



Neutral Citation Number: [2026] UKUT 376 (AAC)
Appeal No. UA-2026-000692-HSW

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

DENBIGHSHIRE COUNTY COUNCIL

Appellant

- v -

MR & MRS AB

Respondents

Before: Lady Poole and Sir Gary Hickinbottom
Hearing date: 22 September 2025
Mode of hearing: In person

Representation:

Appellant: Cat Jones of Counsel
Respondents: Parties in person

On appeal from

Tribunal: Education Tribunal for Wales
Tribunal Case No: A0135 0925
Tribunal Venue: Remote hearing
Decision Date: 2 February 2026

SUMMARY OF DECISION

An 11 year old child was in her last year of primary school. She had diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder. Her parents, the respondents, sought a determination of whether she had additional learning needs. Both her school and the local authority found she did not. A subsequent decision of the Education Tribunal for Wales, that she did have additional learning needs and that an individual learning plan should be prepared, was appealed to the Upper Tribunal.

The Upper Tribunal concludes that, notwithstanding the child's diagnoses, the Education Tribunal for Wales erred in law in its finding that she has additional learning needs within the meaning of sections 2 and 3 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018. In particular, the child's learning difficulty or

disability did not call for additional learning provision, and so she did not have additional learning needs. The Education Tribunal for Wales also erred in relying on its specialist expertise to make findings about the educational or training provision generally made in mainstream secondary schools.

The appeal is therefore allowed. However, the decision of the Education Tribunal for Wales is neither re-made nor set aside, in exercise of Upper Tribunal's powers under section 12 of the Tribunals, Courts and Enforcement Act 2007. It is in the child's best interests that any further decisions affecting her are made on the basis of her current circumstances. A review of her existing individual learning plan is planned for mid-October 2026. Taking account of the appeal rights available under section 70 of the 2018 Act in respect of any decision made on that imminent review, the appropriate course is for that review to proceed.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The appeal is allowed. The Education Tribunal for Wales erred on a point of law in its decision dated 16 February 2026. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, the decision is nevertheless not set aside, re-made or remitted for reconsideration.

REASONS FOR DECISION

Introduction

1. This case is about an 11 year old girl ("**C**"), and a decision of the Education Tribunal for Wales ("**ETW**") dated 16 February 2026 that C has Additional Learning Needs ("**ALN**"). Denbighshire County Council (the "**Council**") appeals that decision to the Upper Tribunal ("**UT**"). C's parents, the respondents, oppose the appeal.
2. At the time of the ETW's decision, C was in year 6 of a maintained mainstream primary school. She has diagnoses of autistic spectrum disorder ("**ASD**") and attention deficit hyperactivity disorder ("**ADHD**"). C's parents asked the school to consider whether she has ALN. By letter dated 11 October 2024, the school decided that she does not have ALN, after having regard to her academic attainment and process. On 18 July 2025, the Council confirmed that decision. The respondents appealed to the ETW.
3. The ETW accepted that C is academically able and achieving well at school without any support beyond that ordinarily expected from good teaching practice. However, it found that, because of "masking", C had to work harder to maintain her level of presentation and achievements at school. The ETW concluded that C has ALN, and requires Additional Learning Provision ("**ALP**") given those

needs. The ETW directed the Council to prepare an individual development plan (“IDP”).

4. The Council prepared an IDP in April 2026, and C moved successfully to a mainstream high school in the summer of 2026. However, the Council also appealed the decision of the ETW. The Council argues that the ETW failed properly to apply the legal tests in the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (the “**2018 Act**”), and reached a conclusion that was not properly open to it on the evidence. The Council further argues that the ETW failed to provide adequate reasons for the decision that C has ALN, and unjustifiably relied on a future position not tested in evidence. The respondents contend that the ETW made no error of law and was entitled to reach the decision it did. The UT is grateful to parties for their helpful submissions, both written and oral, all of which have been taken into account.

Governing law

5. The 2018 Act defines ALN and ALP. The definition of ALN is found in section 2 (emphasis added):

“(1) 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**.

(2) A child of compulsory school age or person over that 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 (c. 15) **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 or mainstream institutions in the further education sector”.

(3) A child under compulsory school age has a learning difficulty or disability if he or she is, or would be if no additional learning provision were made, likely to be within subsection (2) when of compulsory school age.

6. The definition of ALP is found in section 3 of the 2018 Act, which provides:

“(1) ‘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,

(b) mainstream institutions in the further education sector in Wales, or

(c) places in Wales at which nursery education is provided”.

7. The Additional Learning Needs Code for Wales 2021 (the “**Code**”) has been issued under section 4 of the 2018 Act. Various bodies (including local authorities

and the ETW) are under an obligation to have regard to relevant parts of the Code, in circumstances defined in sections 4(3) and 4(10) of the 2018 Act. Chapter 2 of the Code contains some commentary on the application of sections 2 and 3 of the 2018 Act. The guidance in the Code is not comprehensive (paragraph 1.14), and nor is it legislation; it is for the tribunals and courts to apply and interpret the statutory definitions in the 2018 Act in cases before them (*Nottinghamshire County Council v SF and GD* [2019] UKUT 243 (AAC)). Nevertheless, what is said in the Code may be of assistance.

8. The Code (paragraphs 2.6-2.11) suggests that two questions should be posed in order to decide if a person has ALN:
 1. Does the child or young person have a learning difficulty or disability?
 2. Does the learning difficulty or disability call for ALP?

However, if taken out of their statutory context, these questions oversimplify the provisions of the statutory scheme in two ways.

9. First, there are two different ways in which a learning difficulty or disability may be established under sections 2(2)(a) and (b) of the 2018 Act (set out above). Under the second limb (disability), having a disability in itself is insufficient to fall in scope: the disability must be one “which prevents or hinders him or her from making use of facilities for education or training of a kind generally provided for others...”.
10. Second, the relationship between ALN and ALP is more complicated than the sequential approach suggested by the Code implies, because, by section 1(1), a person only has ALN if he or she has a learning difficulty “which calls for [ALP]”. Effect must be given to those words. If an identified “need” does not “call for additional learning provision”, then it is not ALN. The definitions of ALN and ALP are consequently, if not circular, at least mutually dependent.
11. Section 3 is also relevant in this context. It defines ALP as provision that is additional to, or different from, that made generally available in mainstream schools. Mainstream schools educate a wide range of pupils. Some provision in mainstream schools may help those with learning difficulties or disabilities, but where that provision is generally available, it is not ALP and the statutory definition of ALN is not satisfied. The concept of additionality is central to the statutory scheme.

General comments

12. Local authorities are subject to a range of statutory duties. Their duties include but are not limited to those arising under the 2018 Act. It is primarily for the legislature, not courts and tribunals, to decide what duties it is appropriate to impose on local authorities. In making legislative choices about duties, the legislature must balance competing considerations, including the limits of available public resources.

13. The role of a tribunal is to apply the legislation enacted by the legislature. It must make findings of fact on the basis of evidence led before it, and apply the statutory provisions to those facts.
14. The ETW is a specialist tribunal, and under the overriding objective, should make effective use of its specialist expertise when dealing with cases (Educational Tribunal for Wales Regulations 2001 regulation 4(2)(d)). However, it remains under a duty to act with procedural fairness (*R (on the application of L) v Waltham Forest LBC* [2003] EWHC 2907 (Admin) ("**Waltham Forest**"). The ETW may use its specialist knowledge when evaluating evidence before it and drawing inferences from it. But it must have evidence on which to base its factual findings, and cannot rely on assumptions derived from its expertise without alerting the parties and giving them an opportunity to comment.

This case

The tribunal's use of its own experience

15. The issue before the ETW was whether C ha ALN. The ETW prefaced its conclusions by noting that it was common ground that C has diagnoses of ASD and ADHD. It then said (paragraph 29, emphasis added):

“The Tribunal are clear that such diagnosis or being considered disabled does not automatically mean that a child or young person has ALN **but it is our experience that it is rare that they do not**”.

16. That assumption does not derive from the 2018 Act or the Code; and we do not consider that the tribunal were correct in relying on their own experience in this way. First, even if it were to be true as a general proposition, it cannot assist in the necessarily fact-specific task of determining whether C has ALN. Second, there is nothing to suggest that the tribunal gave the parties an opportunity either to lodge evidence or make submissions in relation to that proposition.

Learning difficulty or disability

17. In the part of its decision seeking to apply section 2(2)(a) of the 2018 Act, the ETW found that, as a consequence of masking, C had to work harder to maintain her presentation and achievements (para 34). That resulted in a significantly greater difficulty in learning than the majority of others of the same age.
18. We consider that the evidence about masking must be approached with care. The ETW described masking as behaviour adopted at school to try to fit in, avoid negative reactions, or meet the expectations of those around them, which can be exhausting for some pupils (paragraph 34). However, mimicking behaviour to fit in and meet expectations at school, emotional outbursts and tantrums at home, and reliance on parental support, are types of behaviour which may be exhibited by many children. They do not, of themselves, show that a child has significantly greater difficulty in learning than the majority of others the same age. Further, it is not necessarily the case that all children with ASD mask in school. There must

be evidence with regard to the particular child before the test in section 2(2)(a) is met.

19. However, in this case, we are satisfied that the ETW was entitled to find that the test in section 2(2)(a) of the 2018 Act was met. The ETW made factual findings not only that C experienced emotional outbursts and required support from her parents at home, but also that C suffered from anxiety manifesting itself in stomach aches and vomiting on numerous occasions (paragraph 17). Those findings were based on evidence from C's parents, and were supported by correspondence involving two different medical professionals. The inference of masking at school related to ASD and ADHD was supported by the evidence of an educational psychologist (Dr Woods), who had observed C. Although that was not a conclusion that had been reached by the Council's educational psychologist (Ms Nash), the ETW was entitled to accept the evidence of the parents and Dr Woods, and find that C was having significantly greater difficulty in learning than the majority of others of the same age.
20. Although the ETW made findings under both sections 2(2)(a) and (b) of the 2018 Act, a "learning difficulty or disability" is established if either test is met. The ETW's findings on section 2(2)(b) are therefore not material to the outcome of this appeal.
21. It is nevertheless appropriate to note that the ETW's reasoning under section 2(2)(b) of the 2018 Act (paragraph 36) is problematic. The ETW relied on its conclusions about masking (paragraph 34) to conclude that C's learning difficulty or disability prevented or hindered her from making use of facilities for education or training of a kind generally provided for others of the same age in mainstream institutions. However, section 2(2)(b) sets out a different test from section 2(2)(a). It is not in dispute that C has a disability for the purposes of the Equality Act 2010. But, to fall within the scope of section 2(2)(b), that disability "must prevent or hinder the child making use of educational or training facilities". There has to be evidence that the child is in fact prevented or hindered from making use of those facilities.
22. The ETW found that C loved going to school, consistently produced work of a high standard, and her reports showed a consistent pattern of good achievement (paragraphs 17, 23 and 24). The ETW also found it was undisputed that C was academically able, achieving well at school, receiving no ALP, and there were no specific strategies in place to support C other than those expected with good teaching practice (paragraph 32). These factors point towards C not being prevented or hindered from using facilities for education. There was simply no evidence of C having any functional deficit in school. It is true that there were other findings relating to differences between C's presentation at home and at school which seemed to reflect C's extra expenditure of energy and effort at school (paragraph 34), and a drop in progress in maths in year 5 (although C is still considerably higher in achievement than the average (paragraph 24)). However, it is not clear how that resulted in C being prevented or hindered from making use of facilities for education. There does not appear to be any evidence upon which it could be found that C's disability in any way prevents or hinders her use of the facilities for education at the school.

ALN and ALP

23. As we have described, any need or requirement cannot be ALN if it does not call for ALP.
24. The ETW, having found that C had a learning difficulty or disability, went on to consider whether she required ALP. It accepted that C was not receiving any ALP at her primary school (paragraph 37). The ETW's concerns were about secondary school, where C would move after the summer holidays, and a successful transition to that school. The ETW noted that C's secondary school had not yet been confirmed, and would not be until March 2026, after the date of its decision (paragraph 39).
25. The ETW then said (emphasis added, paragraph 41):
- “It is also our decision that C will also require ongoing ALP to be put in place at this time. **It is the tribunal's experience** that general classroom strategies such as movement breaks to support regulation and concentration; access to fiddle toys; a visual timetable; chunking of verbal instructions which are commonly available strategies in primary schools are not usually found within a mainstream secondary school. C's use of assistive technology is a recommendation made by both Dr Nash and Dr Wood which has not been put into place by her primary school. While C has not had to use the sensory space at primary school it does not mean that she will not need it in the new and busier and more sensory stimulating environment of a secondary school. **It is the tribunal's experience** that these are both provisions which she will not be able to access in a mainstream secondary school unless they are provided as ALP. Having been identified as having ALN will mean that C's secondary school will need to put in place an IDP which all staff teaching or supporting will need to be made aware. This will provide the consistency of approach and provision which will allow her to be successful in this new environment.”
26. We accept that the ETW may sometimes need to look ahead when making decisions (*DWL v Milton Keynes City Council* [2026] UKUT 203 (AAC)). For example, in *Wilkin v Goldthorpe* [1998] ELR 345 it was held to be permissible to decide a point of principle of whether a secondary school after transition should be special or mainstream, although the child was still in the last term of primary school. However, in such cases, any decision must still be based on evidence.
27. At this stage of its decision making, the test the ETW had to apply was whether C's learning difficulty or disability called for ALP within the meaning of section 2(1) of the 2018 Act. Because of the definition of ALP in section 3(1) of the 2018 Act, this required the ETW to identify the provision generally available to children of C's age in mainstream education and then determine whether C required provision that was additional to, or different from, that general provision, on the basis of evidence.

28. The ETW made findings about C's primary school. Those findings did not support the conclusion that she required ALP. The ETW found on the basis of evidence about C's school that she was achieving well with no specific strategies in place other than those that can be expected with good teaching practice (para 32).
29. The position was different in relation to secondary school. The secondary school C would attend had not been confirmed. In those circumstances it is perhaps not surprising that there was no evidence before the ETW about the provision available at secondary school. The ETW therefore made no findings in fact about that provision. Instead, the ETW relied on its own experience to fill that evidential gap. In our view, that was not a permissible use of the ETW's specialist expertise. The issue required findings of fact based on evidence.
30. Even if that view is wrong, it appears that the ETW acted procedurally unfairly. (It is unfortunate that recordings are not currently made of hearings before the ETW so that in appropriate cases these types of issues can be checked, although recording is standard in many other tribunals (transcription being a different and separate matter)). In any event, there is nothing before this tribunal, including in submissions, indicating that the ETW raised these matters with the parties and gave them an opportunity to comment on them (*Waltham Forest*). The error is material because the outcome might have been different had evidence been led or parties given an opportunity to comment.
31. However, as we have described above (paragraphs 10 and 11), if a child has a need or requirement that does not call for ALP, then that child has no ALN. In this case, there is no evidential foundation upon which a finding could be made that C in primary school required any such provision; and, for the reasons given immediately above, nor is there any basis for making a finding in advance of her attending senior school. The ETW therefore erred in finding that C has ALN.

Conclusion and Disposal

32. The ETW erred in law in finding that C has ALN. It failed to apply correctly the tests in sections 2 and 3 of the 2018 Act, and purported to make findings on the basis of its expertise which were not properly open to it. In so finding, we are not interfering with any facts properly found by the ETW or attaching different weight to facts found (*Henderson v Foxworth Investments Ltd* [2014] UKSC 41 and *Volpi v Volpi* [2022] EWCA Civ 464). Rather, we have identified errors of law in the decision of the ETW.
33. Although the Council also argued that the ETW's reasons were inadequate, it is unnecessary to consider that ground. This was not, in essence, a reasons case. The central errors of law in this case were the ETW's misapplication of the statutory tests and its improper use of its specialist expertise.
34. Section 12 of the Tribunals, Courts and Enforcement Act 2007 (the "**2007 Act**") applies to this appeal by virtue of section 81 of the 2018 Act. For reasons given above, the ETW's decision involved the making of an error on a point of law within the meaning of section 12(1) of the 2007 Act. The Council's appeal is therefore allowed.

35. We however do not consider it is appropriate to exercise our powers under the 2007 Act to set aside the decision and either re-make it or remit it to the ETW for reconsideration. That is because an IDP was prepared by the Council following the finding of ALN in the ETW's decision under appeal. C is now in secondary school. That IDP is due to be reviewed, invitations having been issued for a review this month (October 2026). Decisions will be made thereafter about ALN and ALP on the basis of up to date information and circumstances. That being the case, we consider the appropriate course of action is for that review to take place. If necessary, there are then appeal rights to the ETW against descriptions of ALN and ALP (or lack thereof) in an IDP, or a decision to cease to maintain the IDP, under section 70(2)(c), (d) and (j) of the 2018 Act.

**Lady Poole
Chamber President**

**Sir Gary Hickinbottom
President of Welsh Tribunals
sitting as a Judge of the Upper Tribunal**

Authorised by the Judges for issue on 05 October 2026