPECIAL EDUCATION,  
IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**THE BOARD OF MANAGEMENT OF A NATIONAL SCHOOL**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 7<sup>th</sup> day of June,  
2022**

**Introduction.**

**1.** The first applicant is the mother of the second applicant. He is a young boy of nine years of age. Testing has revealed that he is a bright child. However, he was diagnosed in December 2020 as suffering from severe dyslexia.

**2.** The first respondent is the Minister for Education and Skills, in which capacity she is responsible for carrying into effect the constitutional obligation on the State to provide for the primary education of children. The second respondent is a body established under the Education for Persons with Special Educational Needs Act 2004. Its functions are set out in s.20 of the 2004 Act. They include the implementation of policies formulated by the first respondent in relation to the education of pupils with special education needs. The third and fourth respondents are the State. The notice party is the school in which the second applicant is currently enrolled.

**3.** Put at its simplest, the applicant's challenge is to the withdrawal of sanctioning for a special class known as a Specific Learning Disability Special Class (hereinafter 'SLD class'), which had been sanctioned by the second respondent for the notice party's school on 16th April, 2021; but which sanction was subsequently withdrawn by them on 6th May, 2021, on the instructions of the first respondent, because the policy for the provision of primary education known as the "new model" provided that, as far as possible, students with special needs would be educated in mainstream schools, with such supports as were necessary. The Minister had not sanctioned funding for any new SLD classes since 2011.

**4.** The second respondent accepts that sanction was given for the SLD class, but maintains that that was done in error by them, as they were not aware of the policy of the first respondent not to fund any new SLD classes, but would instead provide funding for the provision of special education needs supports in mainstream schools.

**5.** The applicants challenge the withdrawal of the sanctioning of the SLD class, on the following grounds: (i) that the second applicant's right to an appropriate education is not being met in the notice party's school; (ii) that the Minister's actions in adopting a strict policy of not funding new SLD classes, is unlawful, as it fetters the discretion of the Minister to provide an appropriate education for pupils who cannot be accommodated in mainstream classes even with supports; (iii) that the Minister acted ultra vires in adopting the new model policy for primary education by circular, rather than by regulation, as required under the Education Act 1998; (iv) that in circumstances where sanctioning had been given by the second respondent for the creation of an SLD class in the notice party's school, in which the second applicant is enrolled, he had a legitimate expectation that the respondents would not resile from their representation that such a class would be created by withdrawing the sanction.

**6.** In very brief terms, the respondents resist the declaratory and other reliefs sought by the applicants herein on the following grounds: (i) that while the general policy under the new model is for the education of students with special needs to take place in mainstream schools; this is not an inflexible rule or policy, such that there can be SLD classes and SLD schools where necessary; (ii) the first respondent does not accept that the educational needs of the second applicant are not appropriately catered for at present in the notice party's school; (iii) the introduction and implementation of the new model for primary education, which was introduced in 2017, is a matter of policy, which comes within the competence of the executive and within the jurisdiction of the first respondent in particular, and is not an area into which the courts can, or should intervene; (iv) the Minister was entitled to introduce a new model by means of guidelines; she was not obliged to do so by regulation under the 1998 Act; (v) the doctrine of legitimate expectation was not applicable in the present case, because the representation was made to the school, not to the applicants; the representation was made in error, which was very quickly corrected; in the circumstances the applicants did not act in reliance on the letter of sanction, nor did they act to their detriment on foot of it; accordingly, the doctrine did not apply.

**7.** That is but a very brief outline of the issues that arise for determination in this case. The issues and the evidence that was led in relation to them will be discussed in more detail later in the judgment.

**Chronology of Key Dates.**

**8.** It will be helpful to set out a brief chronology of the key dates in this case, which can be summarised in the following way: -

2012	The second applicant was born. It is not clear when he first enrolled in the notice party's school (hereinafter referred to as 'the school'), however he was in second class in the school in the academic year 2020/2021.
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2/12/2020	The second applicant was examined by Ms. Patricia Timoney, Chartered Educational Psychologist. She diagnosed the second applicant as suffering from severe dyslexia. She recommended that consideration should be given to transferring him into an SLD school.
12/3/2021	The second applicant was reviewed by Ms. Timoney, who recommended that given the extent and severity of his dyslexic condition, it was recommended that he be offered a place in a reading unit (SLD class) where children with severe dyslexia could benefit from intensive support in a class with a greatly reduced pupil/teacher ratio.
16/4/2021	Having discussed the matter with her line manager and with the Head of Operations at the second respondent, the Special Education Needs Organiser (hereinafter 'SENO'), Ms. Cashin, on behalf of the second respondent, wrote to the school stating that an SLD class had been sanctioned.
6/5/2021	The second respondent informed the school by email, that the sanction had issued in error, as they could not sanction the establishment of a new SLD class in the school.
24/5/2021	The second respondent wrote to the school formally withdrawing sanction for the SLD class.
May 2021	Ms. Josepha Madigan, Junior Minister with responsibility for special education, requested the department to arrange a review of policy on SLD classes and SLD schools. The Inspectorate's work was expected to be completed by the end of January 2022, with the findings being available thereafter, which findings would be published.
6/7/2021	The applicants obtained leave from the High Court to proceed by way of judicial review.
September 2021	The second applicant is enrolled in the senior section of the school, commencing in third class.
5/11/2021	The school provides a letter signed by its Principal and Deputy Principal, stating that it could not provide the level of supports set out by Ms. Timoney in her report of March 2021.
November 2021	The second respondent commenced developing policy advice on education provision in special classes and special schools. It was

	expected that that policy advice would become available in Spring 2022.
15/4/2022	The respondent's solicitor by letter, stated that the first respondent had directed that a Special Education Needs Inspection (hereinafter 'SEN inspection') of the school would commence in May 2022. It was hoped that a report would be furnished by the end of June 2022. In the interim, the Minister had approved an additional 15 Special Education Teacher hours for the school until the end of the 2021/2022 school year. Once the SEN inspection report became available, the school's SET hours allocation would be reviewed.

**Relevant Constitutional and Legislative Provisions.**

**9.** The most relevant constitutional and legislative provisions are as follows: Art. 42.4 of the Constitution, is in the following terms: -

*"The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."*

**10.** There are a number of provisions of the Education Act 1998 which are relevant to the issues that arise in this case. The first of these is s.6, which sets out the objects of the Act. The relevant provisions are in the following terms: -

*"6.— Every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act:*

*(a) to give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs, as they relate to education;*

*(b) to provide that, as far as is practicable and having regard to the resources available, there is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people;*

*(c) to promote equality of access to and participation in education and to promote the means whereby students may benefit from education;"*

**11.** Section 7 of the 1998 Act is also relevant. The relevant provisions thereof are as follows: -

*"7.— (1) Each of the following shall be a function of the Minister under this Act:*

*(a) to ensure, subject to the provisions of this Act, that there is made available to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person,*

*(b) to determine national education policy, and*

*(c) to plan and co-ordinate—*

*(i) the provision of education in recognised schools and centres for education, and*

*(ii) support services.*

*(2) Without prejudice to the generality of subsection (1), each of the following shall be a function of the Minister:*

*(a) to provide funding to each recognised school and centre for education and to provide support services to recognised schools, centres for education, students, including students who have a disability or who have other special educational needs, and their parents, as the Minister considers appropriate and in accordance with this Act;*

*(b) to monitor and assess the quality, economy, efficiency and effectiveness of the education system provided in the State by recognised schools and centres for education, having regard to the objects provided for in section 6 and to publish, in such manner as the Minister considers appropriate, information relating to such monitoring and assessment;”.*

**12.** Section 33 gives the Minister the power to make regulations for the purpose of giving effect to the Act. Without prejudice to the generality of that power, the section goes on to list a number of specific matters in respect of which the Minister may make regulations. Section 5 of the Act provides that any regulations made under the Act shall be laid before each house of the Oireachtas.

**13.** The Education for Persons with Special Educational Needs Act 2004 makes provision for the education of people with special needs. It provides as follows in s.2:

*“2.—A child with special educational needs shall be educated in an inclusive environment with children who do not have such needs unless the nature or degree of those needs of the child is such that to do so would be inconsistent with—*

*(a) the best interests of the child as determined in accordance with any assessment carried out under this Act, or*

*(b) the effective provision of education for children with whom the child is to be educated."*

**The Evidence.**

**14.** In an affidavit sworn on 6th July, 2021, the first applicant stated that it became apparent that the second applicant was having difficulty in school when he was in second class. He was referred to Ms. Timoney, Chartered Educational Psychologist, who carried out an assessment of her son on 2nd December, 2020. A copy of that report was exhibited in a subsequent affidavit sworn by the first applicant on 16th November, 2021. In that report, Ms. Timoney stated that the second applicant was functioning within the average ability range in relation to general cognitive functioning. However, due to his severe dyslexia, he had considerable literacy deficits. These were evident on the Woodcock Johnson tests of achievement that were administered by her. These revealed that his functioning in a number of categories was "extremely limited" and was "very limited" in a number of other categories. He was "limited to average" in two categories and "limited" in the remaining category.

**15.** In that report, Ms. Timoney stated that given the extent and severity of the second applicant's dyslexic condition, it was recommended that consideration should be given to transferring him to Catherine McAuley's Special Reading School, in Baggot Street, Dublin. She noted that the second applicant was receiving learning support in his school at that time. She further noted that access to technology was essential for effective education. She went on to recommend a number of courses and supports that could be accessed online.

**16.** The second applicant was reassessed by Ms. Timoney on 11th March, 2021. In her report following that assessment, Ms. Timoney noted that despite a consistent, staged approach to learning support in school and constant help at home, the second applicant had failed to make progress with reading. She noted that he had worked intensively and diligently since his original assessment, although schools had been closed due to the Covid-19 pandemic. His parents had been conscious of his struggle and how it was affecting his self-esteem. For that reason, they had referred him for a review of his attainments.

**17.** Ms. Timoney reassessed the second applicant in relation to maths, reading and spelling. In five of the categories tested, he remained in the same category that he had been at the date of the previous assessment in December 2020. However, his standard score had decreased by two percentage points in the test for letter-word identification and by eight points in maths facts fluency. It had decreased by one point in passage comprehension, but had increased by four points in writing samples. Overall, Ms. Timoney stated that the results highlighted the extent and severity of the second applicant's literary deficits. He was under achieving significantly in all aspects of reading. Ms. Timoney gave the following advice: -

*"Given the extent and severity of [Redacted]'s dyslexic condition, it is recommended that [Redacted] is offered a place in a Reading Unit where children with severe dyslexia can benefit from intensive support in a class with a greatly reduced pupil teacher ratio. [Redacted] is currently on the waiting list in Catherine McAuley's Special Reading*

*School, in Baggot Street. Results today which show further deterioration in his attainments may enable [Redacted] to move up the list. Alternatively [Redacted]'s parents should apply to all Reading Units in Dublin as his needs are unlikely to be met in a mainstream classroom."*

**18.** Ms. Timoney went on to state that the second applicant should continue to avail of intensive learning support in school. Access to the curriculum was seriously compromised. He needed assistive technology for effective education. She noted that he had been granted an exemption from Irish, based on the results of his original assessment. She advised that while his peers were studying Irish, the second applicant should be offered extra learning support, or facilitated with assistive technology to develop reading and spelling skills.

**19.** In her affidavit sworn on 6th July, 2021, the first applicant stated that an SLD class was sanctioned for the school on 16th April, 2021. That decision was withdrawn on or about 6th May, 2021. The first applicant stated that she and her son were greatly surprised and disappointed by that decision.

**20.** The letter of sanction was exhibited in the first applicant's second affidavit. That was a letter from Ms. Paula Cashin, SENO for the Dublin City D region. In the letter dated 16th April, 2021, which was addressed, the Principal of the school, she stated as follows: -

*"I wish to confirm that SLD class has now been sanctioned for your school. The sanctioned class is intended to meet the needs of pupils with a Specific Learning disability, in line with Department of Education and Skills (DES) criteria for entrance to an SLD class. See DES circular 08/2002."*

**21.** The letter went on to advise the school that as the classes were now sanctioned, they should apply for enhanced capitation and/or special class setup grants. They were given the website addresses for such applications. The school was also given further information about the operation of an SLD class.

**22.** The sanction for the SLD class for the school was withdrawn on 6th May, 2021. The school was notified of that by email. This was confirmed in a letter sent to the school on 24th May, 2021. That letter was sent by Ms. Emma Kilcommins, the Dublin Regional Manager of the second respondent. In that letter she stated as follows: -

*"As stated in earlier discussions, the sanctioning of this class was an error on behalf of the NCSE and I apologise for this as I am aware that this has caused considerable stress to yourself and families. This error was picked up by the Department of Education when they received your planning application who has advised us that since 2017 all schools are resourced with Special Education Teachers (SETs) to support the learning needs of pupils with special education needs. The allocation of SETs to schools is based on the individual profile of each school. It is the policy of the Department of Education that pupils with additional needs including dyslexia, in line with the*

*principles of inclusive education, are supported in mainstream classes with additional supports provided by the Special Education Teacher (SET).*

*Where a school perceives they have insufficient SET allocation to meet the needs of the children enrolled, they can apply to the NCSE for additional SET resources. Application forms and guidelines are available at [website address]. Teachers can also avail of professional advice and CPD from the NCSE Support Service to support the teaching and learning of children with special education needs."*

**23.** When the first applicant became aware of the withdrawal of the sanction for the SLD class, she raised the matter with the Tánaiste by email. She received a response from his constituency office on 19th May, 2021, wherein she was advised that the Tánaiste was anxious to establish why the sanction for the reading unit had been withdrawn. The email stated that he would endeavour to try to get the decision reversed if possible. The first applicant also engaged in correspondence with the first respondent in relation to the matter.

**24.** On 25th May, 2021, the first applicant attended a meeting with the second respondent, at which it was stated that the second respondent could not lobby the first respondent to open a reading unit, they were only permitted to show the level of need that existed for one. It was also explained to the first applicant that the decision to sanction the reading class was against the first respondent's policy and that was why the sanction had been withdrawn. An apology for the error on the part of the second respondent was given to the first applicant.

**25.** The applicant went on in her affidavit to exhibit various policy documents and circulars that had issued by the first respondent in relation to the provision of primary education and in particular, to students with special needs. She stated that currently, her son was placed in an inappropriate educational setting, which was not equipped to meet his needs. She stated that she believed that there was no legal basis for the respondent's not locating an appropriate educational placement for her son. She believed that his needs would likely be met if an SLD class was provided. As previously noted, the applicant swore a second affidavit on 16th November, 2021. That had been sworn for the purposes of an appeal on a question of law pursuant to s.20 of the Disability Act 2005. In that affidavit, she exhibited her son's Student Support File for the period September 2020 to June 2021.

**26.** In that affidavit, the first applicant exhibited a letter dated 5th November, 2021, which had issued from the school Principal and Deputy Principal, stating that they would not be in a position to meet the second applicant's educational needs. The court is of the view that this is a letter of considerable significance. Accordingly, it is appropriate to quote it in full: -

*"At the request of [Redacted], we have prepared the information below relating to Ms. [Redacted]'s son [Redacted].*

*[Redacted] is a 3rd Class pupil in our school having enrolled in September 2021. A non-reading ability test completed last year in the Junior School shows that [Redacted]*



*achieved a 78th percentile (STen 7) which clearly indicates [Redacted]'s academic ability and potential. His psychological report completed on 02/12/2020 states "he is essentially a non-reader" and 'Given the extent and severity of [Redacted]'s dyslexic condition, it is recommended that he attend a reading school'*

*Based on our knowledge of [Redacted] these past two months, together with the information provided by [Redacted]'s parents, the staff of the junior school, and the above mentioned report, we believe that as a mainstream primary school, we are not in a position to meet [Redacted]'s needs as outlined in his report, which are:*

- To provide an intensive programme to address the challenges of severe dyslexia to raise his literacy level and maintain his self-esteem*
- To provide small class grouping*
- To provide daily one-to-one expert tuition*

*Further, [Redacted] is very conscious of his challenges and very intensive support is required to maintain his self-esteem as well as developing skills so that [Redacted] can achieve his full potential.*

*As [Redacted] progresses through the maths curriculum, the problem solving component of Maths now requires strong literacy skills which is impacting [Redacted]'s performance in Maths. Indeed, this applies to all curricular areas in the Senior School.*

*Attached herewith please find the following supporting documents:*

- Individual Education Plan (IEP) for 3rd Class*
- Individual Education Plan (IEP) for 2nd Class.*

*Should you have any additional queries in relation to the above, please feel free to contact us.*

*Yours sincerely,*

*[Name Redacted] [Name Redacted]*

*(Principal) (Deputy Principal/SEN Coordinator)."*

**27.** The first applicant went on in her affidavit to summarise the IEP dated 30th September, 2021 from third class, which set out, inter alia, that her son needed the following: intense phonics instruction with a systemic approach to learning phonics to enable him to decode words; support in blending sounds to hear the correct words; help in building his self-esteem in relation to reading; support in his fluency and reading comprehension; and support in reading maths language. The first applicant noted that the IEP demonstrated

that her son had received a score of 37% in his maths performance, while he was given no grade in reading because “it was decided that it would not be appropriate for [Redacted] to sit the reading test”.

**28.** The first applicant noted that the IEP showed that her son receives 1:2 support x 4, 1:1 support x 1 and 1:4 literacy activities x 1. The IEP recommended that [Redacted] should apply for enrolment in the SLD school and that assistive technology was deemed essential for him to access the curriculum. She went on to set out the list of priority targets that had been set for her son in March 2021.

**29.** That constitutes a summary of the evidence that was led on behalf of the applicants. The court is of the view that the most essential elements thereof are the views expressed by Ms. Timoney in her reports following her assessment of the second applicant in December 2020 and March 2021, to the effect that given the level of his dyslexia, he required admission to an SLD class. The second element of critical importance, is the letter from the school Principal and Deputy Principal dated 5th November, 2021, which stated unequivocally, that the school was not in a position to meet the second applicant’s educational needs as outlined in the report furnished by Ms. Timoney. The court will return to this evidence later in the judgment.

**Evidence on Behalf of the Respondents.**

**30.** The evidence of the respondents was contained in a number of affidavits sworn by Ms. Mary McGrath, the Head of Operations with the second respondent and the affidavit sworn by Ms. Margarita Boyle, Assistant Principal Officer in the Special Education Section of the Department of Education. In her affidavit sworn on 17th November, 2021, Ms. McGrath set out the role and functions of the NCSE. She stated that the primary objective of the NCSE was to improve the delivery of educational services to persons having special educational needs arising from a disability, with particular emphasis on the needs of children. She went on to outline the statutory functions of the NCSE, which included: the allocation of resources to schools; the establishment of specialist education placements; the allocation of staffing and resources to special classes and special schools; the provision of teacher professional learning; the provision of in-school support; the provision of visiting teachers, who support the educational needs of children and young people who are deaf or hard of hearing, or are blind, or are visually impaired; the carrying out of research and the provision of policy advice to the Minister for Education and the running of projects, such as the school inclusion model and the in-school therapy demonstration project.

**31.** In relation to the function of the establishment of specialist education placements, Ms. McGrath stated that through its network of SENOs, the NCSE had a role in establishing specialist education placements with a view to ensuring sufficient special class and special school placements across the State. SENOs are available to assist parents and guardians in the identification of available school placements, and generally act as a local point of contact in advising on the services and resources available in a particular locality for children who

may have special educational needs. She stated that as a matter of practice, SENOs engage with parents, interact with school authorities and liaise with the HSE, in order to provide resources to support children with special educational needs.

**32.** Ms. McGrath stated that through the network of SENOs, the NCSE engaged with parents and schools on an ongoing basis in relation to resources for special education provision. As part of that process, it canvasses and notes demands for and availability of, inter alia, places in special classes and special schools. She stated that for the most part, those demands related to autism specific provision, but also covered other areas. Ms. McGrath stated that during the period January to March 2021, SENOs in North Dublin became aware of demand from parents for places in SLD classes and schools. On 23rd March, 2021, Ms. Helen Walsh, NCSE Team Manager, submitted a report to the Regional Manager regarding the demand for SLD support in North Dublin that had been conveyed to them. Following that, the SENOs liaised with various schools in the North Dublin area. The notice party indicated that it was willing to accommodate the establishment of a new SLD class at the school.

**33.** Following on from that, the local SENO sanctioned the establishment of a new SLD class in the school. That sanction was communicated to the school by the SENO, Ms. Paula Cashin, by letter dated 16th April, 2021. Ms. McGrath stated that in the letter there was reference to a circular of 08/2002, which is no longer in force.

**34.** Ms. McGrath went on in her affidavit to explain in a very fair and candid way, how the error had arisen in relation to the sanctioning of the new SLD class in the school. She stated that the grant of such sanction was within the area of responsibility and authority of the relevant SENO. Ms. Cashin did not need any approval to grant the sanction, but the sanctioning of the class had been discussed with Ms. Cashin's manager and with Ms. McGrath. Ms. McGrath stated that she was aware that the NCSE intended sanctioning a class, but she had not been involved in the process, or with any of the details. The intention to establish special classes was referred to in the course of contacts between the Department of Education and the NCSE in relation to representations which had been made to politicians by parents and had been referred to during a regular meeting on 15th April (the year is not stated), between the NCSE and department officials, but no decision was made at the meeting, as same was a matter for the SENO.

**35.** Ms. McGrath went on to outline how the error in the sanctioning of the SLD class came to light. On 16th April, 2021, the NCSE received an email from Mr. Tom Cunniffe of the Special Education Section of the Department of Education, seeking input from the NCSE in relation to certain queries that had been raised by the Joint Oireachtas Committee on Children, Disability, Equality and Integration. The query related to any plans that NCSE had to increase either the number of SLD classes, or SLD schools.

**36.** Ms. McGrath stated that following receipt of the query, she made contact with Ms. Teresa Griffin, the Chief Executive Officer of the NCSE and discussed amongst other matters, the response that they would make to the query. During the conversation, Ms. McGrath informed Ms. Griffin that the NCSE had very recently sanctioned the establishment of a new SLD class at the notice party's school. Ms. Griffin expressed surprise at that and informed Ms. McGrath that it was her understanding that the policy of the Department of Education was not to establish any new SLD classes, but rather to cater for children with SLD in an inclusive environment in mainstream schools, wherever possible. Ms. Griffin advised her to contact the Department. Ms. McGrath stated that the question of the possible establishment of a new SLD class had never previously come up during her role, so she had no reason to have considered that previously. She was not aware that it was the policy of the Department not to establish new SLD classes.

**37.** On 23rd April, 2021, Ms. McGrath telephoned Mr. Eddie Ward, Principal Officer in the Department of Education, to establish the Minister's policy on the establishment of new SLD classes. Mr. Ward confirmed to her that Ms. Griffin's understanding was correct. She stated that Mr. Ward informed her that the Department no longer supported, or funded the opening of new SLD special schools, or SLD special classes. He explained that the Minister's policy was to make provision for the education of children with special educational needs in an inclusive environment in mainstream schools wherever possible. He referred her to the departmental circulars 13/2017; 14/2017; 7/2019; and 8/2019.

**38.** Three days later, on 26th April, 2021, Mr. Ward emailed Ms. McGrath setting out the Minister's policy in the following terms:

*"To the extent of the allocation of additional Special Education Teachers that are provided to mainstream schools at present, with some 13,600 Special Education Teachers now provided to mainstream schools, to support the learning needs of pupils who have additional needs in literacy, including those arising from specific learning difficulties, it is the policy of the Department that in accordance with the principles of inclusive education, that pupils with such additional learning needs are supported in mainstream with additional provision being made by Special Education Teachers."*

**39.** In that email Mr. Ward had also queried whether any new SLD classes had been established since the introduction of the Department's "new model" in September 2017. Having made enquiries, Ms. McGrath responded to confirm that the last SLD, or reading class, had been established in 2011. Following upon receipt of the email from Mr. Ward, Ms. McGrath contacted Ms. Helen Walsh, the North Dublin Team Manager in the NCSE and asked her to contact the school to explain that the letter sanctioning the establishment of a new SLD special class at the school, had issued in error and would have to be withdrawn. The school was notified of the error on 6th May, 2021. A formal letter notifying the school of the withdrawal of sanction issued on 24th May, 2021.

**40.** On 25th May, 2021, the NCSE was contacted by the school Principal, seeking permission to furnish the letter withdrawing sanction to the parents of children in the school. That permission was given. On the same day, NCSE officials met with a number of the affected parents to explain why the sanction for the establishment of a new SLD class at the school had initially been given and had then been withdrawn.

**41.** Ms. McGrath stated that in or around June 2021, the NCSE contacted the school and offered to carry out a review of the SET allocation to it. The new model provides that schools are entitled to seek a review of their allocation by the NCSE and to seek additional resources. That review had been completed and a recommendation for additional SET resources to be allocated to the school had been submitted to the Department of Education. It will be seen from later affidavits, that the Department sanctioned an additional 15 SET hours for the remainder of the academic year 2021/2022. Ms. McGrath ended her affidavit by apologising to all those affected by the error that had occurred in relation to the initial sanctioning of the new SLD class and in particular, she apologised to the school, the parents and the pupils concerned.

**42.** The second main plank of the respondent's response to the application herein, were the affidavits sworn by Ms. Margarita Boyle, an APO in the first respondent's Department. The first of these was sworn on 16th November, 2021. At the outset, she stated that while she did not dispute that the second applicant had a diagnosis of dyslexia, it was not accepted that he had an entitlement to a place in an SLD class. To explain the respondent's position in that regard, it was necessary to set out the background to the respondent's policy for supporting children with special educational needs, including children with reading difficulties and to give the rationale for that policy.

**43.** She began by pointing out that the overriding policy of the Education for Persons with Special Educational Needs Act 2004 was that wherever possible, the education of people with special educational needs should take place in an inclusive environment with those who do not have such needs, wherever this was possible and appropriate. This was provided for in s.2 of the 2004 Act.

**44.** She stated that the majority of children with special educational needs, attend mainstream schools, where they benefit from appropriate additional educational and care supports in an inclusive setting. It is only where a child has been assessed as being unable to be supported in mainstream education, that special class placements, or special school placements, are provided.

**45.** Ms. Boyle went on to outline the old model of supporting children with special educational needs, which was known as the "general allocation model". It is not necessary to go into the details of that model, as it was subsequently replaced by the "new model" which was introduced in 2017.

**46.** Ms. Boyle stated that prior to the introduction of the new model, the Minister had received a considerable amount of expert advice as to the most appropriate way in which to cater for the educational requirements of students with special educational needs. In particular, the NCSE, which had carried out a review of the general allocation model, reported that the system of allocation under that model was inequitable. There was a real risk that children were being diagnosed as having a special educational need for resource allocation purposes, rather than such a diagnosis being required for medical reasons, because resources were allocated on the basis of diagnosis.

**47.** In addition, there was a spectrum of ability and disability within each category of special educational need. That was not catered for within the previous model.

**48.** Ms. Boyle stated that following the publication of the NCSE report in 2013, the NCSE went on to establish a working group to develop proposals for a new model based on that report. In 2014 the working group published its report, which was exhibited to the affidavit. The working group recommended that the old model should be replaced by a new model, which would allocate supports based on the profile of educational needs of schools. It proposed that the allocation of additional teaching supports to schools would in future be based on a school's educational profile comprised of two components: a baseline component provided to every mainstream school to support inclusion, assistance with learning difficulties and early intervention; and a school educational profile component, which would take into account (a) the number of pupils with complex needs enrolled in the school; (b) the learning support needs of pupils, as evidenced by standardised test results; and (c) the social context of the school, including disadvantage and gender.

**49.** Ms. Boyle stated that the working group report concluded that the combination of a baseline allocation based on school enrolments and a profiled allocation, would give a fairer allocation for each school, which recognised that all schools need an allocation for special needs support, but which provides a graduated allocation, which takes into account the level of need, whether future or predicted, and pupil mixture in each school.

**50.** Ms. Boyle stated that having considered the advice from the NCSE in its 2013 report and the working group report which flowed from that, in 2017 the Minister introduced a new model to support pupils with special educational needs. The provisions of the new model were set out in circulars 13 and 14 of 2017 and 7 and 8 of 2019. These were exhibited to the affidavit.

**51.** Ms. Boyle stated that the new model was designed to ensure insofar as possible having regard to the provisions of the 2004 Act, that the education of people with special educational needs would take place in an inclusive environment with those who do not have such needs. To that end, the new model provided for a single unified upfront allocation for special educational teaching support to each mainstream school, based on that school's educational profile and crucially, permits schools to deploy resources based on each pupil's individual

learning needs, rather than category of disability. She stated that the new model provided a greater level of autonomy for schools, by allowing individual schools to manage and deploy additional teaching support within their school, based on the individual learning needs of pupils, as opposed to being based primarily on a diagnosis of disability. A diagnosis of disability was no longer required for children to access supports.

**52.** Ms. Boyle pointed out that the allocation of Special Education Teachers (SET) hours, was now frontloaded into schools to support children with special educational needs, with the result that schools no longer had to make individual applications to the NCSE for additional supports. This allowed schools to provide additional teaching support for all pupils who required such support and to deploy resources based on each pupil's individual learning needs. This meant that those with the highest level of need could access the highest level of support within the school in a timely manner. Guidelines for schools on the organisation, deployment and use of their special education teachers had been published on the Department's website. In addition, schools were supported by the National Educational Psychological Services (NEPS).

**53.** Under the new model, it was a matter for individual schools to monitor and utilise their allocation of additional teaching support to best support the needs of identified pupils, in accordance with the Department's guidance. The additional teaching time afforded to each individual pupil was decided and managed by schools, taking into account each child's individual learning needs. Schools were also entitled to seek a review of their allocation by the NCSE and to seek additional resources, in circumstances where a school considered that exceptional circumstances had arisen subsequent to the development of the profile.

**54.** Ms. Boyle pointed out that considerable funding had been provided for the provision of education to pupils with special educational needs. Funding for over 13,600 SETs was currently provided to mainstream schools to support the learning needs of pupils who had additional needs, including those arising from specific learning difficulties. In 2021, the Department of Education would spend approximately €2bn, or just 25% of the education budget for 2021 on making additional provision for children with special educational needs.

**55.** Ms. Boyle then dealt with the policy of the Minister in relation to SLD classes. She stated as follows at paras. 28 and 29 of her affidavit:

*"28. One of the effects of the introduction of the New Model is that the Department of Education no longer supports or funds the opening of new reading schools (properly known as Specific Learning Disability (SLD) special schools) and/or Specific Learning Disability (SLD) special classes within mainstream schools. No such SLD special schools and/or SLD special classes have been opened since the introduction of the New Model in September 2017. In fact, the last occasion on which a new SLD class was opened was in 2011.*

*29. Under the New Model, pupils with additional learning needs arising from an SLD are supported in mainstream classes with additional provision made by Special Education Teachers."*

**56.** Ms. Boyle stated that when the new model was introduced in September 2017, there were four SLD special schools in operation. Three of those were in Dublin and one was in Cork. As of November 2017, there were thirteen SLD special classes in primary schools: eight of those were in Dublin; two in Clare, and one each in Louth, Wexford and Galway. Upon the introduction of the new model, it was decided by the Minister not to withdraw funding from the existing SLD schools and SLD classes. She stated that the new model reflected the current departmental policy based on advice from the NCSE for making provision for the education of children with special educational needs including children with an SLD, but the Minister of the day decided not to withdraw support for the schools and classes which were already in operation. Therefore, they continue to be funded.

**57.** Ms. Boyle stated that, while those SLD schools and SLD classes, which were in existence at the time of the introduction of the new model, continue to operate, no new SLD schools or SLD classes have opened since the introduction of the new model in September 2017, as the opening of such classes is inconsistent with the new model.

**58.** Ms. Boyle pointed out that the Minister's function was to set policy and provide funding for educational provision. It was the statutory function of the NCSE to process and determine applications from schools for special educational supports and to sanction the allocation of resources where appropriate.

**59.** Ms. Boyle referred to the proposal to sanction a new SLD class in the notice party's school. She stated that that would obviously be of concern to the Minister, because the establishment of SLD classes would be contrary to the advice which the Minister had received as to the best way of making provision for the education of children with special educational needs arising from SLDs, as contained in the reports referred to and would undermine the model which had been put in place by the Minister.

**60.** Ms. Boyle then turned to deal with specific averments in relation to the educational needs of the second applicant. She stated that the core issue in this case was whether provision was not being made for an appropriate education for the second applicant. She did not accept the assertion that the second applicant was currently placed in an inappropriate educational setting which was not equipped to meet his needs, as alleged by the first applicant. She stated that the school was free to, and should be able to organise its allocated resources to ensure that the second applicant got such additional teaching support as may be necessary to meet his specific educational needs.

**61.** Ms. Boyle stated that under the new model, if the school considered that exceptional circumstances had arisen, subsequent to the allocation of SET hours, it was entitled to apply to the NCSE for a review of its allocation and seek additional resources.



**62.** Ms. Boyle on behalf of the Minister took issue with the assertions made by the first applicant that the second applicant was not receiving an appropriate education at present. She stated as follows at para 42:

*"42. I also take issue with [Redacted]'s assertion that there "is no legal basis for the Respondent not locating an appropriate educational placement for [Redacted]". As set out above, under the New Model, provision is made for the education of people with special educational needs including the Second Named Applicant, in an inclusive environment with those who do not have such needs. I say and am advised that the special educational needs of the Second Named Applicant can be appropriately provided for in his current school through the provision of additional teaching support, including SETs."*

**63.** Ms. Boyle went on to state that in June 2021, the NCSE contacted the school and offered to carry out a review of the SET allocation to it. Ms. Boyle stated that at the time of swearing her affidavit, the review had been completed by the NCSE and a recommendation for additional SET resources to be allocated to the school had been approved by the Department of Education. In a letter sent by the respondent's solicitor, it was stated that an additional 15 SET hours had been allocated to the school for the remainder of the academic year 2021/2022.

**64.** Ms. Boyle stated that in May 2021, the Minister for State at the Department of Education with responsibility for special education and inclusion, Ms. Josepha Madigan, had requested the Department to arrange a review of policy on SLD/reading classes and schools. That review would involve visits to a number of education settings for children with specific learning disabilities and the gathering of evidence in line with the normal Inspectorate inspection model. It was expected that the Inspectorate's work would be completed before the end of January 2022, with composite findings becoming available thereafter, which will be published.

**65.** In addition, Ms. Boyle stated that the NCSE was currently developing policy advice on education provision in special classes and special schools. It was expected that that policy advice would be available in the Spring of 2022. She stated that the outcome of that work would inform future policy on supporting children with special education needs, particularly in relation to reading and literacy.

**66.** Ms. Boyle swore a further affidavit on 25th April, 2022, in which she exhibited a letter dated 15th April, 2022 that had been sent by the Chief State Solicitor's Office to the applicant's solicitor, in which the applicants were informed that the Department of Education was instigating a SEN inspection in the school to evaluate the usage and allocation of the SET hours as currently allocated. The inspection was due to commence in May 2022. It was hoped that the inspection report would be available by the end of June 2022. The letter went on to state that to address the period between then and the receipt of the inspection report,

the Department had approved an additional 15 SET teaching hours on a temporary basis until the end of the school year. It was stated that those additional hours, when combined with the school's existing SET allocation, would enable the school to put in place an additional fulltime SET post for the remainder of the school year.

**67.** The letter went on to state that once the completed SEN inspection report was available, the school's SET allocation (including the additional 15 temporary SET hours) would be reviewed. The Department would be engaging with the school management authorities and the patron to inform them of this additional resource. The letter went on to state as follows: -

*"The Applicant ought to be able to access the appropriate supports and services within the School. While the Department is of the view that the School currently has the resources available to meet the special educational needs of its pupils, including the applicant, the purpose of the inspection is to establish whether this is indeed the case. If the School does not have a sufficient allocation of SET hours to meet the needs of its pupils, that allocation will be adjusted appropriately."*

**68.** The letter went on to state that in light of the content of that letter, the respondents were of the view that the hearing of the action should be adjourned until after the report of the Inspectorate was available.

**69.** The invitation to adjourn the hearing of the matter was not accepted by the applicants. In a brief replying affidavit, sworn on 26th April, 2022 by Mr. Garrett Noble, the applicant's solicitor, it was stated that by email dated 26th April, 2022, the Principal of the school indicated that she had received no notification from the Department of any increase in SET hours for the remainder of the school year. She went on to state that should the school be offered additional hours, it would then need to review the overall needs of the school and reconfigure its support allocation for all pupils in line with the Continuum of Support Model. The email dated 26th April, 2022 from the School Principal, was exhibited to the affidavit.

**70.** That concludes the evidence that was put before the court. However, in argument at the bar, it was indicated that the notice party's school had a total of 377 pupils. They had an allocation of 110 SET hours, which equated to 4.4 fulltime SET posts. The reason for the number containing a fraction of a unit, was due to the fact that some of the special education teachers worked on a part-time, or job share basis. What the court does not know however, is what this means in real terms. The court does not know the number of pupils with special education needs in the school at the present time, nor the level of their individual disabilities. More importantly, the court does not know whether the existing allocation of SET hours is capable of providing an appropriate education to the second applicant. All the court has before it, is the letter signed by the School Principal and Deputy Principal on 5th November, 2021, stating that with their current allocation of SET hours, the school would not be in a

position to provide the level of supports indicated by Ms. Timoney as being necessary for the second applicant.

**Submissions on behalf of the Applicants.**

**71.** In moving the application on behalf of the applicants, Mr. Shortall SC made it clear that the applicants were not contesting the overall efficacy of the new model. They recognised that in its fundamental objective of educating students who had special educational needs within mainstream schooling, wherever possible, that was a laudable objective, which was in accordance with the 1998 Act and the 2004 Act.

**72.** It was submitted that the problem lay, not with the overall policy as contained in the new model, but in the application by the Minister of a strict policy whereby she would not consider the creation of any new SLD classes, or SLD schools. It was stated that that was contrary to the provisions of s.2 of the 2004 Act, which recognised that, while inclusive education was the primary objective, there may be circumstances where that was not appropriate, such as where the specific learning disabilities of the child did not permit him or her to be educated within a mainstream class, or where to do so, could reasonably interfere with the provision of education to other children in the class. Counsel submitted that it was clear from the content of the email sent by Mr. Ward and from the averments contained in Ms. Boyle's affidavit, that the Minister had adopted a policy of simply not considering the creation of any new SLD classes or SLD schools. Indeed, while the SLD classes and schools that had been in existence in 2017 had been continued in existence, it was noteworthy that no new SLD class had been created since 2011.

**73.** It was submitted that in the circumstances of this case, the SENO, Ms. Cashin, who is an expert in the area in relation to what was required for the provision of adequate education to pupils with special needs in her area, being the Dublin City D area, she, in consultation with her line manager and Ms. McGrath, had deemed that the creation of a new SLD class was necessary. Counsel submitted that it was extraordinary that the NCSE should recommend the creation of an SLD class, and indeed went even further and sanctioned the creation of such a class in the school, apparently unaware that the Minister was adopting a policy which did not allow for the creation of such classes since prior to the introduction of the new model in 2017. It was submitted that while the Minister had a discretion in relation to the overall policy in relation to the provision of primary education, it was impermissible for the Minister to adopt a policy which restricted her discretion to even consider the creation of new SLD classes, when same was provided for in s.2 of the 2004 Act.

**74.** It was submitted that by operating an inflexible policy in this regard, the Minister was acting in disregard of the second applicant's constitutional right to receive an appropriate education. In this regard counsel referred to the decisions in *Greene v. Minister for Agriculture* [1990] 2 IR 17; *O'Shiel v. Minister for Education* [1999] 2 IR 321 and *Devitt v. Minister for Education* [1989] ILRM 639.

**75.** By way of secondary attack on the new model, counsel submitted that it was unlawful for the Minister to have introduced the new model by way of circulars, rather than by way of regulation. It was submitted that s.33 of the 1998 Act provided that the Minister may make regulations for the purpose of giving effect to the Act and in particular, could make regulations relating to access to schools and centres for education for students with disabilities, or those who have other special education needs, including matters relating to reasonable accommodation and technical aids and equipment for such students. Section 5 of the 1998 Act, required that such regulations should be laid before both Houses of the Oireachtas as soon as may be after they have been made.

**76.** Counsel submitted that by adopting the new model by means of circulars, rather than by regulation, the Minister had circumvented the requirement that the regulations would have to be placed before both Houses of the Oireachtas. It was submitted that that was unlawful and inappropriate. In this regard counsel relied on the decision in *O'Neill v. Minister for Agriculture and Food* [1998] 1 IR 539.

**77.** As a third ground of challenge, it was submitted that the applicants had a legitimate expectation based on the letter of sanction that had issued on 16th April, 2021, that the second applicant would be admitted to a special class within the school for the school year commencing in September 2021. It was submitted that that letter constituted a representation that, while initially directed to the Principal of the school, was intended to benefit a class of persons, being those students with special education needs who required admission to an SLD class, of which the second applicant was one. In these circumstances it was submitted that the second applicant was entitled to rely on the representation that had been made by the second respondent in that letter.

**78.** It was further submitted that the applicants had acted to their detriment by holding off taking any judicial review proceedings until July 2021. In this regard, counsel relied on the decision in *Glencar Explorations plc. v. Mayo County Council No. 2* [2002] 1 IR 84. Insofar as it may be argued that the applicants had not acted to their detriment, or in reliance upon the representation contained in the said letter, it was submitted that where the representation was made by a statutory authority, it was not necessary to exhibit the same level of reliance or detriment as may be required where one was relying on the doctrine of promissory estoppel: see *Daly v. Minister for the Marine* [2001] 3 IR 513.

**79.** Finally, counsel submitted that it was well established in law that it was a constitutional right of children to be provided with an appropriate primary education: see *Sinnott v. Minister for Education* [2001] IESC 63 and *O'Donoghue v. Minister for Health* [1996] 2 IR 20.

**80.** It was submitted that the question of whether the provision made was appropriate, was primarily a question of fact: see *O'Carolan v. Minister for Education and Science* [2005] IEHC 296 and *SO'C v. Minister for Education and Science* [2007] IEHC 170.

**81.** It was submitted that in the present case, the evidence clearly established that, while the school had done their best to cater for the educational needs of the second applicant, it was not in the position to do so. The second applicant's educational needs had been clearly set out in the reports furnished by Ms. Timoney. In response thereto, the school had very clearly set out in its letter of 5th November, 2021 that they would not be able to meet those needs. In that letter they had stated very clearly: "*...we believe that as a mainstream primary school, we are not in a position to meet [Redacted]'s needs as outlined in his report...*"

**82.** Counsel submitted that that very clear assertion had never been contradicted in evidence by any of the respondents. They had had sight of that letter since it was exhibited in the affidavit sworn by the first applicant on 16th November, 2021. The only averment that could be seen as being a response to that, was contained in the affidavit sworn by Ms. Boyle on 16th November, 2021, wherein she had stated at para. 42 thereof, that she was advised by some unknown parties that the special educational needs of the second applicant could be appropriately provided for in his current school through the provision of additional teaching support, including SETs. It was submitted that that averment was no more than a vague assertion, based on unidentified hearsay opinion evidence, of some unidentified third party. It was submitted that it was noteworthy that the respondents had never sought to put in any further affidavit setting out clearly why they were of the view that the existing supports that were available in the school, would be capable of catering for the educational needs of the second applicant, as outlined in Ms. Timoney's reports.

**83.** It was submitted that in these circumstances, the overwhelming evidence was that the second applicant's current educational needs were not being met in the school and more importantly, the school itself had stated that it would not be in a position to meet those needs in the future. It was submitted that in these circumstances, where the option of inclusion in a mainstream school, did not appear possible or appropriate to meet the educational needs of the second applicant, the existence of an inflexible policy in operation by the Minister, which was against the creation of new SLD classes, meant, in effect, that the second applicant's constitutional right to an appropriate primary education would be breached. It was submitted that in these circumstances, the court should grant the declaratory reliefs sought in the notice of motion.

**Submissions on behalf of the Respondents.**

**84.** In response, Mr. O'Donnell SC on behalf of the respondents submitted that it was not correct to say that the Minister was adopting an inflexible policy under the new model, which prohibited the creation of any new SLD classes or SLD schools. While the situation was that no new SLD classes, or schools, had been sanctioned since 2011, that was not due to any inflexible policy being operated by the Minister. Rather, it was due to the capability of the new model to cater for the educational needs of children with special needs within mainstream schooling, by the provision of additional supports to such schools, as and where necessary.

**85.** It was submitted that the new model was not only more equitable, but was more efficient in providing targeted supports for students who needed them within mainstream schooling. This was done by means of providing both a baseline allocation to schools, together with a further allocation, based on their actual need at any given time. In addition, the school was given the further option of approaching the NCSE to seek additional hours in circumstances where their existing SET allocation was found to be inadequate. It was submitted that in this regard, the new model was better than the old model, because it was more flexible, in that it provided a provision whereby the school could seek additional SET hours as the need arose. Furthermore, the school itself had additional flexibility, in that it was the school which could decide how the hours that had been allocated to it, should be deployed to the students enrolled in the school.

**86.** It was submitted that, while the first applicant may have formed a view that the second applicant required admission to an SLD class, that was not determinative of the question as to whether admission to such a class was necessary to afford him an appropriate education. It was submitted that the law clearly established that the parents of children could not dictate the precise type of education that was given to their children with special needs. It was only if they were able to establish that the model which was being provided for their child was inappropriate, having regard to his or her special educational needs, that the court could intervene: see *O'Carolan v. Minister for Education* [2005] IEHC 296 and *SO'C v. Minister for Education and Science*.

**87.** It was submitted that in the present case, while there appeared to be some minor disimprovement between the scores obtained by the second applicant on his first series of tests conducted by Ms. Timoney in December 2020 and the second set of tests conducted in March 2021, Ms. Timoney had not assessed the level of supports that were being afforded to the second applicant in his present school. She had not given any opinion that those supports were inadequate to meet his educational needs. It had to be remembered that schools had been closed for considerable periods during 2020 and 2021 due to Covid-19. That would have had an adverse effect on the second applicant's educational progress.

**88.** In relation to the assertion that the new model should have been introduced by means of regulation, rather than by circular, it was pointed out that the implementation of policy by circular had long been adopted within the sphere of education going back over a long number of years. That practice had existed prior to the enactment of the 1998 Act. It had not been prohibited by the provisions of that Act. The 1998 Act had merely provided that the Minister "*may make*" regulations to give effect to the Act. This did not impose any obligation on the Minister to proceed by way of regulation.

**89.** It was submitted that having regard to the complexity of matters that were encompassed within the provision of primary education, as contained in the new model and in the circulars giving effect thereto, and having regard to the fact that it was much easier to amend circulars, rather than regulations, to cater for changes in circumstances over time,

it was entirely appropriate that the Minister had proceeded by way of circular, rather than by regulation. Furthermore, it was stated that in introducing the new model, the Minister had not gone outside the principles or provisions of the 1998 Act itself.

**90.** Finally, in relation to the assertion that the applicants were entitled to rely on the doctrine of legitimate expectation to prevent the respondents from resiling from the representation that had been made in the letter granting sanction for the SLD class, it was submitted that the applicants were not entitled to rely on that doctrine for the following reasons: firstly, if the said letter constituted a representation, that representation had not been made to the applicants, but had been made by the NCSE directly to the school; secondly, it was clear from the matters that had been set out in Ms. McGrath's affidavit, that the letter had issued in error, which error had been corrected within a very short period of time by means of email on 6th May, 2021; thirdly, the applicants had not acted in reliance on the assertion in the letter of 16th April, 2021. They had not given up a place on any other course, or in any other school; nor had they otherwise acted to their detriment. Accordingly, it was submitted that the doctrine of legitimate expectation did not avail the applicants in the circumstances of this case.

**91.** In summary, it was submitted that the new model provided a flexible, fair and efficient means of catering for the special education needs of students who required support. It was submitted that in the present case, there was no cogent evidence that the supports that were available in the notice party's school were not adequate to deal with the second applicant's special educational needs. Even if they were, there was provision within the new model for the school to apply for an allocation of additional SET hours. No such request had been lodged by the school. It was submitted that in these circumstances, it could not be said that the new model, or the operation thereof, failed to properly cater for the constitutional rights of the second applicant to an appropriate primary education. Accordingly, it was submitted that the reliefs sought in the notice of motion should be refused.

## **Conclusions.**

### **(i) The New Model.**

**92.** In fairness to the applicants, they do not seek to have the new model overturned in these proceedings. They very fairly conceded that the new model, in its overall objective of providing an inclusive education for students with special needs, is a good policy. Having read the reports that underpinned that policy and having regard to the provisions thereof and to the advantages and flexibility of the new policy as outlined in Ms. Boyle's affidavit, the court is satisfied that the first respondent and the second respondent and their respective staffs, have put in a very considerable amount of work in formulating a model that is designed to best provide a fair and appropriate education for students with special needs. The court is satisfied that the new model is a reasonable and fair policy for the provision of primary education for all within the State.

**93.** The court is further satisfied that it does not have jurisdiction to intervene in issues of policy, which remain within the area of authority of the Executive. This was clearly articulated by Hardiman J. in the Sinnott case, where he stated as follows at p.694/695:

*“By comparison, the duty to provide for free primary education is a complex one, involving enormous annual expense, and requiring for its implementation the taking and constant reviewing of decisions on policy both by the legislature and by the executive. The content of the education provided for, the standard to which that content is to be taught, the mode of teaching, the age at which it is to commence and end, and many other matters must be decided upon and provided for.”*

**94.** Hardiman J. went on to note that the enormous expense of educational provision must be provided for in the manner laid down by the Constitution. That is to say, monies must be provided under legislation giving effect to the annual financial resolutions. Having noted the provisions of Art. 17.2 of the Constitution in regards to the passing of resolutions in relation to expenditure of public monies, he continued as follows: -

*“It seems to me that the constitutional requirements for the conduct of public business, and in particular the expenditure of public monies, as exemplified in this Article and other provisions to be considered later, emphasise that the duty imposed by Article 42 must be discharged in a manner approved by the legislature on the recommendation of the executive. It is true that neither of these organs of Government are in a position to disregard a constitutional duty and that the Courts have powers and duties in the unlikely event of such disregard. But, excepting that extreme situation, the duty imposed by Article 42 is a duty to be discharged in the manner endorsed by the legislature and executive who must necessarily have a wide measure of discretion having regard to available resources and having regard to policy considerations of which they must be the judges.”*

**95.** Later in the same judgment at p.699, the judge noted that the question of the services to be provided to a student with special needs; the requirement of persons to provide those services; the mode of assessing the result of the provision of those services and the costs of those services; were decisions that were normally a matter for the legislature. He stated as follows: -

*“Decisions of this sort are normally a matter for the legislative and executive arms of government. This is not merely a matter of demarcation or administrative convenience. It is a reflection of the constitutionally mandated division of the general powers of government, set out in Article 6 of the Constitution. A system of separation of powers of this sort is a part of the constitutional arrangements of all free societies.”*

**96.** Accordingly, the court is satisfied that it does not have jurisdiction to intervene in relation to a particular policy that is pursued by a particular Minister, unless the court is satisfied that in pursuing that policy the Minister concerned was acting *ultra vires* the Act



which gave them the power to implement the policy, or was satisfied that the policy itself contravened the constitutional rights of third parties. The court is satisfied that the new model policy for the provision of primary education, which was introduced in 2017, accords with the statutory provisions of the 1998 Act and the 2004 Act. It is in express compliance with the provisions of s.2 of the 2004 Act. The court is satisfied that the policy does not in its general terms, contravene the constitutional rights of the second applicant.

**97.** Turning to the allied question of whether the Minister was entitled to implement the policy by means of circular, rather than by regulation, the court accepts the argument put forward by Mr. O'Donnell SC in this regard. The provisions in the 1998 Act, merely state that the Minister "*may make*" regulations to give effect to the Act. It does not oblige the Minister to enact regulations when setting out a general policy for the provision of primary education for persons with special education needs. The court accepts the submission made by counsel that education policies had been implemented prior to the 1998 Act, by means of circular. That practice had not been condemned or prohibited in the 1998 Act. Furthermore, the court is satisfied that having regard to the nature of the policy, it is preferable that it be implemented by means of circulars, which allow the policy to be implemented and changed over time in a fast and efficient manner. Accordingly, the court refuses to grant any relief based on the fact that the new model was introduced by the means of circulars, rather than by regulation.

**(ii) Is the Minister Adopting an Inflexible Policy?**

**98.** The circulars that establish the new model for primary education do not prohibit the establishment of SLD classes, or SLD schools. The report published by the NCSE in 2013, made it clear that the overall objective was for an inclusive education system, whereby children with special education needs would be catered for within mainstream schools, wherever possible. The NCSE recommended that the Department would introduce a robust regulatory enrolment framework for schools to ensure the following: that every child with special educational needs was protected from enrolment practices or policies with overt or covert barriers that block his/her access to enrolment in the school; every child with special educational needs may enrol in the nearest school that is or can be resourced by the NCSE to meet his/her needs; a school must enrol a student with special educational needs if so directed by the SENO, on the basis that the school will be provided with the resources in line with national policy and a school must establish a special class if so requested by a SENO. It should be noted that this report was a most comprehensive report, running to 188 pages.

**99.** The conclusions of the working group which considered the recommendations of the 2013 Report, were similar in nature. Under the heading Guiding Principles, the working group stated as follows: -

*"The working group considers that the inclusion of students with special educational needs in mainstream school is an important principle, while at the same time*

*recognising that some students with complex needs may require a more supportive special school or special class placement."*

**100.** Thus, the situation would appear to be that, while the overall objective under the new model is that students with special educational needs should be catered for in mainstream schools with appropriate supports, wherever possible; the necessity to provide SLD classes or SLD schools was not ruled out. Indeed, this appears to be accepted by the Minister, because she has continued to fund the four SLD schools and the thirteen SLD classes, which were in existence at the time of the adoption of the new model in 2017.

**101.** While noting that position, it appears to be the case that the Minister has pretty firmly set her mind against the question of establishing new SLD classes or schools. This is evident from the email from Mr. Ward and from the averments contained in Ms. Boyle's affidavit.

**102.** The existence of such a policy is evident from the facts in this case. It would appear that there was no assessment given to the need for an SLD class to cater for the Dublin 15 area, as recommended by the SENO, because the sanction for the SLD class was countermanded by Mr. Ward without sight of any documentation from the SENO as to why she, her manager, and Ms. McGrath, considered that such a class was necessary. This would suggest that the Minister was applying a strict policy against the funding of such SLD classes, without enquiring into whether there was in fact a necessity for the creation of such a class. That would appear to be contrary to the provisions of the new model, which provides that an inclusive education in mainstream schools is the preferred option, but it retains the possibility of providing for such educational needs in special classes and special schools.

**103.** The existence of an inflexible policy on the part of the Minister, is further supported by the fact that no new SLD class has been created since 2011. This begs the question as to whether it has been possible to cater for all students with special educational needs, either within mainstream schools with supports, or in the existing SLD schools or SLD classes.

**104.** In the course of argument at the bar, Mr. O'Donnell SC emphasised that there was a division of roles between the respondents; in particular, in relation to the provision of education to children with special education needs. In this regard, it was emphasised that, while the Minister was responsible for setting the overarching policy that would be applied concerning the provision of primary education within the State; the allocation of SET hours to schools, was a matter for the second respondent, which was the expert body in relation to the provision of supports to schools which had children with special education needs. It was emphasised that through their SENO's they had people on the ground, who would liaise directly with the schools. Under the new model, it was then a matter for the school authorities to decide how best they would utilise their allocation of SET hours.

**105.** It is against that background that the court has considerable concern that in April 2021, the SENO with responsibility for the Dublin City D region came to the conclusion that there were sufficient students in her catchment area who required teaching outside of the

mainstream class setting, which would justify the establishment of a new SLD class. To that end, she discussed the matter with her line manager and with the Head of Operations of the NCSE, Ms. McGrath. It appears that they were in agreement with her suggestion that a new SLD class should be sanctioned. The notice party school had agreed to host the new SLD class, which would cater for pupils who would come from across the catchment area.

**106.** The court has to say that it finds it extraordinary that those who are expert in the field of the provision of education supports to children with special education needs, should sanction the establishment of a new SLD class in April 2021, when, apparently, the Minister had not funded any such new classes under the new scheme, and indeed, no such class had been created in the previous 10 years, since 2011.

**107.** At the very least, this appears to the court to demonstrate a marked lack of communication between the first and second respondents. It also raises the question, as to what is to happen to the cohort of students whom Ms. Cashin, as the expert in the area, considered could not be catered for within a mainstream setting and would be the participants in the new SLD class, if the Minister has set her face against funding any such new classes. How are they going to be accommodated? However, that is a wider question, that does not arise for determination in these proceedings.

**108.** It appears to the court that on the evidence before it, the first respondent countermanded the decision to sanction an SLD class, without considering whether the provision of such a class was necessary having regard to the special educational needs of the pupils for whom it was intended to cater. In countermanding the sanction of the SLD class without any such evaluation or information, the Minister appears to have been adopting an inflexible rule whereby she would not countenance the creation of any new SLD classes. The court is satisfied that adopting such a policy, is contrary to the provisions of the 2004 Act and contrary to the provisions of the new model itself.

**109.** The court will grant a declaration that insofar as the Minister adopted a policy whereby she would not consider the creation of any new SLD classes simpliciter, the Minister acted contrary to the provisions of the 2004 Act and contrary to the provisions of the new model policy, which had been introduced by her in 2017.

**(iii) Doctrine of Legitimate Expectation.**

**110.** The operation of the doctrine of legitimate expectation was described in the following way by Fennelly J. in *Glencar Exploration plc v. Mayo County Council (No. 2)* [2001] IESC 64 at p.162: -

*“In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or*

*representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine."*

**111.** In *Palmer v. Minister for Defence* [2014] IEHC 446, the applicant was allowed onto a training course in error, despite being above the applicable age limit. The error in allowing him to participate in the course was spotted very quickly. Cross J. rejected the argument that the error created a legitimate expectation that the applicant would be admitted onto the training course. He stated as follows at paras. 31 and 32: -

*"31. I do not find in this case that there was any promise or any representation made by the respondents. What occurred was a mistake by them as to the applicable criteria and the applicant did nothing to his legal detriment in order to invoke the operation of the doctrine even accepting Denning M.R's view as I do that mistake can result in the legitimate expectation operating.*

*32. I also accept the submission on behalf of the respondent that if I am incorrect in viewing that no expectation arose that there was certainly no legitimate expectation. The applicant was never eligible from inclusion in the course as he did not satisfy the criteria set out in the Joining Instructions. The applicant accordingly never had any legitimate expectations about the course, that he never had an expectation which was either reasonable or legitimate which is a prerequisite for the doctrine to arise."*

**112.** In *Daly v. Minister for the Marine* [2001] 3 IR 513, the Supreme Court noted that there was a distinction between the doctrine of legitimate expectations and promissory estoppel. Fennelly J. stated as follows at p.528: -

*"Legitimate expectations constitutes an accepted part of the principles of administrative law applied by our courts through the vehicle of judicial review. It is concerned essentially to see that administrative powers are not used unfairly. An expectation may be legitimate and cognisable by the courts even in the absence of the sort of action to the claimant's detriment that forms part of the law of estoppel.*

*On the other hand, I would not accept that the mere fact of an expectation can suffice without some context relevant to fairness in the exercise of legal or administrative powers. Those who come within the ambit of an administrative or regulatory regime may be able to establish that it would be unfair, discriminatory or unjust to permit the body exercising a power to change a policy or a set of existing rules, or depart from an undertaking or promise without taking account of the legitimate expectations created by them. However, the very notion of fairness has within it an idea that there is an existing relationship which it would be unfair to alter."*

**113.** The legal doctrines of legitimate expectations and promissory estoppel share many similar characteristics. Both are largely based on equitable notions of fairness. While promissory estoppel can only arise where there is a close relationship between the representor and the representee, that is akin to a contractual relationship; under the doctrine of legitimate expectations, which relates primarily to pronouncements or practices by the government or other statutory bodies in relation to their exercise of executive or statutory functions, the representation on which the claim is based does not have to be specifically addressed to the representee. In other words, where one is dealing with an alleged representation either by means of a course of practice, or by a written representation that is made by the government or a statutory body in relation to the exercise of their powers, that representation can be acted upon by anyone in the class of persons to whom the representation has been made generally.

**114.** In some of the case law, the question was raised as to whether it was possible under the doctrine of legitimate expectations to obtain a particular benefit, rather than a right to be heard before the particular practice was changed by the government or statutory body. In other words, while it was possible under promissory estoppel for the representee to claim that he or she was entitled to the particular benefit that had been indicated in the representation, there was some argument in the case law that where one was dealing with the doctrine of legitimate expectations, which arose primarily due to the conduct or representations of the executive or the statutory body in the past, that could only give the member of the public, or the member of the particular class who acted upon that representation or practice, a right to be heard and make submissions before that practice was changed to their detriment. For an interesting analysis of the similarities and differences between the doctrines of promissory estoppel and legitimate expectations, see Clark, "Contract Law in Ireland", 8th Ed., paras. 2-73 to 2-86.

**115.** It is not necessary for the court to go into the nuances of the distinctions between these two legal doctrines in the present case. This is due to the fact that the court is satisfied that the doctrine of legitimate expectations can only relate to a representation or practice that was adopted by the statutory body deliberately. In the court's opinion, it could not apply to a representation that was made in error, unless that erroneous representation was wilfully or negligently allowed to remain in place for an appreciable period of time, when the

statutory body or authority knew, or ought to have known, that people would act to their detriment in reliance upon it.

**116.** In the present case the court is satisfied that the sanctioning of the SLD class by Ms. Cashin on 16th April, 2021, was done in error. That error was corrected very promptly and the true situation was communicated to the school by email on 6th May, 2021. The court is satisfied that where a representation was made as a result of a genuine error and where that error was corrected very quickly, those circumstances cannot give rise to any form of legitimate expectation on the part of any member of the class of persons to whom the representation may be said to have been made.

**117.** The court is further supported in its conclusion that the doctrine of legitimate expectations does not apply in this case, due to the fact that the applicants did not act in reliance upon the representations that had been made by Ms. Cashin in the letter of 16th April, 2021, nor did they act to their detriment as a result of the making of that representation. They did not give up a place in another school that may have had an SLD class, nor did they give up the opportunity to take a place in the SLD school in Baggot Street, in reliance upon the representation that had been made. In short, they did not act in reliance on that representation. While it was undoubtedly a matter of considerable disappointment to them that sanction for the SLD class had been withdrawn, that is not a matter that gives rise to a cause of action under the doctrine of legitimate expectations.

**(iv) Is the Second Applicant Receiving an Appropriate Education?**

**118.** The constitutional right to a primary education as provided for in Art. 42.4 of the Constitution was described in the following way by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 IR 20 at p.65:

*"I conclude, having regard to what has gone before, that there is a constitutional obligation imposed on the State by the provisions of Article 42, s. 4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be. Or, to borrow the language of the United Nations Convention and Resolution of the General Assembly – "such education as will be conducive to the child's achieving the fullest possible social integration and individual development; such education as will enable the child to develop his or her capabilities and skills to the maximum[.]"*

**119.** In *Sinnott v. Minister for Education (No. 2)*, Denham J. (as she then was) stated as follows: -

*"The right to have a free primary education provided is a fundamental and important right established by the Constitution. It is a right with which certain individuals or groups may encounter physical, mental or social difficulties in exercising. Therefore,*

*the norm may not cover minorities. The right is given to all children. It is appropriate that the construction of the article should ensure that all children may get the benefit of the right."*

**120.** The concept of what constitutes an appropriate education was considered in *O'Carolan v. Minister for Education*. In that case the parents of a child suffering with severe autism, wanted him placed in a special school in Wales. The respondents were proposing a placement in a special school in Ireland. McMenamin J. held that the question of whether the education provided or proposed was "adequate", was primarily a question of fact to be decided objectively. He held that parents do not have a right to dictate what form of education is appropriate for their child. He stated as follows at paras. 196–199: -

*"196. The first issue of principle is whether the state is obliged to provide a severely disabled child with the particular type of education and care that his parents choose, or whether the obligation upon the state is simply to provide a standard of care and education that is adequate from an objective perspective.*

*197. No authority has been cited to the effect that parents are entitled to choose the exact type of care and education which their child receives. Indeed the most relevant authority, O'Shiel v. The Minister for Education [1999] 2 I.R. 321, is to the contrary effect. This authority demonstrates that the test as to whether there is a right to adequate care and education is to be objectively decided.*

*198. In that case Laffoy J. held that the State was not constitutionally obliged to fund any proposal for primary education emanating from parents and could legitimately adopt reasonable criteria for identifying schools that would qualify for public funding. She stated at p. 347–348 that:*

*"Even though the State must have regard to the constitutional guarantee of parental freedom of choice in framing (the scheme for the disbursement of public funding in the support of primary education), nonetheless it is proper for the State and, indeed, I would say incumbent on the State, to incorporate in the scheme measures to ensure that need and viability are properly assessed and that there is accountability."*

*199. Laffoy J. added:*

*"Fulfilment of the State's constitutional obligation under Article 42.4 must take account of the parental freedom of choice guaranteed by Article 42, but it must be arrangements which have a rational foundation and prescribe proper criteria for eligibility which accord with the purpose of Article 42 and the provisions of the Constitution generally"."*

**121.** McMenamin J. went on to state that the issue before the court was not whether the Irish school was better than the Welsh school, or whether it was the best school, but whether

it was appropriate. He held that the constitutional duty which devolved on the court, was to deal with the constitutional rights and duties as defined in the Constitution itself and by precedent. The primary question for consideration was not individual preference, but constitutional and statutory duty as established in evidence.

**122.** In *SO'C v. Minister for Education and Science*, Peart J. held that the applicants had to establish in evidence that what was capable of being provided for under the particular model of education proposed for the child, fell short of an appropriate primary education provision for the child. The standard of proof by which that onus had to be discharged was on the balance of probability: see paras. 858/859.

**123.** In considering this question, the court must return to the letter from the Principal and Deputy Principal of the school of 5th November, 2021. In that letter, it was made abundantly clear that, having regard to the educational supports as identified by Ms. Timoney in her reports as being necessary for [Redacted], the school authorities were stating that they were not in a position to meet those needs. In that letter they stated very clearly "*...we believe that as a mainstream primary school, we are not in a position to meet [Redacted]'s needs as outlined in his report...*". That is a very stark statement by the school Principal and by the Deputy Principal, who is also the SENO coordinator, that the school will not be in a position to provide the necessary supports for the second applicant, so as to give him an appropriate education.

**124.** The assertions in that letter are not contradicted by the first respondent, even though they had sight of that letter from the time that it was exhibited in the affidavit sworn by the first applicant on 16th November, 2021. The furthest that the respondent was able to go, was for Ms. Boyle to state that she had been advised by unnamed third parties that, on the basis of some unknown evidence or information that was before them, the school had adequate supports to cater for the needs of the second applicant. The court cannot act on such a vague assertion, in the face of the clear and unequivocal evidence contained in the reports of Ms. Timoney and more particularly, in the letter from the Principal and Deputy Principal of the school.

**125.** Having regard to the very clear evidence of Ms. Timoney as to what is required to provide an appropriate education for the second applicant and having regard to the very clear response thereto from the school, that they cannot provide that level of support, the court must find that the second applicant is not receiving an appropriate education at present and will not get such an education under the levels of SEN supports available in the school as of November 2021.

**126.** However, the court is cognisant of a number of matters. Firstly, as stated in the affidavit of Ms. Boyle, there are reviews going on at a macro level. In particular, further to the request made by Ms. Madigan TD, the Department is carrying out a review of policy on SLD classes. The Inspectorate's review was expected to be completed by the end of January



2022, with the findings thereon becoming available thereafter. The court has not been advised as to the outcome of that review.

**127.** In addition, Ms. Boyle stated that the NCSE was currently developing policy advice on education provision in special classes and special schools. That policy advice was expected to be available in the Spring of 2022. Again, the court has not been advised as to whether such advice has come to hand.

**128.** Secondly, and more importantly from the point of view of the second applicant, the court notes that an additional 15 SET hours were sanctioned by the first respondent for the school in April 2022, for the remainder of the school year. In addition, there is an SEN inspection currently underway in the school; in respect of which, a report is expected by the end of June 2022. Following the delivery of that report, the allocation of SET hours for the school will be reviewed. Thus, it may well be that the second applicant's educational needs will be appropriately accommodated following that review.

**129.** In these circumstances, the court will make the declaration outlined above, that the second applicant's educational needs were not being met as of November 2021, but will defer making any final order in the matter, pending the outcome of the SEN inspection and review of the SET hours' allocation for the notice party's school. To that end, the court will put the matter in for mention on 20th July, 2022 at 10.30 hours to review progress.

**130.** The court directs that the respondents are to liaise with the notice party as soon as possible after the conclusion of the SEN review and that the results of that review are to be communicated by the notice party to the applicants, once it has determined how it will utilise whatever SET hours are allocated to it.

**131.** In light of that information, the applicants will be able to consult with Ms. Timoney and, based on her expert opinion, will be able to form an opinion as to whether the second applicant's educational needs will be appropriately met in the school in the coming year.

**132.** If it is determined that those needs will be appropriately met, that will determine the matter. On the other hand, if the first applicant feels that the second applicant's needs will not be appropriately met under whatever new supports are put in place following the review, and if that is contested by the respondents, it will be necessary for the court to hear oral evidence on that issue. In such circumstances, the court will relist the matter for further hearing by means of oral evidence at the earliest possible time. The court will hear submissions from the parties in that regard when the matter is reviewed on the "for mention" date.