Neutral Citation Number: [2026] UKUT 205 (AAC)
Appeal No UA-2026-000103-HSW

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

ON APPEAL FROM THE EDUCATION TRIBUNAL FOR WALES

Dated: 21 April 2025

Before:

The Rt Hon Sir Gary Hickinbottom **Judge of the Upper Tribunal**

Appellant: Cyngor Gwynedd

Respondents: Mrs Ellen Jones and Mr Michael Jones (mother of Hari John Cain Jones)

Heard at: Remote

Attendance

For the Appellant: Samantha Broadfoot KC and Crash Krylova of Counsel

For the Respondent: Christian J Howells and Laura Shepherd of Counsel

Date of hearing: 8 April 2026

Date of decision: 21 April 2026

On appeal from:

Tribunal: The Education Tribunal for Wales
Tribunal Case No: A0074 0525
Tribunal Venue: Remote
Decision Date: 3 October 2025

DECISION OF THE ADMINISTRATIVE APPEALS CHAMBER OF THE UPPER TRIBUNAL

The appeal is allowed, and I remake the decision of the Education Tribunal for Wales by revoking paragraphs 3-5 of its Order dated 3 October 2026.

Subject Matter

Meaning of "educational provision" in section 3 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 – the circumstances in which health care and social care provision is "educational provision" in that context

Cases referred to

R v Lancashire County Council ex parte M [1989] FLR 276
R v London Borough of Lambeth ex parte MBM [1995] ELR 374
City of Bradford Metropolitan Council v A [1997] ELR 417
Bromley London Borough Council v Special Educational Needs Tribunal [1999] All ER 587
Devon County Council v OH [2016] UKUT 292 (AAC)
East Sussex County Council v KS [2017] UKUT 273 (AAC)
Cardiff Council v X [2025] UKUT 68 (AAC)
Y Council v X [2025] UKUT 191 (AAC)
R & RK v Hertfordshire County Council [2025] UKUT 381 (AAC)
KTS v Governing Body of Milby Primary School [2026] UKUT 41 (AAC)

Introduction

1. This is an appeal from the decision of the Education Tribunal for Wales ("the ETW") (Judge Gwyn Eirug Davies, Specialist Member Angharad Billingsley and Specialist Member Rhys Parri, "the ETW Panel") dated 3 October 2025 allowing the appeal of the Respondents (Ellen Jones and Michael Jones, parents of Hari Jones ("Hari")) against the decision of the Appellant local authority ("the Council") to issue an Individual Development Plan ("IDP") in relation to Hari's Additional Learning Needs ("ALN") in the terms that it did. I shall refer to the ETW Panel decision dated 3 October 2025 as "the ETW Decision".

2. In particular, the Council appeals against the decision of the ETW Panel to include in the IDP as Additional Learning Provision ("ALP") a provision that: "Hari shall be supported at school at all times by two suitably qualified and trained carers", on the grounds that (i) the Panel erred in classifying the provision of relevant "qualified and trained carers" as ALP (Ground 1) or, alternatively, (ii) in adding that provision, the Panel failed to have regard to the expert evidence and/or deal with that expert evidence fairly and/or give adequate reasons for departing from clinical recommendations (Ground 2).

3. The President of the ETW having refused permission to appeal on 8 January 2026, I granted permission on both grounds on 9 March 2026.

4. At the hearing, Samantha Broadfoot KC and Crash Krylova of Counsel appeared for the Council, and Christian Howells and Laura Shepherd of Counsel appeared for Hari's parents. I thank them all for their assistance.

Relevant Legislation: National Health Service

5. Under section 1 of the National Health Service (Wales) Act 2006 ("the NHS Act"), the Welsh Ministers have a duty to continue the promotion of a comprehensive health service in Wales, and must provide or secure the provision of services to that end.

6. By section 3, they have a duty to provide throughout Wales, to such extent they consider necessary to meet all reasonable requirements, services or facilities for the care of persons who suffer from illness and such other services or facilities as are required for the treatment of illness; and, under section 2, they have a general duty to provide such services as they consider appropriate for the purpose of discharging any duty imposed on them under the Act and to do anything else which is calculated to facilitate, or is conducive or incidental to, the discharge of

such a duty. By section 10, Welsh Ministers may arrange for others to provide such services.

7. LHBs are created by section 11 of the NHS Act and are given the powers set out in Schedule 2 which include a general power to do anything which appears to it to be necessary or expedient for the purposes of or in connection with its functions. Section 12 empowers the Welsh Ministers to direct that LHBs exercise their functions in relation to its area; and, under regulation 4(1)(b) of the Local Health Boards (Directed Functions) (Wales) Regulation 2009 (made under section 12 of the NHS Act), the Welsh Ministers delegate the functions set out in the Schedule, including those functions under sections 2, 3 and 10, to the LHBs.

8. Section 33 gives the Welsh Ministers (and LHBs) the power to enter into arrangements with local authorities in relation to the exercise of prescribed functions of NHS bodies and prescribed health-related functions of local authorities "if the arrangements are likely to lead to an improvement in the way in which those functions are exercised" (section 33(1)).

Relevant Legislation: Local Authority Care and Support

9. Sections 21 and 28 of the Social Services and Well-being (Wales) Act 2014 ("the SSW Act") impose a duty on local authorities to assess the needs of a child for care and support, both discretely and together with the needs of any carer. Section 32 provides that, if that assessment identifies needs for care and support, then the local authority must consider and determine whether the identified needs meet the relevant eligibility criteria now set out in the Care and Support (Eligibility) (Wales) Regulations 2015. Regulation 4 provides that the need of a child will meet the eligibility criteria if (i) the need arises from (amongst other things) the child's physical ill-health, disability or similar circumstances, or the need is one that, if unmet, is likely to have an adverse effect on the child's development (regulation 4(1)(a)); and (ii) the need relates to (again, amongst other things) "involvement in… education" (regulation 4(1)(b)(iv)).

10. Section 37 of the SSW Act imposes a duty on a local authority to meet identified needs for support.

11. Section 47(1) generally prohibits the provision of health services under this obligation, as follows:

> "A local authority may not meet a person's needs for care and support (including a carer's needs for support) under sections 35 to 45 by providing or arranging for the provision of a service or

> facility which is required to be provided under a health enactment, unless doing so would be incidental or ancillary to doing something else to meet needs under those sections";

and section 47(4) expressly prohibits a local authority meeting a person's needs for care and support under sections 35 to 45 by "providing or arranging for the provision of nursing care by a registered nurse". However, section 47(9) expressly provides that these prohibitions do not apply to arrangements made between an LHB and a local authority under section 33 of the NHS Act (see paragraph 8 above).

Relevant Legislation: Additional Learning Provision

12. Since 23 August 2022, the regime governing the identification of, and provision for, children with ALN in Wales has been prescribed in the Additional Learning Needs and Education Tribunal (Wales) Act 2018 ("the ALN Act") which replaced the provisions of Part 4 of the Education Act 1996 ("the 1996 Act") relating to "Special Educational Needs" ("SEN"), and the Additional Learning Needs Code for Wales 2021 ("the ALN Code") made by the Welsh Ministers under section 4(1) of the ALN Act.

13. Under section 2 of the ALN Act (so far as relevant):

> "(1) A person has [ALN] if he or she has a learning difficulty or disability (whether the learning difficulty or disability arises from a medical condition or otherwise) which calls for [ALP].
>
> (2) A child of compulsory school age has a learning difficulty or disability if he or she–
>
> > (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
> >
> > (b) has a disability for the purposes of the Equality Act 2010 which prevents or hinders him or her from making use of facilities for education or training of a kind generally provided for others of the same age in mainstream maintained schools…".

In any specific case, ALN therefore informs the required ALP.

14. By section 3 (again, so far as relevant):

> "Additional learning provision" for a person aged three or over means educational or training provision that is additional to, or different from, that made generally for others of the same age in—
>
> (a) mainstream maintained schools in Wales…".

In this appeal, we are concerned with "educational provision" rather than "training provision" (to which I need make no further reference).

15. A local authority must decide if a child has ALN where it comes to its attention or appears to it that that child may do so (section 13). If it decides that the child does have ALN, then it must prepare and maintain an IDP for that child (section 14(1)(a) and (2)(a)). The IDP must include (i) a description of the child's ALN, (ii) a description of the ALP which the child's learning difficulty or disability calls for, and (iii) "anything else required or authorised by or under [Part 2 of the ALN Act]" (section 10(a), (b) and (c)). Given the respective statutory definitions of ALN and ALP, it is clear that ALP is entirely responsive to identified ALN.

16. The provisions in relation to preparing and maintaining an IDP are found in Chapter 23 of the ALN Code. There is a mandated standard form for the IDP in Annex A of that Code (Annex B for a looked after child), and how the various sections of that form are to be completed is set out in paragraphs 23.15-23.96 of the Code. Section 2 of the IDP is relevant to this appeal, notably Sections 2A to 2C, which are headed as follows:

> "Section 2A: Description of the child or young person's [ALN]"
>
> "Section 2B: Description and delivery of the child or young person's [ALP]"
>
> "Section 2C: Description and delivery of ALP to be secured by an NHS body."

17. Within Section 2B, Section 2B.1, there is set out the outcome intended by the provision of each element of ALP ("intended outcome"); and Section 2B.2, "ALP to be provided", requires a description of the ALP to be provided with a view to meeting the intended outcome.

18. Section 14(10)(a) requires a local authority which maintains an IDP to secure the ALP described in the plan. That is reflected in the mandated IDP form which requires the local authority to identify who will provide

each element of the ALP. Those might include the local authority directly, an outsourced contractor or an NHS body under sections 20-21 which impose obligations on health bodies to provide ALP in certain circumstances.

19. Under section 20(1), a local authority may refer a matter to the relevant LHB and ask it to consider whether "there is any relevant treatment or service that is likely to be of benefit in addressing the additional learning needs of a child or young person". Where a matter is referred, the LHB must consider whether there is such treatment or service; and, if it identifies any, it must secure that identified treatment or service (section 20(4) and (5)). By section 20(6):

    > "…. 'relevant treatment or service' means any treatment or service that an NHS body would normally provide as part of the comprehensive health service in Wales continued under section 1(1) of the [NHS Act]".

20. By section 21, if the LHB identifies such a treatment or service, it must notify the local authority which must then describe the treatment or service in the IDP, specifying that it is ALP to be secured by the LHB; and the local authority's obligation to provide it ceases. If the LHB does not identify any such treatment or service, then it is required to notify the local authority of that fact.

21. By section 21(8), nothing in section 21 affects the power of the ETW to make an order under that Part of the ALN Act; but, by section 21(9) (emphasised in paragraph 21.39 of the ALN Code), if the ETW orders the revision of an IDP in relation to ALP as provision an LHB is to secure, the LHB is not required to secure the revised ALP unless it agrees to do so.

22. I considered these provisions in <u>Y Council v X</u> [2025] UKUT 191 (AAC). In short, the ALN scheme requires a step-by-step approach, as follows:

    (i) the identification of any ALN;

    (ii) the identification of ALP, i.e. education provision required to meet the identified ALN;

    (iii) the identification of who will provide the ALP, e.g. the local authority, a contractor or, if the body agrees, an NHS body such as the relevant LHB.

23. Under section 76 of the ALN Act, the ETW may, in relation to an appeal, (i) require an LHB to give evidence about the exercise of its functions (section 76(1)(a)) and (ii) make recommendations to an LHB about the exercise of its functions (section 76(1)(b)). Where a recommendation is made by the ETW to a Health Board, that Board must report to the ETW and must state the action which the Board has taken or proposes to take, or why it has not taken and does not propose to take any action in response to the recommendation (section 76(3) and (4)).

The Facts

24. Hari was born on 13 February 2016, and so is now 10 years old. He has x-linked myotubular myopathy, a rare condition severely affecting his muscle development, which was diagnosed at birth. He requires supervision at all times and is unable to function independently. All of his care needs (including medication, feeding (by percutaneous endoscopic gastronomy tube), self-hygiene, toileting and repositioning) have to be met by others. He is unable to breathe independently, and is dependent upon invasive long-term ventilation day and night.

25. In 2019-20, he spent a number of months at Alder Hey Children's Hospital ("Alder Hey"), where a tracheostomy was fitted and an appropriate community care package put in place. Since the tracheostomy has been fitted, Hari's condition has been stable and he has not required admission to hospital because of any deterioration in his health, although he has spent extensive periods in hospital due to difficulties in commissioning the services of a competent carer particularly at night. However, since September 2023, he has been cared for at home where he lives with his father (who has his own serious medical issues), his elder sister and his mother who cares for both him and his father.

26. A community management escalation plan was formulated in July 2020 in anticipation of Hari's discharge from Alder Hey. It provided that he should always be directly supervised by someone who is fully trained and competent to look after his tracheostomy and ventilator and who can institute cardiopulmonary resuscitation ("CPR") if necessary (a "competent person"); and, if there is a competent person supervising Hari without his parents being present, then there should be a second person – a responsible adult, but who need not be a competent person – immediately available. Hari's mother is such a competent person. Otherwise, the competent persons who care for Hari are health care professionals (either nurses or specialist health care support workers).

27. These requirements have been frequently reviewed and consistently repeated in Care Plans and Children and Young People's CCC Review

Documents, including those dated 29 July 2023, 29 January 2024, 22 February 2024, 22 June 2024, 24 June 2024 and February 2025. The latest Specialist Children's Complex Care Package – Child's Care Plan, finalised by the Health Board on 6 March 2025 and reviewed in July 2025, thus states (all emphasis in the original):

> "This care plan is to provide guidance to Hari's carers what activities are needed on a daily basis to meet Hari's assessed needs at home, in the community and when attending school.
>
> Hari should always be directly supervised on a 1:1 basis by **someone who is a fully trained and competent carer** to look after his ventilator and tracheostomy and who can start [CPR] if necessary. This person could be his mother or a health practitioner. During any breaks, the competent carer will remain sufficiently proximate to Hari to be able to respond in the event of an emergency. Health staff fulfilling this role are paid for breaks and do not leave the premises during their shift.
>
> If there is a trained competent carer supervising Hari without his parents present, there should be at least one other responsible adult available on the premises as well. This additional person, or **second carer** should be **tracheostomy aware** ["trache-aware"], but does not have to be trained in providing any direct health care to Hari, such as looking after the ventilator or tracheostomy, or providing emergency care. In the event of an emergency and the competent carer is not immediately present (e.g. if going to the toilet or on a lunch break etc), the second carer should call for help. The second carer should also provide practical help, under the direction of the competent carer, in the form of acting as a runner or assisting passing equipment."

This Care Plan included a detailed table identifying the roles and responsibilities of the competent carer and second carer respectively, updated in July 2025.

28. It is to be noted that this Care Plan requires the competent person to remain at all times "sufficiently proximate to Hari to be able to respond in the event of an emergency", even during breaks. In the event of an emergency, if the competent carer is on a break, then the second carer is required to "call for help", i.e. help from the competent carer who must remain sufficiently close to be able to respond to a call for help in appropriate time to ensure that the child's safety is not put at risk. That requirement has featured in each of Hari's Care Plans etc.

29. Whilst this Care Plan refers to the assessment of Hari's need "at home, in the community and when attending school", Hari does not spend time in the community: but this is a clinical assessment of his needs when at home or at school, namely direct 1:1 supervision by a competent carer supported by a second, trache-aware (but not necessarily competent) carer.

30. There is nothing in the assessments in the Council and Derwen Integrated Team for Disabled Children Care and Support Plans, which have been regularly produced from June 2019, that runs contrary to those requirements. Rather, they are premised on the requirements being necessary.

31. These requirements have consistently been identified as applying to Hari "when attending school". Since 2020, the responsible authorities (i.e. the Council and the Health Board) recognised Hari's needs at school included a requirement for two people on site, one competent person and a second carer who, whilst they need not be a competent person, would be trache-aware, i.e. would have undertaken tracheostomy awareness training and would be able to summon help if (e.g.) the competent person was on a short break. The care reviews consistently considered access to education with the requirement for a competent carer to accompany Hari to school with a second responsible adult who is trache-aware.

32. The first IDP is dated 7 September 2023 and, consistent with the above, it has as Hari's "medical needs":

> "Due to Hari's dependency on invasive ventilation, Hari requires 24 hour supervision day and night by someone who is trained in both tracheostomy and ventilator care and management. There is also a need… for a second responsible adult to be available at all times (this person does not need to be fully ventilator trained)."

The challenge in providing that level of care at home, let alone at school, was noted. There is no suggestion in the IDP that this care is to be provided at school as ALP, as opposed to (e.g.) pursuant to the general obligations of the Health Board under sections 1 and 3 of the NHS Act (see paragraphs 5-6 above).

33. This IDP was in very early form; but these essentials (i.e. the need for a care package including a competent carer and a second responsible adult who is trache-aware, but neither provided as ALP) did not vary over time. They appear in IDPs (including drafts and reviews) dated 29

January 2024, 22 February 2024, 6 March 2025, 11 June 2025 and 4 September 2025.

34. A formal Risk Assessment of the level of supervision needed for Hari in respect of his tracheostomy in "home and school environment" was conducted by the Health Board on 29 May 2024. The hazard is described thus:

> "• Hari has poor respiratory function and is dependent on permanent mechanical ventilation via a tracheostomy tube.
>
> • Hari is able to self-ventilate for short periods of time using his tracheostomy solely. Hari is able to breathe spontaneously when awake and has the ventilator set at a minimum of 20 breaths per minute if he requires this. During times that Hari is asleep or unwell, Hari is fully reliant on the ventilator throughout this time.
>
> • Hari would become significantly unwell and require hospital admission if ventilation was to discontinue for any length of time."

Having set out the existing control measures (which include not only the direct supervision by a competent care "AT ALL TIMES" (emphasis in the Assessment) but also, e.g., various inspections and checks that need to be carried out regularly), the "Action Required" is set out in the Risk Assessment as follows:

> "If there is a trained competent carer supervising Hari without a parent present there needs to be a responsible adult available – this additional person does not need to be ventilator or tracheostomy competent as highlighted in Hari's community management plan developed by Alder Hey. A parent may supervise Hari alone but they would have to accept it would be more difficult to deal with any problems that may arise and if they are on their own, they take full responsibility for all his medical needs. In reality overnight a parent is the second responsible person."

The "Residual Risk" is assessed as being "Moderate", i.e. "Action that is cost effective in reducing the risk and planned and implemented within a reasonable time scale". The "Required Control" is identified as: "A second responsible person available at all times to support trained carer or parent either in family home or school environment"; and the "Agreed

action", as "Ensure 2nd person identified to support in either environment".

35. As to Hari's care needs at home and at school, the documents emanating from the Health Board and the Council are therefore consistent from 2019, when Hari was in Alder Hey and since when his condition has been stable: he requires a competent carer, and a second responsible adult who is trache-aware but not necessarily a competent carer.

36. However, the Health Board found providing that level of care in practice to be challenging. Mrs Jones considered that the level of care and support in fact being given to Hari, and her as carer, by the Health Board and/or the Council was insufficient; and, so, on 14 December 2024, she commenced judicial review proceedings against both authorities. Alleging breaches of the NHS Act, the SSW and the ALN Act, she sought various remedies in the form of mandatory orders and declarations, including, in respect of Hari's schooling, "a mandatory order compelling either the Health Board or the Council to provide a second trache-aware carer to enable [Hari] to attend school" (paragraph 3(2) of the Amended Statement of Facts and Grounds dated 4 March 2025) on the basis that "either the Health Board or the Council are in breach of the duty in sections 20(5)(a) or 14(10) of the [ALN Act] respectively to secure [ALN], namely a second [trache-aware] carer, to enable [Hari] to attend school". However, the ALP complaint in those proceedings was not that, at any time, Hari needs two competent carers; but that (i) the Health Board had failed to provide the (single) competent carer support that it had identified as required, and (ii) a second, trache-aware carer had not been provided either and the Health Board and the Council were at odds as to which authority should bear the cost of this second carer. In those proceedings, no issue appears to have been taken with the criteria for the second carer: as Mrs Jones's Skeleton Argument for the judicial review said, her concern was simply with the *delivery* of the provisions assessed by the Health Board as being required to enable Hari to attend school (paragraph 102).

37. Shortly before the substantive hearing of that application the Health Board and Council made a joint offer to Mrs Jones which proposed a phased return to school for Hari, with a competent carer provided by the Health Board and a second, trache-aware carer being funded by the Council to accompany Hari to school with that person being replaced over time by a school assistant who had been trained to be trache-aware. This offer was based on an amended Care Plan produced by the Health Board on 6 March 2025, quoted above (paragraph 27), in which the roles and responsibilities of the competent carer and second carer were detailed. The Council was satisfied that the function of the second carer did not amount to health provision (which, by section 47 of

the SSW Act, it was proscribed from providing: see paragraph 10 above) and could be provided by it as social care provision under the SSW Act.

38. The offer was accompanied by a new IDP dated 6 March 2025, in which Section 2B.1 had, as an intended outcome: “I will attend educational setting”, and the ALP to be provided in response was indicated as (i) “Physical and Medical Advisory Teacher to support Hari’s educational setting, in co-ordination with other supporting agencies”, (ii) “ELSA strategies to be incorporated into daily routine” and (iii) “Opportunities to interact with peers in activities to form friendships”. In Section 2B.4, (i) was to be provided by the Council through Gwynedd a Môn ALN Specialist Service; and (ii) and (iii) by “School via [Council] funding”. There was no reference to any care at school – in the form of a competent carer and/or a second responsible, trache-aware adult – being provided as ALP.

39. The judicial review proceedings were withdrawn by Mrs Jones, with the permission of the Court in a Consent Order dated 11 March 2025, on the express basis of (amongst other things) the 6 March 2025 offer and the Council maintaining an IDP in the form of the 6 March 2025 version.

40. The Council expected that this agreement would enable Hari to go to school.

The ETW Appeal

41. However, on 1 May 2025, Mrs Jones appealed against the 6 March 2025 IDP.

42. Several matters were raised which are no longer in issue (e.g. the provision of ALP in the Welsh language). So far as relevant to this continuing appeal, Mrs Jones sought the following (Section 12 of the Appeal Form):

> “Section 2 of Hari’s IDP lacks sufficient information regarding his ALP. Hari requires the necessary provisions to be inserted back into his IDP to ensure that he can safely attend school. Hari also requires his ALP to specify that he requires two medically qualified [i.e. competent] carers to accompany him at all times….”.

43. Mrs Jones relied on the evidence of Rhiannon Stokes, an Occupational Therapist, who assessed Hari at a meeting with him and his parents on 11 December 2024, and produced a report dated March 2025.

Paragraph 10 deals with "Education". That said that the main reason for Hari not attending school was that "he does not have the suitable support in place to provide the care he requires at school": and that, in Ms Stokes's view, "if Hari had a suitable care package at home then the care staff could accompany him to school and provide the care". There does not appear to be any suggestion in the report that Hari needed two competent carers a school; but Ms Stokes also gave oral evidence to the ETW Panel, who record in the ETW Decision: "In order to attend school, [Ms Stokes] considers that Hari requires two experienced staff to support and for each to be able to attend to all his needs".

44. On 10 June 2025, the Council referred the matter to the Health Board under section 20 of the ALN Act requesting it to consider if there was a treatment or service that may be of benefit to Hari's ALN. The Health Board responded on 13 June 2025, in a response prepared by Ms Liz Fletcher and Ms Liz McKinney. Ms Fletcher has worked in the NHS for 49 years mainly in the fields of acute and community nursing of children and their families including delivery of services for universal and complex care. She is now the Associate Director of Child and Adolescent Heath at Ysbyty Gwynedd. She first became involved with Hari and his family in June 2020, when she was involved in discussions about the proposed package of care needed for Hari to be cared for at home; and has been more actively involved in his care from April 2022. Ms McKinney is the Designated Education Clinical Lead Officer.

45. As summarised by Ms Fletcher (28 August 2025 Statement, paragraphs 44-45), in the section 20 response, the Health Board said that "no relevant treatment or service from the complex care team had been identified to support Hari's [ALN]" because:

> "… the competent carer's role is one that supports Hari's health, safety and wellbeing at all times, including when he is at school, rather than a role or service that would amount to [ALP] as defined in section 3(1) of the [ALN Act]. It does not amount to 'educational or training provision' for Hari. While healthcare/nursing support delivered by one competent carer is essential for Hari at all times, this does not, in itself, make it [ALP] for the purposes of s 3(1)…".

46. The ETW gave directions dated 28 July 2025 (amended 6 August 2025) under section 76(1)(a) of the ALN Act (see paragraph 23 above) that the Health Board provide written evidence to the tribunal as to:

    (a) whether Hari requires a second carer at all times i.e. including when he is at school, who is medically trained so as to have the same qualifications as the 'competent carer';

(b) the qualifications of any such second carer;

(c) whether it would agree to secure a second carer while Hari is at school in accordance with sections 20 and 21 of the [ALN] Act."

It seems that no documents were provided to the Health Board in support of that request.

47. The Health Board responded in the form of a statement of Ms Fletcher dated 28 August 2025.

48. As no documents or evidence had been sent to the Health Board, Ms Fletcher said the Board did not know why Mrs Jones now considered a second competent carer should be provided, as the appropriateness of a single competent carer supported by a trache-aware second carer had not been challenged in the judicial review proceedings (paragraphs 10-12 of her statement). She asked that, if Mrs Jones sought to rely on any evidence supporting the need for two competent carers be shared with the Health Board before any hearing so that it could respond (paragraph 13); and, if the ETW Panel was invited to make a recommendation that the Health Board provide a second competent carer, the Board "request the opportunity to file further evidence and/or make submissions on that issue before the tribunal make its determination" (paragraph 53).

49. Otherwise, Ms Fletcher's evidence confirmed the position as set out in the various Care Plan reviews which she exhibited. As I have already indicated, Hari had been assessed as requiring 24-hour supervision by a competent carer by the clinical Multi-Disciplinary Teams ("MDTs") at both the Health Board and Alder Hey drawing upon their direct experience of caring for Hari at home and in hospital over an extended period (see, especially paragraphs 20-22 and 34). In addition, there was an assessed requirement for a second responsible adult who was required to be trache-aware but not a competent carer (paragraphs 23-25, 37-41 and 48-52); and: "During breaks, the competent carer will remain sufficiently proximate to Hari to be able to respond in the event of an emergency" (paragraph 35). She relied on the July 2024 Risk Assessment which confirmed the level of risk at home and at school, and how that risk could be appropriately managed by the provision of a competent carer and a second responsible adult who is trache-aware (paragraph 19 and Exhibit LF3). She confirmed that the Health Board would not agree to secure a second carer while Hari was at school because that was not a service that an NHS body would normally provide as part of the comprehensive health service in Wales (section 20(6) of the ALN Act, quoted above at paragraph 19) (paragraph 52). However, following the judicial review, it had been agreed that the Health

Board would fund the competent carer, and the second carer would be funded by the Council (paragraph 28).

The ETW Decision

50. The ETW Panel proceeded on the basis that:

> "There is a consensus that Hari must be supported at all times by two adults when attending school. Without this support Hari will be unable to access an educational setting, which defeats one of the intended outcomes identified in the IDP. It is clear to us that the provision of these two carers must be ALP." (paragraph 46 of the ETW Decision).

That is a finding that is challenged by the Council in Ground 1 of the appeal.

51. In respect of the issue of supervision at school, the ETW Panel set out the position as follows:

> "53. It is agreed that the carer who is identified as 'the competent carer' must be fully trained and able to look after Hari's tracheostomy and be able to start [CPR] (if necessary). This person must be sufficiently proximate to Hari at all times to respond promptly in the case of emergency. This detail is to be incorporated in Sections 2B and 2C of the IDP. The competent carer is provided by the Health Board.
>
> 54. The LA agrees to provide a second carer in accordance with the assessment of the Health Board, namely that this second carer should be tracheostomy aware, but will not be required to provide any direct or emergency care. In the event of an emergency occurring when the competent carer is not immediately present then the second carer should call for help…".

52. Whilst the Headteacher said that the school had no level of expertise in terms of the health issues involved and no formal health risk assessment had as yet been completed, the school would follow the recommendations of the Health Board. However, he (the Headteacher) said that, in the event of an emergency, the school would ring for an ambulance; and that the nearest hospital was 15-20 minutes away (paragraph 60).

53. The ETW Panel continued:

> "61. In the event of an emergency occurring at school then the competent carer should be able to address matters with the assistance of the second carer. However, what is of concern for us is what happens in the event of an emergency occurring if the competent carer, for whatever reason, is not 'sufficiently proximate' to deal with that emergency. An untrained second carer will not be able to directly assist Hari and will have to call for help. This may be to telephone for an ambulance. However, given the very narrow wi[n]dow that exists for Hari to manage without his ventilator then an ambulance may not arrive in time.
>
> 62. The assessment of the Health Board is that Hari must be constantly supervised by a trained carer. If, however, the competent carer is not present then Hari is not under the supervision of a competent carer. It seems to us that the assessments are predicated on the basis that a competent carer will always be present. In that case there is no reason why a [trache-]aware second carer would not be sufficient. If however, the competent carer were to become unwell or pass out and an emergency occurred, then Hari would not be properly supervised, and the second carer would be alone and unable to assist.
>
> 63. Judging from the evidence it seems highly likely that Hari would become agitated in the event of an emergency, making it even more important, in the absence of his mother, for issues to be addressed immediately.
>
> 64. In all the circumstances, we cannot at present be satisfied that the proposed arrangements, for Hari to attend school with one competent carer and an untrained second carer, are such that Hari will be safe and secure in school. In our judgement for Hari to be able to safely attend school he requires two component [sic] carers. Hari is very aware of his situation and in order for him to thrive at school then he must be confident and reassured that, in the absence of his mother, his carers will be able to provide for him."

It is essentially this analysis which is challenged by the Council in Ground 2 of the appeal.

54. The ETW Panel therefore concluded that "providing two [competent] carers to enable Hari to attend school is an ALP…" (paragraph 66).

55. The ETW Panel consequently allowed the appeal and directed that:

(i) The following be included in Section 2B.2 of the IDP: “Hari shall be supported at school at all times by two suitably qualified and trained carers” (paragraph 66 and paragraph 3 of the Order). This is based on the premise that the Health Board would agree to provide one competent carer, but not two.

(ii) Section 2B.4 shall identify that one of the carers will be provided by the Health Board and one by the Council (paragraph 66 and paragraph 4 of the Order). This is based on the same premise.

(iii) If the recommendation of the tribunal be accepted by the Health Board, then Section 2C.4 be amended to indicate that one competent carer shall be provided by the Health Board (paragraph 5 of the Order).

(iv) The Health Board be requested under section 76(1)(b) of the ALN Act to:

(a) reassess its position regarding the funding of the second carer at school;

(b) to reassess the qualifications and training of the second carer to support Hari at school; and

(c) to explore and devise a training plan to upskill the second carer to become a competent carer using some of the funding the Council has agreed to commit to providing a second carer (paragraphs 65-66).

56. In essence, this order in substance required the Council to provide two competent carers to supervise Hari whilst at school. The Health Board had agreed to provide one. The ETW Decision obliged the Council to secure provision of the second competent carer unless, in response to the recommendation of the ETW Panel, the Health Board agreed to provide both competent carers.

<u>The Health Board’s Response</u>

57. Ms McKinney on behalf of the Health Board responded to the section 76(1)(b) request on 13 November 2025, a response that was accompanied by a letter dated 27 October 2025 from Ms Elaine O’Brien, a Nurse Consultant in Sleep and Long-Term Ventilation at Alder Hey.

58. The response is comprehensive and lengthy. In summary:

(i) It says that the Health Board has still not been provided with the evidence upon which the ETW Panel made their determination except they have been provided with (a) Ms Stokes's March 2024 Report and (b) the ETW Decision itself which summarises the evidence upon which it has relied (paragraphs 25-27).

(ii) Some of the matters raised by Hari's parents, as recorded in the ETW Decision, were said to be either inaccurate or required explanation. In particular, the Health Board said that Hari's health had been stable since the insertion of the tracheostomy in 2019; and the Health Board was unaware of any occasions when Hari has required resuscitation by Mrs Jones or anyone else since then. There are no records of any ambulance call outs, requests for urgent medical assistance or hospital admission that would inevitably follow a significant incident such a resuscitation or CPR to Hari (paragraphs 28-32).

(iii) In response to the request from the ETW Panel, the clinical recommendations as to the level of supervision at school (i.e. one competent carer supported by a second responsible adult who is trache-aware) had been fully reviewed. There had been no material change to Hari's needs or care requirements (paragraphs 43-44), or level of risk (paragraph 45) although that would be kept under review (paragraph 46). The Health Board remained of the view that the appropriate level of supervision at school is a competent carer with the support of a second responsible adult who is trache-aware (paragraphs 60-61). That was a clinical decision made by appropriately qualified and experienced practitioners who had been involved with caring for Hari over a prolonged period (paragraph 61), and was a clinical opinion shared by Alder Hey (paragraphs 49-50). None of this was new: it reflected the consistent Care Plans originating from the Health Board from time-to-time.

(iv) The response reiterates that the competent person is paid for breaks, and "will remain in close proximity to Hari during break periods" (paragraphs 54-55).

(v) The response specifically deals with the concern expressed by the ETW Panel of the competent person suddenly becoming incapacitated (paragraph 51). The letter from Nurse O'Brien says:

> "I am aware that there is a concern around what if a carer becomes suddenly unwell. This should be risk assessed and managed through an occupational health stance.

Generally, the chances of a young person's carer becoming rapidly unwell would be rare and that a young person with good stability would also become unwell and need immediate support at that same moment, would be extremely unlikely. We would advise that within the risk assessment there would be control measures placed and a plan in the very rare event that this should occur."

(vi) Whilst it is not apparent what weight, if any, the ETW Panel gave to the evidence of Ms Stokes, it was said that it was not clear why, in relation to the supervision requirements at school, the ETW Panel preferred the evidence of Ms Stokes (an occupational therapist and case manager) based on a home visit in December 2023, over the specialist Multi-Disciplinary Teams ("MDTs") convened by the Health Board and Alder Hey that have specific expertise in the management of tracheostomies and long-term ventilation in children and have been involved with Hari continually since 2019 (paragraph 33-35).

(vii) It is part of the transition plan that the Health Board will meet school staff prior to Hari attending school to finalise an Individual Health Care Plan and school-based risk assessment (paragraphs 36-40). The situation in school will be kept under continual risk assessment (paragraph 48).

(viii) The Health Board responded to the particular requests made, as follows:

(a) The Health Board did not consider it should fund a second competent carer at school because Hari's assessed health needs do not require this to be funded in the context of NHS Continuing Care. The current clinical assessment was that Hari requires one competent carer supported by a second responsible adult who is trache-aware.

(b) and (c) The Health Board's position on the qualifications for the second carer had not changed, although it was willing to provide enhanced training for second carers to extend to (e.g.) suctioning which could be delegated to a non-regulated and non-health worker. That training could be provided to members of the school staff who may be the second carer from time-to-time.

<u>The Grounds of Appeal: Introduction</u>

59. The Council rely on two grounds of appeal.

60. First, Ms Broadfoot submitted that the ETW erred in law by holding that the provision of a “competent carer” amounted to ALP (Ground 1). In the alternative, second, she submitted that, in concluding that the second carer at school should be a competent carer – as opposed to a responsible adult who is trache-aware – the ETW Panel erred in law in the way in which they dealt with the “expert” evidence, i.e. the evidence from the Health Board and Alder Hey as to Hari’s needs when at school. They failed to have proper regard to this evidence and/or failed to give adequate reasons why they departed from the clinical recommendations in that evidence and/or failed to deal with that evidence fairly (Ground 2).

The Parties’ Submissions

61. In respect of Ground 1, Ms Broadfoot submitted that the ETW Panel erred in proceeding on the basis that any provision that is essential for a child to attend school is capable of being – and, indeed, is sufficient – to be ALP (paragraph 46 of the ETW Decision, quoted at paragraph 50 above). Whether the child would be unable to attend school without the provision is not determinative: for provision to be ALP under section 3 of the ALN Act, it must be “*educational* provision”.

62. She submitted that there is well-established, long-standing authority under both the 1996 Act (the predecessor of the ALN Act in Wales) and the Children and Families Act 2014 (“the CF Act”, the successor to the 1996 Act in England), which have materially similar concepts and wording to the ALN Act, that, just because provision is necessary for a child to attend school, that is not sufficient for the provision to be “educational”. In particular, it has been held under the 1996 Act that nursing care cannot, as a matter of law, be “educational provision” for these purposes (City of Bradford Metropolitan Council v A [1997] ELR 417 (“Bradford”)); and this case, it is submitted, is indistinguishable because a second competent carer would have to be a nurse or a specially trained health care support worker.

63. In any event, leaving authority aside, Ms Broadfoot submitted that the ETW Panel’s conclusion that Hari required two competent carers at school was contrary to the clear wording of the ALN Act which requires ALP to be, not simply “provision” but “*educational* provision”. The requirement is based on an assessment of Hari’s medical needs and applies equally in a non-educational setting. The second carer at school would have no educational role at all: their role would be to provide medical assistance notably in the case of an emergency if and when the first, competent carer was not available. As a matter of law, that function cannot be “educational provision” and, so, cannot be ALP. Equally, it was submitted, the first, competent carer would have no educational

role: they, too, had a role that was exclusively medical. As a matter of law, their function, too, could not be "educational provision" or ALP.

64. Mr Howells for Hari's parents submitted that the scheme set up by the ALN Act is self-contained, and the Welsh and English schemes adopt materially different legislative approaches to defining the scope of ALP/Special Educational Provision ("SEP"). The English scheme directly addresses the circumstances in which health or social care provision may be treated as educational provision, by reference to whether the provision educates: whilst section 21 of the CF Act expressly distinguishes educational provision from health care and social care provision, section 21(5) requires health or social care provision which educates to be treated as SEP. That mechanism is not replicated in section 3 of the ALN Act, which does not impose the express requirement that heath or social care provision must be characterised by reference to whether it educates before it can be treated as falling within the scope of "educational provision". It simply focuses on whether the provision is required to enable a child to access educational facilities when compared with the educational provision that is made generally. Accordingly, Mr Howells submits, the English authorities must be applied with caution, the proper approach being to construe the scheme enacted by the National Assembly rather than importing assumptions derived from the English legislation.

65. He submitted that the ETW Panel were correct to hold that, under the ALN Act, if a provision is necessary to facilitate a child accessing educational facilities which, because of a disability, they could not otherwise access, then its purpose is educational and it is "educational provision". It is uncontroversial that Hari cannot access educational facilities at the school without two carers; and the ETW Panel found he could not do so without two competent carers. Whilst it was for the Health Board to make clinical decisions in relation to Hari, the Board had made the clinical decision that Hari required a competent carer to be available at all times. The ETW Decision did not undermine that clinical opinion, but the ETW Panel found that the only safe way of that clinical decision being implemented in practice at the school was for there to be two competent carers at all times rather than just one competent carer and a support carer. That was a determination well within both the jurisdiction and competence of the ETW Panel whose task was to ensure that appropriate provision was made to ensure that, generally, a child could access educational facilities and, specifically, that Hari would achieve the intended outcome identified in his IDP of "I will attend educational setting" (see paragraph 38 above).

Discussion and Conclusion

66. As Ms Broadfoot said, there is substantial jurisprudence from the 1996 Act and the CF Act on what, in those contexts, is meant by "educational provision". The most relevant for our purposes is the 1996 Act because, although the creature of a different Parliament (the UK Parliament rather than the Parliament in Wales in the form of the National Assembly or the Senedd), it is the direct predecessor of the ALN Act.

67. Whilst the terminology is different, the Explanatory Notes to the ALN Act, although of course carrying no authority, are correct in saying that the definition of "additional learning needs" in section 2 of the ALN Act "is very similar to the definition of 'special educational needs' under [section 312(1) of] the 1996 Act".

68. Section 312(1) of the 1996 Act provided:

> "A child has 'special educational needs' for the purposes of this Act if he has learning difficulty which calls for special educational provision to be made for him"

This replicated its predecessor, section 156(1) of the Education Act 1993 ("the 1993 Act"). That definition is informed by section 312(2)(b) of the 1996 Act (which replicated section 156(2)(b) of the 1993 Act) which, so far as relevant, provided:

> "…. [A] child has a 'learning difficulty' for the purposes of this Act if–
>
> …
>
> > (b) he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools within the area of the local education authority…".

By comparison, section 2(1) of the ALN Act (quoted above: paragraph 12) states:

> "A person has additional learning needs if he or she has a learning difficulty or disability (whether the learning difficulty or disability arises from a medical condition or otherwise) which calls for additional learning provision".

Both the 1996 Act and the ALN Act thus define SEN/ALN in terms of a learning difficulty or disability which "calls for" SEP/ALP.

69. Paragraph 8 of Hari's parents' Response to the Grounds of Appeal suggests that there is a divergence between section 2(2)(b) of the ALN Act and its equivalent in the CF Act (section 20(2)(b)), because the ALN Act formulation expressly centres on practical educational participation and access, rather than solely upon learning difficulties, which (it is submitted) informs the proper construction of the scope of ALN. However, there is no force in this submission. Section 2(2)(b) of the ALN Act is set out above (paragraph 13). Section 20(2)(b) of the CF Act provides:

> "… A child of compulsory school age or a young person has a learning difficulty or disability if he or she… has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions…".

There is simply no material difference between these provisions (or, indeed, between them and the equivalent in the 1996 Act (section 312(2)(b)): they use substantively similar wording to reflect similar concepts and legislative architecture.

70. Similarly, in the Explanatory Notes, it is correctly said that the definition of "additional learning provision" in section 3 of the ALN Act "is very similar to the definition of 'special educational provision' found in [section 312(4) of] the 1996 Act".

71. Section 312(4) of the 1996 Act (replicating section 156(4) of the 1993 Act) provided, so far as relevant:

> "In this Act, 'special educational provision' means –
>
> > (a) in relation to a child who has attained the age of two, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local education authority (other than special schools)…";

whilst section 3(1) of the ALN Act (again, quoted above: paragraph 13) provides:

> "'Additional learning provision' for a person aged three or over means educational or training provision that is additional to, or different from, that made generally for others of the same age in –
>
> (a) mainstream maintained schools in Wales …".

Both the 1996 Act and the ALN Act thus define SEP/ALP in terms of educational provision that is additional to, or different from, that made generally for others of the same age in mainstream schools.

72. With that legislative background, I turn to the relevant authorities relating to the meaning and scope of "educational provision" in the 1996 Act.

73. The issue in Bradford was whether the relevant tribunal (the Special Educational Needs Tribunal) had erred by identifying nursing care required for a child at school as "educational provision" which the local education authority had a duty to provide (under section 168(5)(a)(i) of the 1993 Act, which became section 324(5)(a)(i) of the 1996 Act), rather than "non-educational provision" in relation to which, under the 1993 and 1996 Acts, it had only the power (but no obligation) to arrange (under section 168(5)(a)(i) of 1993 Act, which became section 324(5)(a)(i) of the 1996 Act) (page 420C-D). The issue was, on the face of it, similar to the issue in this appeal because, in Bradford, nursing supervision was required because the child had a tendency to fit (up to several times a day) and she risked injuring herself when she did so. That required constant supervision by a nurse, including at school (page 423E).

74. In considering that issue, Brooke J referred to two previous authorities under the same (or, as I have described, a materially identical predecessor) statutory provisions.

75. First, in R v Lancashire County Council ex parte M [1989] FLR 276 ("Lancashire") in the context of a child who suffered from a congenital speech deformity, the issue was whether speech therapy could, as a matter of law, constitute "educational provision". The Court of Appeal directed itself to the Shorter Oxford English Dictionary definition of "education" ("the systematic instruction, schooling or training given to the young... in preparation for the work of life… the whole course of scholastic instruction...") and "educational" ("pertaining to education"). It was held that, by that yardstick, the provision of speech therapy was capable of being "educational provision"; but whether it was in fact such would be dependent upon the circumstances of the particular case. Teaching a child to communicate by speech is not different from teaching that child to communicate by writing, and so was "educational"; but speech therapy might be required for a non-educational purpose,

e.g. in an adult who may have lost their larynx was a result of cancer in which the therapy would be therapeutic rather than educational.

76. The second case (R v London Borough of Lambeth ex parte MBM [1995] ELR 374) arose in very different circumstances. The child in question had congenital muscular weakness which meant that she took 20 minutes to get from one floor of the school to another because there was no lift and so she was, for practical purposes, denied access to the science room and library. The issue was whether the education authority acted unlawfully by not including the provision of a lift as "educational provision" for the child. Owen J held that it did not: insofar as a lift was necessary for the child, it was necessary to assist her mobility and was not educational provision.

77. In the Bradford case, as recorded by Brooke J (page 428D-E), it was argued for the child, much as Mr Howells argued in this appeal:

> "It is said that A has a learning difficulty by virtue of having significant difficulty in learning, more so than the majority of children of her age, and that this gives rise to special educational needs which require specialist input. In addition to this she has [SEN] arising from her physical disabilities which either prevent or hinder her from taking advantage of the educational facilities which are to be provided for her…
>
> Mr Nadim [Counsel for the child] submits that on the proper approach to section 156 of the [1993] Act there should be an onus on the local education authority to make [SEP] in the form of equipment, support or supervision designed to overcome or diminish the effect of her disability so that the child may make use of the educational facilities provided by the [education authority]."

78. However, having considered the authorities, Brooke J held that there was a distinction between "special educational provision" which must by definition be educational, and "non-educational needs" which are "the needs of the child for which the authority consider that provision is appropriate if a child is to properly benefit from the special education provision" (page 428H). He held that "nursing care falls fairly and squarely into the latter category". In his judgment, it "is not 'educational provision', according to the meaning of the words as approved by the Court of Appeal, but 'non-educational provision': provision which is appropriate if a child is to benefit properly from the special education provision".

79. Whilst those cases concerned the issue of whether certain provision was capable of being "educational provision" as a matter of law, the Court of Appeal in Bromley London Borough Council v Special Educational

Needs Tribunal [1999] All ER 587 held, and particularly emphasised, that there was no sharp dichotomy between special educational provision and non-educational provision; and, between the unequivocally educational and the unequivocally non-educational, there is "a shared territory of provision which can be intelligibly allocated to either" and which calls for a "case-by-case judgment" (page 596A-D). Where particular provision falls is "a question primarily for the local authority and secondarily for the tribunal's expert judgment" (page 596F-G). So, whilst the Court recognised that particular provision might be "unequivocally educational", or unequivocally not, in many cases, it held that whether provision is educational will require an assessment on the facts of the particular case with which an appeal court/tribunal will only interfere if the decision-maker (i.e. the local authority or, in its stead, the relevant tribunal) has erred in law.

80. Ms Broadfoot also relied on authorities under the 1996 Act's successor in England, i.e. the CF Act, which confirm that Bradford remains good law under that new scheme (see, e.g., Devon County Council v OH [2016] UKUT 292 (AAC) at [33], and East Sussex County Council v KS [2017] UKUT 273 (AAC) at [48] and [89]) because the "building blocks" of the 1996 Act scheme and the CF Act scheme have common features such that the legislative intent was for "continuity of approach" except where the CF Act provides a specific reason to conclude otherwise. However, given that the ALN Act scheme has been enacted by a different legislative body and the policy drivers in England and Wales may now be different (see in that context, e.g., Cardiff Council v X [2025] UKUT 68 (AAC)), I do not consider the authorities under the CF Act can be of any real assistance with regard to the construction of section 3 of the ALN Act and, in particular, the legislative intent of the National Assembly with regard to the scope of "educational provision" as that term is used in that section.

81. Having set the scene, I now turn to Ground 1, namely the Council's submission that the ETW Panel erred in law in holding that the provision of the two carers required for Hari's attendance at school is ALP.

82. I have concluded that the Panel did err in that respect, for the following reasons.

83. In construing the legislative intention, the starting point must be the words used by the legislature in the relevant provisions. In section 3(1) of the ALN Act, ALP is defined in terms, not simply of any "provision", but of "*educational*… provision": to be ALP, provision must be "*educational* provision", and provision that is not "*educational*… provision" cannot be ALP. There must be a presumption that the legislature used the adjective "educational" with the intention that it is given some meaning and is not otiose. The word is not defined in the

ALN Act; and there is nothing in the Act to suggest that the word is used as a term of art, or that it should be given anything other than its ordinary meaning. Whilst the dictionary definition used in Lancashire may now be regarded as somewhat rigid, there is no doubt that "education" must be defined in terms of the act or process of acquiring knowledge.

84. Whilst some of the terms used are different (ALN instead of SEN, and ALP instead of SEP), the substantive wording of the respective provisions is materially the same in the 1996 Act and the ALN Act. The term "educational provision" in section 3(1) of the ALN Act replicates the term used in its predecessor statute, in a scheme which has the same architecture and appears to adopt the relevant concepts of that earlier Act in essentially similar wording.

85. As was said by Lord Lloyd of Berwick in Lowsley v Forbes (trading as LE Design Services) [1999] 1 AC 329 at page 340F-G:

> "It has long been a rule of construction that when Parliament uses a word or term, the meaning of which has been the subject of judicial ruling in the same or similar context, then it may be presumed that the word or term was intended to bear the same meaning…".

As Ms Broadfoot submitted in relation to context, the building blocks that are common to the 1996 Act and the ALN Act include: the definitions of ALN/SEN, the definitions of ALP/SEP, the definitions of learning difficulty and that, under each Act, the driver for making a plan is the need for ALP/SEP to be determined in the lights of a needs assessment.

86. As I have indicated, Mr Howells emphasised the differences between the current Welsh and English schemes, i.e. the provisions relating to the relationship between health and social care provision on the one hand, and educational provision on the other, in the ALN Act and the CF Act (see paragraph 64 above). I am not convinced that the express provision in section 21(5) of the CF Act (that if, and only if, it "educates", health or social care provision must be treated as "educational provision") can greatly assist in construing section 3 of the ALN which has no such express provision and was enacted by a different legislature without any evidence that it had in mind the provisions of the CF Act. In determining the intention of the National Assembly in enacting section 3, the more pertinent question is whether, in using the phrase "educational provision", the National Assembly intended to use that phrase in the same or a different sense from the use of that same phrase in the immediately preceding provisions in Part 4 of the 1996 Act.

87. I accept there are differences between the 1996 Act scheme and the ALN Act scheme, notably section 324 of the 1996 Act (replicating section 168 of the 1993 Act: see paragraph 73 above) which not only imposed an obligation on the appropriate education authority to arrange special educational provision identified as being required but also gave it a power to arrange for any *non-educational* provision identified in the Statement of SEN in such manner as it considers appropriate. That power does not appear in the ALN Act. But I do not consider that difference to be material to the question of the scope of "educational provision" (as opposed to the very different question of how provision which falls outside that scope is dealt with).

88. Mr Howells further submitted that:

(i) If "educational provision" is construed as being less in scope than all provision required by a child as result of a disability to enable that child to access educational facilities, then "no public body bears responsibility for provision which the specialist tribunal has found to be necessary for Hari to access school safely" (paragraph 28 of the Skeleton Argument, reflecting paragraph 40 of the Response to the Appeal). As recognised in Y Council v X at [42]-[43], he submitted, the ALN scheme does not permit such a lacuna.

(ii) As the ALN Act is a self-contained code, the prohibition on social service departments providing health care contained in section 47 of the SSW Act (see paragraph 11 above), which expressly applies only to meeting needs under that Act, has no application.

89. However:

(i) It is not true to say that, absent an obligation under the ALN Act, no public body is responsible for health and social care provision that is necessary for a child such as Hari to attend school and attend school with reasonable safety. As I have described (paragraphs 5-11 above), LHBs and local authorities have general statutory duties in respect of health care and social care respectively under the NHS Act and SSW Act, irrespective of any duties they may have under the ALN Act. Under the Health Board's obligations arising from the NHS Act, the MDTs at Gwynedd Hospital and Alder Hey have determined that Hari requires supervision at all times and in all circumstances, at home and school, in the form of a competent carer and a second responsible adult who is trache-aware; and the Health Board and the Council have accepted their respective obligations under the NHS Act and SSW Act to provide that supervision. Y Council v X does not assist Mr Howells in this regard: that case merely

confirmed that the ALN Act scheme ensured that provision properly falling within the scope of ALP (not any provision required to enable a child to attend school) is met by either the relevant local authority or NHS body.

(ii) Whilst it is true that the section 47 prohibition only directly applies to meeting needs under the SSW Act, there is nothing in the ALN Act to suggest that the legislature intended to impose the burden of swathes of health care provision upon local authorities in a school context in circumstances in which section 47 reflects a policy of health care provision generally being met by health care providers such as LHBs.

90. Therefore, I do not consider there is anything to undermine the presumption that, in enacting the relevant provisions of the ALN Act, the National Assembly intended that "educational provision" was to bear the same meaning as in the 1996 Act, its immediate predecessor, and intended continuity of approach in respect of the scope of ALP. In my view, in this context, in passing the relevant provisions, if the National Assembly had intended to depart from how that term had been construed under the 1996 Act, it is inconceivable that it would not have made that clear. Instead, by using materially the same wording, the National Assembly made clear that it intended the phrase to be construed in the same way as it had been interpreted under the 1996 Act.

91. How do those authorities under the 1996 Act assist in this case?

92. As I have described, the authorities under the 1996 Act are now quite old, and do not always speak with an entirely consistent voice. As Judge Jacobs said of these cases in R & RK v Hertfordshire County Council [2025] UKUT 381 (AAC) at [23]: "Even a nodding familiarity with some of the cases that deal with classification of provision is sufficient to show that it is not always straightforward".

93. However:

(i) The authorities are clear that provision of health care can be educational provision (see Lancashire, in which the provision of speech therapy was held to be educational provision).

(ii) Nevertheless, they are equally clear and consistent in holding that (a) the mere fact that provision is essential for a child to attend school is not sufficient to make that provision educational, and (b) not all health care provided to a child is educational, even if it is

essential to enable the child to take advantage of educational facilities at school and/or provided at school premises. Those authorities, if not precedentially binding, are so persuasive as to be all but binding. But, in any event, they are, in my view, clearly correct. In terms of provision necessary to enable a child to attend school or access educational facilities, there is no material difference between health care in the form of a device (such as a tracheostomy or a ventilator) and health care in the form of nursing/specialist support, either or both of which may be essential to enable a child to attend school or access educational facilities. In the case on appeal, in all circumstances and wherever he is (including at school), Hari requires health care in the form of supervision by a competent carer supported by a second responsible adult who is trache-aware, just as he requires health care support in the form of a tracheostomy and ventilator. They have both been clinically assessed as necessary in respect of Hari's medical/health needs. They both have a therapeutic function. Neither has any educational role at all.

(iii) Bradford suggests that there may be types of health care (such as nursing) which, as a matter of law, can never in any circumstances be "educational". Ms Broadfoot referred to such provision as "pure health care". She submitted that that is what was held in Bradford; and the care provided by a competent carer is indistinguishable from nursing care, provided as it is by nurses or specialist health care workers. I agree. It was common ground between the parties that that would dispose of this appeal – by requiring it to be allowed, and the references to competent carers removed from the IDP.

(iv) However, whilst Bromley appears to recognise that there are circumstances in which provision might be "unequivocally education", that case makes clear that, usually if not always, whether health care provision is "educational provision" will depend upon a fact-specific assessment. The speech therapy cases are an example. Speech therapy is health care provision and, whether it falls within the scope of educational provision, will depend on the circumstances of the particular case. The cases suggest that speech therapy in a school setting is likely to do so. Whilst I accept that other types of health care provision may be less likely to do so – and for, say, nursing or other specialist medical care that is required to the same extent whether the child is at school or not, it may be simple and straightforward to determine that this is entirely therapeutic, and not educational, provision – it seems to me that the determination of whether any health care or social care provision falls within the scope of educational provision will usually require some consideration of the circumstances of the particular case.

(v) Of course, that does not mean that the decision-maker (whether the local authority or the ETW in its stead) has a free-rein. In making an assessment, they must act lawfully. They must (e.g.) take into account all material factors and not take into account any factors that are immaterial; and, wide as their margin of appreciation may be, it is not boundless and they must remain within it.

94. For those reasons, in case it is wrong to interpret Bradford as meaning that the provision of a competent carer can never be educational provision, I have considered Ground 2, i.e. if the decision as to whether heath care is educational provision is always fact specific, I have considered whether the ETW Panel's approach to the evidence in this matter was appropriate.

95. Unfortunately, I have concluded that the ETW Panel erred in law in the approach that they took to the evidence in this case.

96. Most fundamentally, they erred in proceeding on the basis that any provision that a child, as a result of a learning difficulty or disability as defined in section 2 of the ALN Act, requires to be able to access an educational setting is "educational provision" – as they did proceed (see paragraph 46 of the ETW Decision, quoted at paragraph 50 above). That is wrong as a matter of law.

97. However, whilst I have considerable sympathy with the ETW Panel, who had to consider this challenging case without the benefit of any authority on the relevant provisions of the ALN Act itself, I consider that, in analysing whether the competent carer(s) exercised an educational function in Hari's case, the Panel also erred in law in their approach to the expert evidence of the Health Board and Alder Hey. This involves matters which have been raised by the Council in relation to Ground 2 and, in particular, whether the ETW Panel's approach to the expert evidence was lawful; and, if it was not, the consequences of that.

98. This analysis required the ETW Panel to assess whether the health care provision in Hari's case was "educational provision" when he was at school. As described above (paragraph 68), Ms Shepherd submitted that this is exactly what the Panel did. He denied that the ETW Panel rejected or ignored the expert clinical evidence. On the contrary, he said that the Panel accepted the Health Board's assessment that Hari must at all times be directly supervised by a competent carer capable of responding immediately to a life-threatening emergency. The issue with which the Panel was concerned was different, namely how that requirement could be realistically and safely delivered within the school environment. The Panel determined that that clinical requirement could

only be delivered at the school by the attendance of two competent carers.

99. In this context, I consider there were a number of red herrings, notably:

    (i) There is the faint suggestion in the ETW Decision (and, certainly, in Ms Shepherd's submissions) that, if there were only one competent carer, their breaks to use the toilet facilities or to have food may take them away from the proximity of Hari so they could not respond promptly to an emergency. However, any such suggestion has no evidential foundation: the competent carer is required to stay proximate to Hari even when taking a break, precisely to enable them to respond promptly to an emergency; and, in any event, any risks resulting in (e.g.) the distance from toilet facilities would be picked up (and appropriately and safely managed) through the risk assessment at the school, with Health Board input, which, it is uncontroversial, will need to take place before Hari starts at the school.

    (ii) There was a discussion at the hearing about how long it would take for an ambulance to be called and to arrive at the school, i.e. something in the region of 20 minutes at least. That too was a red herring. References in the Care Plan etc to the second carer "calling for help" is a reference to them calling for help from the (proximate) competent carer, not from someone else such as the Ambulance Service. Clearly, an ambulance would not arrive in time to prevent all life-threatening emergencies: but the Care Plan etc did not suppose that it would. It has never been suggested that the risk posed by an urgent medical emergency with Hari's tracheostomy or ventilator would be managed by a call for an ambulance.

    (iii) The Panel referred to a communication between Dr Chris Grime (Consultant in Paediatric Respiratory Medicine, Sleep and Long-Term ventilation at Alder Hey) to Mrs Jones dated 9 July 2024, in which he said that, during a routine review of Hari's tracheostomy, "Hari tolerated [the removal of the tracheostomy] for up to 2 mins with signs of no respiratory distress"; which was changed, following a challenge to those timings by Mrs Jones (who said the tracheotomy was removed for only 5-6 seconds) to the tracheotomy having been removed for "less than a minute" during the procedure. That, the Panel concluded, cast some doubt on the statement of the Health Board that Hari "has some tolerance of his tracheostomy being removed for several minutes with no respiratory distress". However, (a) as the Panel recited, Dr Grime considered that Hari's respiration could have tolerated the removal of the tracheostomy for longer, although Hari's "own anxiety led

him to asking for it to be replaced"; (b) in coming to the conclusion that Hari required one competent carer at all times, the MDTs at both the Health Board and Alder Hey clearly had well in mind the Hari's respiratory tolerance to (e.g.) the tracheostomy being removed or not working; and (c) the MDTs came to the conclusion that, in their clinical opinion, having one competent carer and a second carer who was trache-aware was sufficient to address the risk involved in a tracheostomy/ventilator emergency.

100. The reason why the ETW Panel concluded that two competent carers were required appears from paragraphs 61-62 of the ETW Decision (quoted at paragraph 53 above). The concern of the Panel was that, if the competent carer at school became incapacitated at the same time as a medical emergency occurred with Hari, then Hari would be at risk. That risk was unacceptable, and could only be addressed in a school setting by having a second competent carer present at all times.

101. However, given the expert evidence from the Health Board and Alder Hey available to the ETW Panel, there are a number of flaws with that analysis.

102. Although the ETW Panel suggest that Hari had issues with his care (e.g. at paragraph 56 of the ETW Decision, the Panel refer to issues on the morning of the hearing which prevented Mrs Jones attending the hearing; and, at paragraph 59, they refer to anecdotal evidence from Hari's parents that an agency nurse had recently reset the ventilator battery, instead of replacing it), there was no evidence before the ETW Panel upon which they could have concluded that Hari's condition was not stable. It has been stable since 2019, and there was/is no evidence of any significant instability (e.g. a medical emergency requiring hospital admission) since then.

103. Further, as I have described, under each of the Care Plans, any competent carer is required to remain proximate to Hari, even during breaks, so that they can be called upon (by the second carer) in the event of any emergency. Any risk that the competent carer might fall indisposed is a risk, not simply at school, but at home too. The ETW Panel were wrong to proceed on the basis that this was uniquely a risk at school. On the evidence before the ETW Panel, the risk of the circumstances occurring when both the competent carer became indisposed at the same time as Hari suffered a medical emergency was clearly both very unlikely indeed and one that pertained at all times and in all circumstances in which there was one competent carer and a second carer who was only trache-aware. It was a risk that the Health Board have no doubt assessed when Hari is at home. The Board would have to assess it in the context of a risk assessment at the school, which has not yet been undertaken. Alder Hey have, since the ETW Panel

hearing, confirmed that that risk assessment will be undertaken and kept under review (see paragraph 58(iii) above) as it properly should; but it was clear from the evidence before the ETW Panel (notably the expert evidence of the Health Board and Alder Hey) that this was so. On the evidence before the ETW Panel, there was no basis for considering that that risk will not be appropriately identified and managed in the school context; and there is no such basis now.

104. I do not consider that there is any force in Ms Broadfoot's submission that the ETW Panel acted with procedural unfairness in not seeking further evidence from the Health Board and/or Alder Hey before accepting the submission that the risk posed of the competent carer being incapacitated at school at the same time as Hari was having a medical emergency was could only be met by having a second competent carer at the school at all times – because the Health Board and Alder Hey were not parties to the appeal and their legal interests were not affected by that decision.

105. However, the more fundamental point is that the Panel were required to take into account the evidence that had been submitted by the Health Board. Ms Broadfoot submitted, as part of Ground 2, that the Panel failed to consider that evidence. Regrettably, I agree. This is not simply a matter of weight given to different evidence, which is quintessentially a matter for the ETW. There is simply no reference in the ETW Decision to the consistent assessments by the Health Board and Alder Hey, over several years, that the risk posed to Hari, at home or at school, could be managed by a single competent carer and a second responsible adult who is trache-aware. There is no acknowledgement that that was a clinical assessment made by the MDTs at the Health Board and at Alder Hey. There is no reference to the risk assessment that was going to be made at the school to identify and manage the risk of the competent carer being indisposed at school. There is no consideration as to why the Panel considered that assessment might be flawed: there is no evidential foundation for considering that it would be.

106. I reject Ms Shepherd's submission that the only clinical decision made by the Health Board and Alder Hey was that a competent carer was required at all times. It was the consistent assessment of the MDTs at both the Health Board and Alder Hey that the risk to Hari could and should be managed in a school setting, as it is managed at home, by a single competent carer with appropriate support. That was a clinical assessment. Even if Ms Stokes gave oral evidence that she considered the risk could only be managed by having two competent carers at school (as she appears to have given), the Panel do not record any analysis she gave which led her to that conclusion in the face of consistent evidence from the Health Board and Alder Hey clinicians; and the Panel themselves put forward no coherent analysis as to why that should be so.

107. Contrary to Ms Broadfoot's submission, this is not a reasons case: no reasons could be given because the conclusion that two competent carers are required at school was unsupportable on the evidence. Despite his best efforts, Ms Shepherd was unable to provide any compelling analysis to support that conclusion.

108. Therefore, whilst often such matters would be referred back to the ETW for redetermination, even if I was not with the Council on Ground 1, I would not consider that to be necessary. Even if, contrary to Bradford, the provision of a competent carer may, in some circumstances, amount to educational provision, I consider that, in the circumstances of this case and on the evidence available to the ETW Panel, it could not arguably be such here.

109. Consequently, even if I had not found for the Council on Ground 1, the Council would have succeeded on Ground 2.

Conclusion

110. For those reasons, I allow the appeal from the ETW Panel to this tribunal. I remake the decision of the ETW Panel by refusing the appeal to it insofar as it challenged the absence of the provision of a competent carer as ALP. The relevant passages (identified in paragraphs 3-5 of the ETW Order: see paragraphs 55(i)-(iii) above) should, as a consequence, be removed from Section 2 of the IDP.

111. At the hearing, I raised the issue of whether this Decision should be anonymised. Hari's parents made it clear that they wished the Decision to be open. The Council, whilst maintaining a neutral position on the issue, lodged helpful written submissions on the approach to be taken in the light of the fundamental principle of open justice, the need to protect children and the power under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to do so, and the guidance recently given by this tribunal in KTS v Governing Body of Milby Primary School [2026] UKUT 41 (AAC).

112. Whilst Hari's parents wish the Decision to be open, and no one seeks to have it anonymised, I am acutely aware that Hari is a particularly vulnerable child, and the parties' views on anonymity are not decisive: it is a matter for the tribunal as to what is necessary for the proper protection of the child.

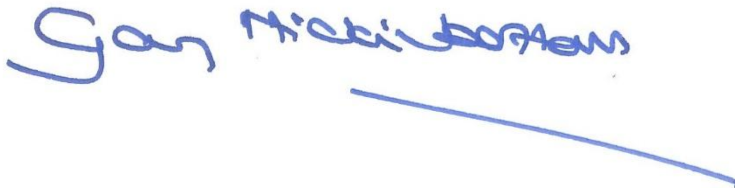
113. I have considered this matter particularly anxiously. Whilst their views are not determinative, I have no doubt that, at all times and in all circumstances, Hari's parents, from the most informed position, have

Hari's best interests in mind; and they clearly consider that anonymising this Decision is unnecessary for Hari's protection and welfare. In all the circumstances, I make no anonymity order.

Permission to Appeal

114. Following circulation of this Decision in draft, an application for permission to appeal to the Court of Appeal was made on behalf of Hari's parents.

115. I refuse that application. Whilst my view on the issue of construction raised in this appeal is firm, I accept that that issue is of some general importance. However, I have also found that the Council would have succeeded on Ground 2 in any event. The application for permission to appeal accepts that a challenge to my conclusion that the ETW did not have regard to the expert evidence of the Health Board and Alder Hey does not meet the second appeals test, which it clearly does not; nor, in my view, would a challenge to that finding stand any real prospect of success. Any further appeal would therefore be academic so far as Hari is concerned.



The Rt Hon Sir Gary Hickinbottom
President of Welsh Tribunals
Sitting as a Judge of the Upper Tribunal
Authorised for issue on 21 April 2026