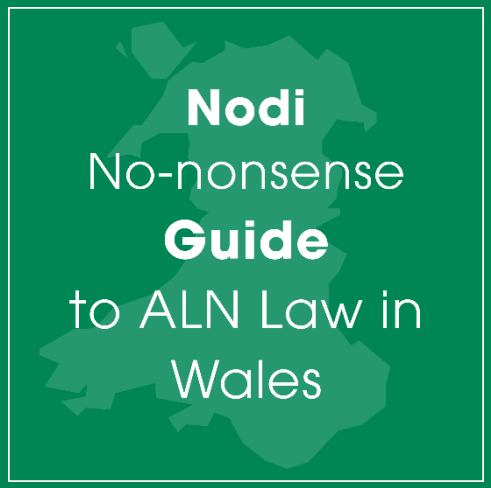


Nodi No-nonsense Guide to ALN Law in Wales

Additional Learning Needs provision law (Wales)

2024 version 1

Cathrine Grubb, Owain Rhys James

Alys Williams, Isabelle Knight, Crash Wigley

Civitas Chambers

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For an online version visit charity Support SEND Kids

Nodi No-nonsense Guide to ALN law in Wales

November 2024

Welcome to the inaugural version of the "Nodi Guide" for Wales.

This Guide sets out our understanding of the legal framework in Wales relating to the education of those with additional learning needs (ALN). This new legal framework is replacing the former Special Educational Needs (SEN) legal framework. Once fully phased in, this framework will apply to most children and young people being educated in or living in Wales. More: Chapter 03: Who is Responsible for CYPs who may/have ALN?

Written by Cathrine Grubb, Owain Rhys James, Alys Williams, Isabelle Knight and Crash Wigley, members of the Education Law team at Civitas Law barristers' chambers with special thanks to David Wolfe KC (Matrix) and Leon Glenister (Landmark), who produce the Noddy Guide to SEN law (in England) for their guidance and editorial input.

We are also grateful to Rachel Amos (Support SEND KIDS), Cath Keegan-Smith & James Rendall (Cardiff Council), Chris McFarland (Sinclairslaw) and the team at SNAP Cymru and the Children's Legal Centre Wales, who have provided valuable feedback and insight from their varying perspectives and considerable experience of the ALN system.

The Guide aims to bring together the relevant legal provisions, the codes of practice, Government guidance and case law. To make it more accessible for those without a legal/judicial background, we have where appropriate opted for plain English over the exact stautory wording. Therefore it is important to remember that this Guide is not intended to be a complete substitute for direct consideration of the legal materials or relevant statuory code.

The Guide will be regularly updated as a free public resource to assist all those who are involved in ALN law. Any comments on it will inform the updates.

The new legal framework that makes provision for those with additional learning needs is being phased in throughout Wales under the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALNET). The current target is for all learners to be moved to the new framework by August 2025.

This guide will only touch on the old legal framework. For those more familiar with the Education Act 1996 and Children and Families Act 2014, see: Introduction to the Additional Learning Needs System which sets out some of the key differences brought in by ALNET.

Using the Guide

The new Welsh framework uses terminology different from that used previously in Wales and still used in England. It refers to “additional learning needs” (ALN) and corresponding “additional learning provision” (ALP). Whereas the old Welsh system and current English system refer to “special educational needs” (SEN) and "special educational provision” (SEP), as does the current English regime. The use of this new terminology can alert you as to whether it is the ALN framework or English or old Welsh law that is being considered.

Our Glossary also provides definitions of some English terminology to help you navigate those different meanings.

For the law as it relates to children and young people being educated in England please see the Noddy ‘no-nonsense’ Guide to SEN law.

Many principles and definitions are similar to the old framework in Wales.The framework in England under the Children and Families Act 2014 also has similarities with the old and new Welsh framework. With that in mind some of the principles established in cases decided under the old Welsh law or English law can provide useful guidance for how the new ALN framework will operate in practice. We will refer to such cases where we think this might be useful. This guide is however not intended to be a comparison between the different systems.

This Guide explains our understanding of the law in Wales and how it should operate. We will update the Guide in accordance with any decisions of the Education Tribunal for Wales. We would be happy to receive comments on any aspect of the Guide and address them in future updates. Please send these to: cathrine.grubb@civitaslaw.com

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Parents and professionals - we invite you to visit the Support SEND Kids charity website. They produce the No-nonsense Guide series and host this Guide as interactive Q&A allowing users to bookmark, share with others or comment on individual questions.

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Additional Learning Needs System: Introduction

The passage of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALNET) brought about significant reform of the law applying to children and young people with additional learning needs (previously called special educational needs). The new system has been introduced on a phased approach from September 2021 and now applies to the majority of cohorts, with the current target to have all learners moved onto the new framework by August 2025.

There are important differences between the new ALN system and the SEN system that preceded it in Wales. The Welsh Government at the time described ALNET as a "complete overhaul" of the system, and that the SEN system was based on a model "widely recognised as being no longer fit for purpose". Readers should be conscious that this is an area of law where there is now substantial legislative divergence between Wales and England.

Some of the most important features of the ALN regime are:

- The legal framework uses the following terminology: additional learning needs (ALN), rather than: special educational needs (SEN).
- ALNET introduced the individual development plan (IDP). A statutory document issued to children and young people with ALN which gives them legally enforceable rights to provision.
- Other than exceptional cases, all CYPs with ALN will have an IDP.
- IDPs replace previous SEN provision such as: school action, school action plus, statements of special educational needs.
- Most IDPs will be made and maintained by mainstream schools and further education institutions. The LA will maintain IDP's only for those with greater ALN, looked after children, those subject to detention orders and those not in a mainstream school or further education institution.
- It remains open to parents to provide elective home education (EHE) or to meet their CYP's needs through the private sector.
- Where a parent opts to electively home educate, the LA may still be under an obligation to maintain an IDP for the CYP and secure provision. IDPs can include provision to be made by parents.
- IDPs will not contain details of social care needs and provision or health needs and provision unless these are also additional learning needs, or additional learning provision.
- IDPs will only name a particular school if certain tests are met.

More: 01.02 What are the main differences between the framework under ALNET and the previous framework in Wales?

The law relevant to Wales

ALNET **Additional Learning Needs and Education Tribunal (Wales) Act 2018** principal piece of legislation which now governs ALN/SEN law.

ALN Regs 2021 **Additional Learning Needs (Wales) Regulations 2021**

ALN Code 2021 **Additional Learning Needs Code for Wales.** **More: 01.05 What is the ALN Code 2021**

Curriculum and Assessment (Wales) Act 2021: established the Curriculum for Wales in law and replaced the basic curriculum

EA 1996 Education Act 1996 – the legislation governed ALN/SEN in England and Wales before the system in England changed under the Children and Families Act 2014. Most aspects are now covered by ALNET in Wales and CFA 2014 in England. Some parts of the EA 1996 still apply in Wales, and we may refer to cases decided under EA1996 where these may still provide useful guidance under the new law.

EA 2002 The Education Act 2002

EHE Guidance 2023 - **Elective Home Education Guidance** is statutory guidance to which LAs must have regard when exercising their functions under s436A EA1996.

EqA 2010 Equality Act 2010

EdTW Regs 2021 **Education Tribunal for Wales regulations 2021**

EWM 2009 **Education (Wales) Measure 2009** provides additional rules for bringing SEN appeals and Disability discrimination claims.

LTM 2008 - **Learner Travel (Wales) Measure 2008** sets out the legal framework specifically related to travel and transport provisions for learners travelling from home to school in Wales.

LTSPOG 2014 - Learner Travel Statutory Provision and Operational Guidance 2014

NHSA 2006 National Health Services Act 2006

MCA **Mental Capacity Act 2005**

RCYP 2011 Rights of Children and Young Persons (Wales) Measure 2011. **More: 01.09 What is the RCYP 2011?**

SEN Regs 2014 Special Educational Needs Regulations 2014

SENTW Regs 2012 **Special Educational Needs Tribunal for Wales regulations 2012**

Tribunal Procedure/Upper Tribunal: **Tribunal Procedure (Upper Tribunal) Rules 2008**

UNCRC United Nations Convention on the Rights of the Child

UNCRPD United Nations Convention on the Rights of Persons with Disabilities and its protocol.

WBFG 2015 Well-being of Future Generations (Wales) Act 2015.

Legislation relevant to England only

CFA 2014 Children and Families Act 2014 – the principal piece of legislation which governs SEN law in England

COP 2015 SEN Code of Practice used in England.

SEN Regs 2014 Special Educational Needs Regulations 2014

More: 01.04 Why does the Nodi Guide refer to the Education Act 1996 and Children and Families Act 2014, and cases decided under those Acts, when Wales has moved from an SEN system to an ALN system?

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Glossary

Case law from the ongoing English and old Welsh (SEN) systems may in some instances continue to provide useful guidance to the new framework under ALNET. This glossary therefore provides definitions of the new Welsh terminology, old Welsh terminology and English terminology.

More: 01.04 Why does the Nodi Guide refer to the Education Act 1996 and Children and Families Act 2014, and cases decided under those Acts, when Wales has moved from an SEN system to an ALN system?

ALNET Additional Learning Needs and Education Tribunal (Wales) Act 2018, the principal piece of legislation governing ALN/SEN law in Wales.

Academy A type of independent school (i.e. not a school maintained by an LA) which has been set up in England in accordance with the Academies Act 2010 (i.e. through a Funding Agreement between the school and the Secretary of State for Education in England) and which is therefore state funded. Other independent schools are referred to here as "private schools".

Additional Learning Needs (ALN) a learning difficulty or disability which calls for additional learning provision in Wales: **s.2 ALNET**. It is substantially similar to the term 'SEN' used in England although there are slight differences in the statutory wording. See further: **Is there a rule specifying what counts as ALP?**

ALN Code 2021 **Additional Learning Needs Code for Wales**. **More: 01.05 What is the ALN Code 2021?**

ALN Regs 2021 The Additional Learning Needs (Wales Regulations) 2021

Additional Learning Provision (ALP) educational or training provision that is additional to, or different from, that made generally for others of the same age in nursery education, mainstream schools in Wales or mainstream institutions in the further education sector in Wales. ALP for a child aged under 3 means educational provision of any kind: **ALNET s.3.**

Annual review The process of yearly review of a statutory plan. IDPs must be reviewed at least annually.

Authorities The collective term for previous decisions made by the courts and tribunals (in the form of decisions and judgments) which set out law on a particular point (case law). These can be relied upon to show that a particular decision should be taken in a certain way. Where we mention an authority as being the reference for a particular legal proposition, the text includes a hyperlink to an on-line copy of its text.

Case law See 'The Law' in the introduction.

Child A person who is not over compulsory school age: **s.99 (1) ALNET**

Compulsory School Age begins on 31 March/August/December after a child turns 5 (s.8(1) EA 1996 and para 2 Education (Start of Compulsory School Age) order 1998/1607) and ends on the last Friday in June in the academic year a person turns 16 (s.8(3) EA 1996 & Education (School Leaving Date) Order 1997/1970).

CYP Child or young person up to the age of 25: **s.99 (1) ALNET**

DECLO Designated Education Clinical Lead Officer. Each local health board in Wales must designate an officer to have responsibility for co-ordinating the health board's functions in relation to children and young people with ALN: s.61 ALNET

Disability The Protected characteristic of disability in **EqA2010 s6** (England, Scotland and Wales) and in **Disability Discrimination Act 1995 s1** (Northern Island only).

EBD emotional and behavioural difficulties/disabilities

Education Tribunal for Wales (ETW**).** The independent court-like body to which parents (in relation to a child) or a young person (on their own account) can appeal.

An initial appeal will be made to the ETW with an option to appeal to the Upper Tribunal on a point of law. English cases would be decided by the Tribunal in England often referred to as “SENDIST” or “SENT” or Special Educational Needs and Disability Tribunal.

EHCP(s) Education Health and Care Plan. The statutory document issued in England.

EHE: Elective Home Education. Where parents choose to be responsible for providing education to their child other than by placing them in a state funded or private school.

EOTIS Education otherwise than in school, provided by the Local Authority under **s.53 ALNET**. Education otherwise than in a school (EOTIS) is also often referred to as “education otherwise than at school” (**EOTAS**). There is a school of thought that the correct term is “EOTIS” as this properly reflects the statutory wording. That being said “EOTAS” is the abbreviation used in the **ALN Code 2021**. Nodi uses the term EOTIS but does not seek to argue that one term should be preferred over the other.

EdTRegs2021 The Education Tribunal for Wales regulations 2021

EWM2009 Education (Wales) Measure 2009 provides additional rules for bringing SEN appeals and Disability discrimination claims in Wales

Further Education Institution (FEI) means an institution falling within section 91(3) of the **Further and Higher Education Act 1992: s 99(2) ALNET**.

HCP English SEN law term meaning health care provision, which is “the provision of healthcare health care services as part of the comprehensive health service in England continued under **section 1(1) of the National Health Service Act 2006”: CFA2014 s21(3)**

ICB Integrated Care Board. These are the local NHS bodies generally responsible for providing health care provision in their area in England under s.14Z25 of the National Health Service Act 2006. Until July 2022, the equivalent bodies were CCGs.

Independent living skills This includes finding employment, obtaining accommodation and participation in society, and will include basic living skills such as (for example) dressing, washing, food preparation etc.

Independent school Means (by virtue of **EA1996 s463**) a school which is not maintained by the LA.

LA Local Authority. Means the council of a county or county borough in Wales, except where specific reference is made to a local authority in England: s 99(2) ALNET

Local Health Board means a Local Health Board established under section 11 of the **National Health Service (Wales) Act 2006**

Looked after child: a child who is not detained, not over compulsory school age and is looked after by a local authority for the purposes of **Social Services and Well-being (Wales) Act 2014: Part 6** (in particular section 74).

Maintained in general terms is an educational institution which is funded by, and operates under the oversight of, an LA. More legalistically: (a) a community, foundation or voluntary school, or (b) a community or foundation special school not established in a hospital, a maintained nursery school or a pupil referral Unit: s.**99(2) ALNET.**

Mainstream maintained school means a maintained school that is not a special school or pupil referral unit: s.99(2) ALNET.

MLD moderate learning difficulties

Nodi Welsh term meaning to note, mark, appoint, identify and map out.

Paramountcy principle The principle that the child’s welfare shall be the Court’s paramount consideration, see **Children Act 1989 s1(1)**

Peer group The other children who a CYP interacts with including in class.

Personal budget English SEN law term referencing the amount an LA has identified as available to secure particular provision which is specified with a view to the child’s parent, or the YP being involved in securing the provision. See **CFA2014 s49** and **The Special Educational Needs (Personal Budgets) Regulations 2014.**

Placement This It is not a term used in the ALN legislation but is often the used to describe the school or institution named in section 2D.1 or 2D.2 of an IDP in Wales or an institution named in Section I of an EHC Plan in England.

Private school A school that charges fees. Often referred to as an “independent school”. The legal definition of independent school in England includes Academy schools.

Public sector equality duty (sometimes: **PSED**) The legal duty placed on all public authorities to consider the need to avoid discrimination and promote equality in the discharge of their public functions, as defined in **Equality Act 2010 s149**.

Regs2014 Special Educational Needs Regulations 2014 for England.

SEN Special Educational Needs. A definition used in England. A CYP is said to have SEN if they have a learning difficulty or disability which calls for SEP to be made for them**: CFA2014 s20**. More: **Noddy Guide (England) 07.01 Are there particular rules about whether a child or YP has special educational needs?**

SEP English SEN law term meaning Special Educational Provision. SEP is educational or training provision that is additional to, or different from, that generally made for others of the same age in mainstream provision**: CFA2014 s21**. More: **Noddy Guide (England) 08.02 Is there a rule specifying what counts as SEP?**

SCP English SEN law term meaning Social Care Provision, which is "provision made by a local authority in the exercise of its social services functions": **CFA2014 s21(4)**; such provision is sometimes called "social care" or "community care".

Section 41 School **CFA2014 s41** allows independent special schools and special post-16 institutions in England to apply to be approved (and then to be approved) as schools which can be the focus of a parental or young person's request for a particular placement in circumstances where there is then a qualified presumption in favour of that request.

Special school Means (by **EA1996 s337**) a school which is specially organised to make ALP for pupils with ALN that is maintained by the LA. In England such a school needs to be an Academy [special] school or a non-maintained special school.

SEMH Social, Emotional and Mental Health

SSEN means Statement of Special Educational Needs. This was the document setting out a CYP's Special Educational Needs and the Educational Provision to be made under the old framework that operated in Wales under the **EA 1996.**

SENTW Regs 2012 The Special Educational Needs Tribunal for Wales Regulations 2012. These apply only to appeals for cases still covered under the old SEN system in Wales. This is currently being replaced by a new system under ALNET.

UT (also Upper Tribunal) The court-like body to which a person can appeal to if they believe the ETW has made an error of law. The principles in its decisions are binding on the ETW.

UNCRC United Nations Convention on the Rights of the Child

UNCRPD United Nations Convention on the Rights of Persons with Disabilities and its optional protocol.

Young person A person who is over compulsory school age but under 25: **s.99 (1) ALNET**

01 ALN Law: context

01.01 What is the legal framework for additional learning needs in Wales?

The primary legislation governing additional learning needs in Wales is the **Additional Learning Needs and Education Tribunal (Wales) Act 2018** (**"ALNET"**). This Act was passed by the National Assembly for Wales (as it then was) to establish a new framework for supporting children and young people with additional learning needs in Wales.

Under ALNET, the Welsh Ministers have various powers (and some duties) to make regulations relating to additional learning needs. The most significant regulations made under the **ALNET** so far are the **Additional Learning Needs (Wales) Regulations 2021** (**"ALN Regs 2021")**.

Under **section 4 of ALNET**, the Welsh Ministers are required to issue a code on Additional Learning Needs, which may include guidance on ALN issues. The Welsh Government has issued the Additional Learning Needs Code for Wales 2021 (**"ALN Code"**). Under **section 4(3) of ALNET**, school governing bodies, local authorities and other organisations are required to have regard to any relevant guidance in the ALN Code when exercising their functions under the ALNET.

Together, **ALNET**, regulations made under the Act, and the **ALN Code** form the legal framework for ALN in Wales. Other legislation may be relevant in some circumstances.

01.02 What are the main differences between the framework under ALNET and the previous framework in Wales?

1. **SEN is now ALN:** Prior to the coming into force of ALNET, learning needs that called for educational training or provision additional to or different from those made generally for other learners of the same age were called 'Special Educational Needs' (**SEN**). Instead of SEN, ALNET uses the term 'Additional Learning Needs' (**ALN**).

2. **IDPs replace previous SEN provision such as school action, school action plus and statements of special educational needs:**

a. The SEN system in Wales was governed by the **Education Act 1996**, accompanying regulations and Special Educational needs Code of Practice. Under that system, children would be issued with a statutory document called a Statement of Special Educational Needs (**SSEN**) if their SEN were of a complexity which required the local authority (rather than their school) to determine what SEP was required and whether the school could reasonably be expected to make such provision within its own resources (SEN code of practice for Wales 8:13). A child would have a legal right to the provision in the SSEN. Those who did not meet the legal threshold to receive an SSEN would still have provision made, but statute did not give them a legal right to this. Enforcing delivery of provision for those without an SSEN was therefore more difficult. That led to disagreement about whether a child required an SSEN.

b. The ALN system introduces a general rule in Wales that every CYP with ALN is issued with a statutory document (now called and Individual Development Plan (**IDP**)), which gives them legally enforceable rights to provision. Their ALN does not have to meet the same minimum threshold of severity as was the case for those children who had a SSEN. As a rule, those with SEN who did not previously qualify for an SSEN will now qualify for an IDP. However, some IDPs will be produced by schools and some by local authorities. Issues therefore arise as to whether it should be a maintained school, FEI or LA that maintains the IDP. Issues also arise as to whether a CYP has ALN.
More:
02.03 What is an IDP?
02.04 Do all CYP with ALN have an IDP?
05.01 Is there a prescribed form of IDP?

3. Most IDPs will be made and maintained by the mainstream school or FEI the CYP attends. The LA make an IDP for those with ALN which cannot be adequately determined by the school or requires ALP the school would not be reasonably able to determine or secure. The LA will maintain an IDP for those with ALN requiring ALP the school would not be reasonably able to secure, looked after children, those subject to detention orders, those who are attending more than one provision (Dual Registered) and those not in a mainstream school/FEI (such as those below school age not in nurseries, electively home educated or receiving education otherwise than in school (EOTIS)).
More: **Chapter 03: Who is responsible for CYP with ALN?**

4. Where a parent opts to electively home educate (**EHE**) the LA may still be under an obligation to maintain an IDP for the CYP and secure provision. Under the old system and English system there is no obligation on the LA to make provision where parents decided to EHE.
   More: 03.11 Who is responsible for deciding whether a child being Electively Home Educated has ALN?
   07.29 Is the LA under a duty to make ALP to fit with Elective Home Education (EHE)?

5. IDPs will not contain details of social care needs and provision or health needs and provision where this is not also ALN/ALP. EHCP's in England contain sections in which social & health needs and provision can be set out separately where these are not also SEP or SEN. These sections do not exist in an IDP. However, where social and health needs and their associated provision also fall within the definition of ALN or ALP they will be included in an IDP.
   More: 07.02 Can health or social care support also be ALP?
   07.05 Are there any rules for coordinating health and social care support with ALP?
   05.01 Is there a prescribed form of IDP?

6. **IDPs can contain ALP provision to be made by parents**: **Elective Home Education Guidance (2023) see p.7.** In comparison, SSENs and EHCPs should not set out any provision to be made by parents. The duty remains on the LA to secure this **ALP**, but in this context, the LA would satisfy its obligation to secure provision by way of agreement with parents and satisfying itself that parents are making this provision.
   More: **02.10 Does the LA have any duties towards a child who is electively home educated (EHE)?**
   09.53 Can parents insist on a hybrid arrangement between EHE and EOTIS?
   Also, **ss.51(5) & 55 ALNET** appear to envisage naming an independent school in the IDP as the organisation to provide ALP specified where the cost is to be met by parents.

7. IDPs will only name a particular school in **exceptional cases.** These cases may include naming a school for accessibility purposes, if a CYP requires support from staff with specialist expertise or if it is unreasonable for a more local school to provide the ALP specified in the IDP (ALN Code for Wales (2021) 23.59 and 23.67).
   More: 09.01 Does the IDP always have to name a school/placement?

09.20 What is the duty to favour mainstream maintained schools?

8. The presumption in favour of naming the maintained school requested by parents no longer applies: Under the old system, there was a general requirement that the LA name the maintained school the parents of a child with an SSEN requested unless the school was unsuitable for the child or the child's attendance at the school would be incompatible with the efficient education of others with whom the child would be educated or the efficient use of resources: *para 8 Schedule 27 Education Act 1996*. There is no such provision in ALNET, however **section 9 of the Education Act 1996** continues to apply. This states that regard must be had that pupils should be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. There are different views on the extent to which this provision will continue to assist parents in having their preferred school named in the IDP.

More:

09.11 Can the CYP/Parents of a child, request a particular placement?

09.12 Is there a presumption in favour of the CYP going to the school/institution that they or their parents want them to?

02.16 Will the operation of section 9 be the same under ALNET?

01.03 Legislation in Wales is drafted bilingually. How should it be interpreted?

Legislation in Wales is drafted in both Welsh and English. Both language texts have equal standing.

Guidance as to the proper approach to take was provided by the Court of Appeal in **R (Driver) v Rhondda Cynon Taf County Borough Council [2020] EWCA Civ 1759**. From that decision, the following principles emerge:

(1) Where legislation is enacted in both languages and the parties submit that there is or may be a "conflict, difference or distinction" between the two languages, then a detailed analysis of both may be necessary.

(2) Where the court concludes that that there is a conflict, difference or distinction, then it must consider both languages and all permissible external sources (e.g. White Papers, consultation

papers etc) with the aim of identifying the purpose of the legislation and must then seek to give effect to that purpose.

(3) Where it is not suggested that the language differs in meaning across the two versions, the court can work from either version, safe in the knowledge that either properly reflects the intention of the legislature.

(4) In considering either language version, the normal principles of statutory interpretation apply.

01.04 Why does the Nodi Guide refer to the Education Act 1996 and Children and Families Act 2014, and cases decided under those Acts, when Wales has moved from an SEN system to an ALN system?

Historically, ALN (or SEN) issues in England and Wales were governed under the same legislation: the Education Act 1996. In England, the SEN system was significantly reformed with the introduction of the Children and Families Act 2014, while the Education Act 1996 continued to apply in Wales until ALNET started coming into force in 2021.

This Guide includes cases decided under those other acts where Nodi considers they are relevant to the new ALN system. Whilst ALNET has brought in significant reforms, there are still commonalities with the old system and the new English system. There is very little case law so far on the new Welsh system, and so cases based on the Education Act 1996 and the Children and Families Act 2014 can sometimes provide an indication on how a court or tribunal is likely to decide a similar issue under the ALNET.

The Upper Tribunal discussed the similarities between the new English system and the old system under the Education Act 1996 in **Devon CC v OH [2016] UKUT 292 (AAC)** deciding that the common features showed a legislative intention that was in general terms for a continuity of approach except where the 2014 Act provides a specific reason to conclude otherwise: para 33.

In Nodi's view, the ETW will likely agree that some approaches under the old system and English system continue to be relevant, particularly where the wording is substantially similar. Also, the ETW may find judgments under the other Acts provide useful guidance on how it should make decisions on the appeals that come before it (in legal circles such cases are sometimes called 'persuasive authority'). However, the ETW is not legally required to apply the law in these cases (in legal circles such cases are sometimes referred to as 'not binding'). Against this, it is important to remember that differences of

approach (such as funding) or wording under the ALNET will make comparisons with cases decided under the other Acts inappropriate.

Glossary: **Education Act 1996; Children and Families Act 2014; case law; persuasive authority**

01.05 What is the ALN Code 2021?

The **Additional Learning Needs Code for Wales 2021** ("the ALN Code") is guidance issued by the Welsh Ministers on how the ALN system in Wales should operate.

Glossary: **ALN Code**

01.06 Is the ALN Code binding on schools and local authorities?

Only where the Code uses "must" or "must not". The **ALN Code 2021** uses the terms 'must', 'may' and 'should'. 'Must/must not' are mandatory requirements which are binding on schools and local authorities: **para 1.10 - 1.11 ALN Code 2021.** These requirements in the Code either reflect legal requirements imposed by legislation, or they are requirements imposed by the Code itself (as to which see **ALNET, s 4(5)–(9A), s 7(4) and s 8(4)**).

Where the **ALN Code 2021** uses 'should/should not', this reflects statutory guidance which is not binding on schools and local authorities. Rather, the provision should be considered and followed, unless it can be demonstrated that there is a good reason for not doing so: **para 1.13 ALN Code 2021**.

School governing bodies and local authorities are required to "have regard to the guidance contained in the Code": **section 4(3), ALNET**. Section 4(3) contains a list of those required to have regard to the Code which includes NHS bodies such as Local Health Boards, further education colleges and youth offending teams.

The Education Tribunal for Wales (**ETW**) is also required to have regard to any provision of the Code which appears relevant to a question arising on an appeal (**section 4(10) ALNET**).

"Having regard" to the ALN Code means that they must consider the guidance in the ALN Code and follow it unless they can show that there is a good reason not to do so: **para 1.13, ALN Code 2021;**

Munjaz v Mersey NHS Trust [2005] UKHL 58 para 46. An explanation needs to be given for departure from the provisions of the ALN Code 2021: **para 1.13 ALN Code 2021**. Good practice would be to make sure that those reasons are recorded with reference to supporting evidence to justify departure from the Code.

However, a school or local authority (or the ETW) must always be prepared to depart from the guidance contained in the Code (ie the provisions which say "should/should not") where that is appropriate in the particular case rather than treating it as "strict rules" to be "slavishly followed": **S v Brent [2002] EWCA Civ 693**, para 15.

01.07 Which children and young people are covered by the ALN system?

This framework applies to most CYP being educated in Wales or who are wholly or mainly resident in Wales. A main exception to this would be where a CYP has been placed in Wales under an EHCP issued by an English LA.
More: Chapter 03: Who is responsible for CYP who may/have ALN?

Any children who have been issued an IDP notice will be subject to the new framework under ALNET. Transitional provisions set out a phased approach for moving CYP to the new system. The current target is for all CYP to have moved to the ALNET framework by 31 August 2025, except for young people who over Y 13 who will remain on the SEN system.
More: Chapter 15: Moving between SEN and ALN

01.08 What is the UNCRC?

The United Nations Convention on the Right of the Child is a document that has been signed by several different countries (including the UK) in which those countries promise to protect and promote the rights of children. The Convention contains 41 Articles in Part 1 setting out what those rights are. Public bodies in Wales are required to have due regard to the rights set out in part 1 UNCRC: **s.7 ALNET**. Welsh Ministers are also required to have 'due regard' to the rights in Part 1 and set up a scheme to make sure that those rights are upheld: **ss.1 & 2 RCYP2011**.

Article 3 specifies that in all actions concerning children the best interests of the child shall be a "primary consideration". Article 12 states that children who are capable of forming their own views have

the right to express those views in all matters which affect them, and that their views should be given due weight in accordance with their age and maturity. Article 23 addresses the rights of disabled children, and the right to care and assistance to have effective access to education, training, healthcare, rehabilitation, preparation for employment and recreation to enjoy a full and decent life.

Local authorities and NHS bodies are required to have due regard to the rights set out in **part 1 UNCRC: s.7 ALNET**.

01.09 What is the RCYP 2011?

The Rights of Children and Young Persons (Wales) Measure 2011 is a piece of legislation that was passed by the Assembly that incorporates the UNCRC indirectly into Welsh law. It requires the Welsh Ministers to have 'due regard' to the UNCRC when exercising any of their functions and to make out a scheme for securing compliance with the **UNCRC** (**ss 1 & 2 RCYP2011).**

Those provisions thus have much greater potential significance in Wales than they do in England (where there no similar 'due regard' obligations in relation to these international law obligations).

01.10 What is the UNCRPD?

The United Nations Convention on the Rights of Persons with Disabilities is a treaty that has been signed and ratified by many different countries (including the UK) in which those countries commit to promoting and protecting disabled people's human rights.

Local authorities and NHS bodies are required to have due regard to the **UNCRPD** and its optional protocol: **s. 8 ALNET**.

Those provisions thus have much greater potential significance in Wales than they do in England (where there no similar 'due regard' obligations in relation to these international law obligations. It remains to be seen how that impacts in practice.

01.11 What is meant by the duty to have "due regard" to the UNCRC and UNCRPD under ALNET?

The 'due regard' formula is borrowed from the UK equalities enactments, and cases bought under these enactments explain how 'due regard' should be implied in practice.

In summary, the duty requires a conscious and open-minded and informed consideration of the rights in the UNCRC and UNCRPD to identify whether they are relevant to the decision at hand and give them the weight that is appropriate in all the circumstances. This consideration must form an integral part of the planning process instead of being merely an afterthought: see also **R (on the application of Meany) v Harlow DC [2009] EWHC 559 (Admin) para 74**, approved in **R. (on the application of Bailey) v Brent LBC [2011] EWCA Civ 1586 para 75.** The duty to have "due regard" is not a duty to achieve a particular result: **para 5.7 ALN Code 2021**. This duty must be exercised 'in substance, with rigor and an open mind' and should not form a mere 'tick box' exercise: see **R. (on the application of Brown) v Secretary of Work and Pensions [2008] EWHC 3158 (Admin) paras. 92 and 95.**

Sections **7(4) and 8(4) ALNET** provide that the duties to have regard are to be interpreted in accordance with any provisions of the **ALN Code 2021** which set out what is required to discharge the due regard duties (that is Chapter 5 of the ALN Code, and in particular **paras 5.6-5.10, 5.12, 5.17 and 5.19.)**

LAs must have due regard to the Conventions when planning generally how they will exercise their functions under ALNET: **para 5.6 ALN Code 2021**.

LAs and NHS bodies should keep a record to demonstrate how they have complied with their due regard duties (**para 5.9 ALN Code**). A failure to do this may make the authority vulnerable to a finding that it has failed to have regard to the Conventions and to the ALN Code.

The duties to have "due regard" to the Conventions do not require specific consideration to be given to the Conventions on each occasion a function under ALNET is exercised (such as a decision made about an individual child or young person): **ss 7(3) and 8(3) ALNET**. This duty is therefore unlikely to impact on decisions made in respect of individual children.

01.12 Does the LA need to take extra steps to have "due regard" under the

No. In the English case of **R (AI) v LB Wandsworth [2023] EWHC 2088 (Admin)**, para 92, it was considered that the statutory mechanism for discharging an LA's education, health and social care

Public Sector Equality Duty under s.149 Equality Act 2010 when delivering ALN in an IDP?

duties to an individual is based upon that individual's own particular personal needs and characteristics, so it is impossible to argue no due regard has been had to the PSED. As the framework under ALNET is also based upon an individual's specific needs, it is likely that the ETW would come to the same conclusion in respect of the Welsh framework.

01.13 Does the socio-economic duty in s.1 of the Equality Act 2010 impact what LA has to do?

This duty is unlikely to impact on decisions made in respect of individual children, but will be relevant where the LA is taking strategic decisions such as when reviewing the arrangements made both by the LA and governing bodies of maintained schools for CYPs with ALN (**under s.63 ALNET**), making arrangements for providing people with information and advice (**under s.9 ALNET**) making arrangements for the resolution of disagreements (**under s 68 ALNET**).

Sections **1-3 of the EqA 2010** (though not in force in England) have been in force in Wales since 31 March 2021. The socio-economic duty in **s 1 EqA** applies to the Welsh Ministers, LAs and NHS bodies: **Equality Act (Authorities subject to the Socio-economic Inequality Duty (Wales) Regulations 2021**) and it requires them have due regard to *"the desirability of exercising [their functions] in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage"* when they are making *"decisions of a strategic nature."*

The **Welsh Ministers' Statutory Guidance** says that: *"In general, strategic decisions will be those which affect how the public body fulfils its intended statutory purpose (its functions in regards to the set of powers and duties that it uses to perform its remit) over a significant period of time and will not include routine 'day-to-day' decisions."* Those subject to the duty must consider this guidance when deciding how to fulfil the duty under **s 1 EqA (ss 2 and 2A EqA**).

Particular decisions in respect of individuals are unlikely to meet the definition of a "strategic decision" but Nodi thinks that the duty is likely to apply when LAs are making broader decisions in respect of funding, provision, or in respect of matters of policy, which would overlap with the situations in which the duty to have regard to the Conventions applies.

More: 01.11 What is meant by the duty to have "due regard" to the UNCRC and UNCRPD under ALNET?

01.14 Does the legal framework under ALNET operate in a vacuum?

No. The legal ALN framework operates within the wider education system operating in Wales, which operates a different curriculum and approaches than that in England.

The **ALN Code 2021** sets out 5 main principles underpinning the ALN system in Wales. One of which is **inclusive education** and consequently, "*improvements in the teaching and learning of children and young people with ALN cannot be isolated from improvements in the teaching and learning for children and young people across a school or FEI as a whole.*"

Additional Learning Provision is defined with reference to that which is made generally for others of the same age in maintained nurseries, schools and FEIs in Wales: **s. 3 ALNET**. Consequently, what provision is made within the general mainstream education system is relevant to whether a CYP will be considered to have ALN.

One of the other main principles in the **ALN Code 2021** said to underpin the ALN system in Wales is *"**collaboration and integration** where services work together to ensure that ALN are identified early, and appropriate co-ordinated support is put in place to enable children and young people to achieve expectations, experiences and outcomes"*: **para 3.2(d) ALN Code 2021**.

More: 07.02 Can health or social care support also be ALP?
07.03 Is Speech and Language Therapy ALP?
07.04 Can psychiatric input be ALP?
07.05 Are there any rules for coordinating health and social care support with ALP?

01.15 Does the Human Rights Act 1998 have any additional relevance?

Usually not. However, Article 2 of Protocol No 1 (Guidance here: **Guide to Article 2 of Protocol No. 1 - Right to education**) to the European Conventions on Human Rights (ECHR) provides that a person is entitled to education. When read together with Article 14 ECHR it provides a person a right not to be discriminated against in terms of their access to education.

A claim for a breach of these rights may be brought under **s 7 of the Human Rights Act 1998**, and, if the claim is successful, a court may order the payment of damages if it is necessary to afford "just satisfaction" (**s 8(3) Human Rights Act 1998**).

Such a breach may arise where the LA knows a CYP is not receiving education and fails to engage in any effectual attempts to provide it, as was the case in: **E v LB Islington [2017] EWHC 1440 (Admin)**, para 156.

Conversely where a child is out of school, but steps are being taken by the LA to provide education (even if the LA could have acted more expeditiously) this is unlikely to be a breach: **A v Essex CC [2010] UKSC 33.** Provision of interim education provision is also a relevant factor to consider.

In **CB v LB Merton [2002] EWHC 877 (Admin)** **para 20** parents sought to argue that their and their child's Article 8 ECHR right to a private and family life had been infringed on the basis that a residential placement had been named in the EHCP against their wishes. The court did not agree that Article 8 was engaged on the basis that naming this in the EHCP merely set out what provision the LA was offering. If the LA sought to compel attendance, this would have the potential of engaging article 8, but then the court would need to consider the compulsion was proportionate.

02 ALN education: overview

02.01 What are Additional Learning Needs (ALN)?

A person has Additional Learning Needs (ALN) if they have a learning difficulty or disability which calls for Additional Learning Provision (ALP): **s 2(1) ALNET**.

More: 04.03 When will a CYP have ALN?

02.02 What is Additional Learning Provision (ALP)?

Additional Learning Provision (ALP) for a person over 3, means educational or training provision that is additional to, or different from, that made generally for others of the same age in a maintained school or FEIs in Wales. ALP for a child aged under 3 means educational provision of any kind: **s 3(1) ALNET**.
More: 04.03 When will a CYP have ALN?

02.03 What is an IDP?

An IDP is an Individual Development Plan. The IDP is a statutory document that must be prepared for all CYP who have been identified as having ALN: **ss 12 & 14 ALNET**.

It is a document that sets out the CYP's Additional Learning Needs (ALN), a description of the Additional Learning Provision (ALP) and other relevant information: **s 10 ALNET**.
More: 06.02 Is there a prescribed form of IDP?

A person with an IDP has a legally enforceable right to receive the provision (the ALP) set out in the IDP: **ss.12(7), 14(10), 19(7) and 42(8) ALNET.**

02.04 Do all CYP with ALN have an IDP?

Generally, yes, but there are exceptions. Where it has been identified that a CYP has ALN then an IDP must be prepared: **ss 12(1) and 14 (2) ALNET**.

Exceptions. A CYP with ALN will not have an IDP where:

- They are a YP and do not consent to an IDP being maintained: **ss 12(2)(b) and 14(3) ALNET**. (A YP means a person above compulsory school age but under 25.)

- An LA in England should be responsible for the CYP or is already maintaining an EHCP for the CYP: **ss 12(2)(c) and (d)**
- Provision for the CYP's ALN is still being made under the old SEN system:
    - **More: Chapter 15: Moving between SEN and ALN**
- In the case of YPs who are not in enrolled in a maintained school or FEI, an IDP will only be prepared where certain conditions are met.
    - **More: 04.12 When is it necessary to prepare and maintain an IDP for a Young Person?**

This is different from the previous SEN system where only learners with the most severe/complex needs had legally enforceable 'statements' (SSEN) setting out the support they are entitled to. The remaining majority of those learners who were identified as having SEN had (at best) more limited non-enforceable non-statutory plans.

02.05 Are there still other categories of intervention for those on the new system such as: "school/early years action", "school/early years action plus", "learning skills plans"; "monitored" or "targeted monitored" ALN.

No. These phrases do not apply any more in Wales to those with or without ALN, except for CYP who have not yet transitioned to the new ALN system **More: Chapter 15 Moving between SEN and ALN**. They either have ALN, which calls for ALP, or they do not. ALNET creates a single statutory plan (the IDP) to replace the existing variety of statutory and non-statutory SEN and LDD plans for learners in schools and further education. This means that all those with ALN will have their rights protected regardless of the severity and complexity of their needs.

The ETW in **ALN appeal decision (1) of 2023-2024** [para 19] considered the use of "monitored" or "targeted monitored" in relation to a child who does not have ALN to be incorrect.

02.06 Are all children with ALN educated in school?

No. A child with ALN need not be educated in school where either:

(1) the parent has chosen to provide the child's education or

(2) if the LA considers it would not be appropriate for them to be educated in school: **s. 53 ALNET.**

02.07 Do all children with ALN who attend schools attend special schools?

No. The **Welsh Government's January 2024 Schools' Census** notes that out of 52,152 pupils with ALN (or SEN) in maintained schools only 6,025 of those pupils attended special schools.

The ALN Code 2021 requires maintained schools, FEIs and local authorities to adopt a graduated approach making ALP at the lowest level necessary to meet the child or young person's identified needs. **Para 20.23 ALN Code 2021**.

02.08 Can a CYP attend a special school without an IDP?

Generally, not unless the CYP's parents have made their own arrangements with an independent school outside of the ALN process: **ss 14, 48 and 51 ALNET**.

02.09 Does the duty on parents to ensure their child receives suitable education apply in the same way to parents of children with ALN?

Generally, yes. Section **7 EA 1996** places a duty on parents to ensure their child receives a full-time education that is:

(a) Suitable to the child's age, ability and aptitude.
(b) Suitable to any ALN the child may have

This can be provided either by sending the child to school (either that offered by the state or by paying privately), **EOTIS** (such as home tuition, vocational/therapeutic placements) or elective home education (**EHE**).

Where a child is registered at a school, it is advisable for parents to give written notice that they will be making their own arrangements to provide their child with a suitable education to avoid any risk of prosecution for non-attendance. The Welsh Government has published a model letter: **Home education: handbook for home educators, Annex A.**

Where the child is registered at a special school, the LA must also give consent to take the learner off the school roll: **reg 8(2), Education (Pupil Registration) (Wales) Regulations 2010**. If the LA refuses an application can be made for a direction from Welsh Ministers.

Where parents choose to provide education themselves, they need to make sure this education is suitable: **s 7 EA 1996**. The LA is under a duty to monitor that suitable education is being provided: **s 436A EA 1996 & R (Goodread) v Portsmouth City Council [2021] EWHC 3057 (16 November 2021).** In order to fulfil these obligations and LA will usually be required to see and communicate with the CYP: **para 4.2 EHE Guidance**:

"In order for a local authority to satisfy itself of the suitability of education provided by the parents, the local authority should see and communicate with the child. It is for the local authority to decide in each individual set of circumstances whether it needs to meet with the child. In some instances, it may be possible that the local authority can satisfy itself of the suitability of the education on the material provided by the parent/guardian, at the request of the local authority. In the absence of seeing and communicating with the child, it will be questionable whether the local authority can reasonably assess suitability of education and to know if evidence of the suitability of the education provided by the parent relates to that child. For example, whether the evidence provided can reasonably be said to have been produced by that child or be about that child. Seeing and communicating with the child may provide an opportunity for the local authority to better understand how the child learns and what areas of learning they are interested in. Parents and Gillick competent children are not, however, obliged to meet with the local authority and are free to decline a meeting if they so wish."

If it appears to the LA that a child of compulsory school age is not receiving a suitable education, it can ask a parent to provide evidence of the education being provided and take action including ordering that the parents send the child to school if suitable evidence is not provided: **s.437 EA 1996**.

More: Chapter 09: Education Otherwise than in School

02.11 Are the parents of a child with an IDP legally obliged to send their child to the educational placement specified in that IDP?

02.10 Does the LA have any duties towards a child who is electively home educated (EHE)?

Yes. Where it is brought to its attention or otherwise appears to a local authority that a home educated child (other than a looked after child) for whom it is responsible may have ALN, the local authority must decide whether or not the child has ALN and, if it decides that the child has ALN, prepare and maintain an IDP and secure the ALP described in that plan: **para 18.21 ALN Code 2021** and **ss 13 and 14 ALNET**.

This does not mean that the LA will necessarily be required to provide ALP at home to fit with the EHE. **Elective Home Education Guidance 2023** states that the duty to secure provision in an IDP *"does not mean the local authority has to directly provide the ALP. Where, for example, the IDP sets out the ALP as being one-to-one support, this could be provided by a parent home educating the child.* The **EHE Guidance** therefore envisages that IDPs will contain provision to meet need that the parents will make, having chosen to EHE. The LA will be fulfilling its obligations to secure this provision by agreeing with the parents that they are to provide this. The LA is however under an obligation to satisfy itself that such ALP is being delivered: **para 18.23 ALN Code 2021** and **4.21 EHE Guidance**.

Where parents are not able to provide the ALP, the LA will need to consider how the ALP will be secured. This could be by way of training to the parent to deliver ALP at home, ALP to supplement EHE or making provision for ALP to be provided at a particular school: **para 18.23 ALN Code 2021**. The EHE Guidance states:

Where a child requires specialist provision, the local authority would need to decide whether it would be reasonable for the support to be provided in the child's home or whether, for example, the provision needs to be made in a school or a specialist educational setting. The local authority is responsible for ensuring the ALP is being delivered. This would be assessed as part of the IDP review undertaken by the local authority, which must be conducted annually or more frequently if appropriate."

More:
02.09 Does the duty on parents to ensure their child receives suitable education apply in the same way to parents of children with ALN?
07.29 Is the LA under a duty to make ALP to fit with Elective Home Education (EHE)?

02.11 Are the parents of a child with an IDP legally obliged to send their child to the educational placement specified in that IDP?

No. If the parent is not happy with the choice of placement, they can also choose to provide EHE or send the child to private school at their own expense. A parent can also appeal the LA's decision to name the placement to the ETW. **More: Chapter 09: IDP Section 2D**

However, steps should be taken to ensure that a child of compulsory school age is receiving suitable education while the appeal is pending. The parent remains under a duty to ensure their child continues to receive a suitable education that accommodates their ALN**: s.7 EA 1996**.

More:

02.09 Does the duty on parents to ensure their child receives suitable education apply in the same way to parents of children with ALN?

02.10 Does the LA have any duties towards a child who is electively home educated (EHE)?

02.12 Must schools, the LA (and ETW in an appeal) have regard to any particular factors when exercising their functions?

Yes. Those exercising functions under ALNET (including schools and LAs) must have regard to (**s 6 ALNET**):

(a) the views, wishes and feelings of the CYP or the child's parent.
(b) the importance of the child and the child's parent or the young person participating as fully as possible in decisions relating to the exercise of the function concerned
(c) the importance of the child and the child's parent or the young person being provided with the information and support necessary to enable participation in those decisions.

The duty in **s 6 ALNET** applies to any *"person exercising functions under this Part"*. This would appear to include the **ETW**, whose main functions are set out later in Part 2 (in particular, **ss 71 and 73**), perhaps subject to argument as to whether the word *"person"* can properly be interpreted to include a court or tribunal.

In any event, the ETW must have regard to the provisions of the **ALN Code 2021** which address the involvement of CYPs and the parents of children where these appear relevant (**s 4(10) ALNET**). **Paras 4.6 and 4.7 of the ALN Code** note that supporting the meaningful participation of children, their parents and young people is more likely to lead to the accurate identification of needs, effective provision, and a better outcomes for the CYP, and **para 4.11** says that all bodies exercising functions under the Act, which would include the Tribunal, should consider how a CYP would like to communicate and participate and how to support them in doing so. In **S v Worcestershire [2017] UKUT 92** (AAC)**,** an English appeal discussing **s 19 CFA 2014,** at paras 72-73**,** the Upper Tribunal noted that if the First-Tier Tribunal discharged its obligations under its procedural rules, including the overriding objective to "deal with cases fairly and justly", it would be doing as much as would be required if it were subject to **s 19**.

When planning generally for the exercise of their ALN functions, LAs and NHS bodies need also to have regard to Part 1 of the UN Convention on the Rights of the Child, and the UN Convention on the Rights of Persons with Disabilities.

More: 01.11 What is meant by the duty to have "due regard" to the UNCRC and UNCRPD under ALNET?

02.13 Does having regard to the views, wishes and feelings of the CYP or Child's parent mean that the maintained school, FEI, LA or Tribunal has to do what they want?

No. The duty to have regard is not a duty to achieve a particular result, but instead to take the wishes and feelings of the CYP or child's parent into account as part of the decision-making process. In practice, this should involve (**para 4.9 ALN Code 2021**):

a) seeking the child, their parent or young person's views on how they wish to participate in the decisions ahead of those decisions being made;
b) providing information relevant to the decision to the child, their parent or young person in a way which enables that child, their parent or young person to understand it;
c) encouraging the child, their parent or young person to participate fully in the process;
d) using the child, their parent or young person's views to inform the decisions; and
e) ensuring the child, their parent or young person has access to information and advice about ALN and the ALN system.

Where the maintained school or FEI or LA reach a different conclusion to the CYP or a child's parent in respect of its various functions under ALNET, there is often a requirement to give reasons. The Nodi Guide sets out the instances where the duty to give reasons arises in more detail in the relevant sections later in the guide.

02.14 What steps are those exercising functions under ALNET required to take to ensure that CYPs and parents are properly involved in the decision-making process?

Those exercising functions under **ALNET** should:

- Seek to understand how the child or young person wants to communicate their views, how they wish to participate and what support may be required to facilitate the child or young person to do so: **para 4.13 ALN Code 2021**.
- Provide the CYP or parent with information relevant to the decision in a way that enables them to understand it: **para 4.9 ALN Code 2021**.

    - The LA must make arrangements to make information and advice about the ALN system easily accessible: **s 9 ALNET & paras 4.38, 6.15 - 6.24 ALN Code 2021**.
    - Any person exercising functions under ALNET is required to provide CYP and parents with the information and support necessary to enable participation in decisions: **s 6(c) ALNET**.
- Encourage a CYP or parent to participate fully in the process. Where a CYPs is to participate in a meeting to make decisions about their ALN, the school, FEI or LA should work with the CYP to help them prepare for the meeting: **para 4.24 ALN Code 2021**.
- Use the CYP and/or parent's views to inform decisions: para **4.9 ALN Code 2021**.

There may be occasions where a parent or Young Person lacks capacity. Lacking capacity has the same meaning as set out in the Mental Capacity Act 2005: **s.83 (4) ALNET**. In those cases, the LA is under a duty to provide for a representative to engage in arrangements for the child's parent or Young Person: **para 40 ALN Regs 2021**. That representative can appeal to ETW on their behalf: **para 41 ALN Regs 2021**. The LA must refer the representative to an independent advocacy service if the representative requests it: **para 40 ALN Regs 2021**.

The general guidance in **Chapter 4 ALN Code** should also be followed by the **ETW** as it exercises its functions on an appeal: by virtue of both **s 4(10) ALNET** and to be consistent with the overriding objective to deal with cases fairly and justly.

More:
12.03 What if the child, parent or young person does not have the capacity to understand matters relevant to an appeal?
02.12 Must schools, the LA (and ETW in an appeal) have regard to any particular factors when exercising their functions?

02.15 Does s 9 of the Education Act 1996 apply in relation to ALN law?

Yes. **Section 9 EA 1996** remains in force in Wales. The **ALN Code 2021** references this duty at **paragraphs 23.102, 23.108, 23.109**.

Section 9 EA 1996 states:

"In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

It is important to bear in mind that this section only applies to the wishes of "**parents"** in relation to those who are "**pupils"**. "Pupils" are those for whom education is being provided in school unless:

- are age 19 or above and having further education provided or
- they are receiving part-time education suitable to those in year 12 or above.

Reference: s.3 EA 1996

Most reported cases considering section 9 EA 1996 related to the extent to which an LA is obliged ensure the child has a place in the school the parents want. The workings of section 9 are therefore addressed more fully in Chapter 09.

More:
Chapter 09: IDP Section 2D: Place at named school/institution/board/lodging
and Chapter 09 section: Wishes of the CP and Parents (s.9 1996)

02.16 Will the operation of section 9 be the same under ALNET?

There is a significant disagreement as to whether **s 9 EA 1996** will operate as it has previously done.

Under the old Welsh system and in England at least a *type* of placement had to be named in the statutory plan, and there were mechanisms written in to enable parents to express a preference as to the school to be attended: **para 3 schedule 27 EA 1996**. There were presumptions in favour of naming the maintained school of parental preference unless this was unsuitable for the child, or their attendance would be incompatible with the efficient education of others or efficient use of resources: **para 8**

Schedule 27 EA 1996. Where the presumption did not apply, specific consideration then needed to be given to **s.9 EA 1996**. The rights of appeal to the Tribunal included a right to appeal in respect of the SEN *"in the statement (including the name of the school so specified)"* or that fact no school was specified: **s.326 (1A) EA 1996**.

Under the new system the **ALN Code 2021** provides that section 2D (in which a placement would be named) should only be used in specific circumstances: **para 23.48 ALN Code 2021**. The specific circumstances in the code are those **under ss 48 and 14(6)/19(4) ALNET**:

- Section 48 gives the LA (and correspondingly the ETW) a discretion to name a *maintained* school for a *child* for the purpose of securing admission but can only do so where it is satisfied that the child's interest requires the additional learning provision identified in his or her plan to be made at the school; and it is appropriate for training to be provided at the school.
- Section 14 places a duty on the LA (and correspondingly the ETW) to name a place at a particular school or institution for a CYP where the reasonable needs of the CYP cannot be met unless the LA secures provision at a particular school or institution.

Appeal rights in **s.70 (2)(e) - (g) ALNET** are specifically in respect of the school/institution named in an IDP and are limited to decisions under **ss.48 (4) and 14(6) & (7) ALNET** (or **19 (4) & (5)** for looked after children).

For these reasons it is being argued that instead of requiring separate consideration, **section 9 EA 1996** now falls to be considered in the context of the tests of **ss.48 and 14(6)/19(4) ALNET**. *If* this approach is correct Nodi considers that:

- Once the threshold tests under **ss.48 and 14(6)/19(4) ALNET** are met, the general principle that the parents' choice of school should be named (unless the exceptions in s.9 are made out) will apply.
- Section 9 may be relevant to whether the threshold test in s.48 ALNET is satisfied: parental preference may be a material factor to consider when deciding whether it is in the child's interest to name a placement under s.48.

- Section 9 will operate differently in respect of naming a placement that is not a maintained school in that it will first have to be shown that the reasonable needs of the CYP would not be met unless a similar type of school is named (further tests under **ss.51 and 55 ALNET** would also need to be satisfied).

The other view is that the guidance in the **ALN Code 2021** (referring to only naming a placement in specific circumstances) is intended to reflect that all CYPs with ALN are now entitled to a statutory document (IDP). A large number of individuals under the old system were unable to effectively enforce their choice of placement in practice as their SEN needed to be at a particular level to qualify for a statutory document (SSEN) and thus attract rights of appeal. It is argued that the ALN Code simply maintains this distinction, even though all CYP with ALN are now entitled to an IDP.

However, the LA has a general discretion under **s 10(b) ALNET** to describe ALN in the IDP that the person's learning difficulty or disability calls for. Section **70(2)(d) ALNET** also provides a general right to appeal against the provision in the IDP. While placement at a school or other institution is no longer mentioned specifically in **s.70(2)(d) ALNET** (as it was in **s.326 (1A) EA 1996**) placement at a school or institution is referred to as provision in ALNET and the ALN Code 2021 (see for example **s.14(6) ALNET**). It is therefore argued that there is a general power to consider naming a place at a school or institution under this discretion which would enable **s.9 EA 1996** to still be considered in its own right as a separate test as it was under the old system and still is in England.

It will be necessary to wait until this issue is resolved by the Upper Tribunal, before it is possible for Nodi to provide a conclusive answer to these issues.

02.17 How important are the child's best interests when taking ALN decisions?

The best interests of a child should be a *"primary consideration"* for decision makers: **Art 3(1) UNHRCR & s.7 ALNET**.

The child's best interests are not more important than other factors. **Section 1(1) of the Children Act 1989** (also known as the *"paramountcy principle"*) does not apply to ALN appeals: **LB Richmond upon Thames v AC [2017] UKUT 173**

Where a child lacks capacity to understand information, documents given or what it means to exercise their legal rights under Part 2 ALNET the ETW has the power to appoint a case friend to represent the child and take decisions on their behalf: **s.85 ALNET**.

02.18 Does the LA have to consider future benefits/problems in how it delivers education?

Yes. The **WBFG 2015** requires the LA to balance short term needs with the need to safeguard the ability to meet long term needs. This is particularly the case when the LA is having to consider the arrangements to be made for CYPs under **s.63 ALNET**.

The duty under **WBFG 2015** does not apply to tribunals**: s.6 WBFG 2015**.

02.19 Does higher education fall within the ALN legal framework?

No. Higher education courses do not fall within the **ALNET** regime. References to *"education"* with **ALNET** and the **ALN Code** do not include higher education: **s.99 ALNET, ALN Code 2021 at paras 1.32, 1.99**.

While **ALNET** imposes duties on local authorities and the governing bodies of further education institutions for young people who are enrolled as students at a further education institution (such as the duty upon an FE institution to decide whether an enrolled student has ALN), these do not apply to students who are undertaking a higher education course: **s.86 ALNET.**

A course of higher education means a course of any description mentioned in Schedule 6 to the **Education Reform Act 1998** (**s.86(5) ALNET**). Just because a course is provided by an institution in the higher education sector does not mean it is a course of higher education for the purpose of **s.86(5) ALNET:** see by analogy, the English cases of **Gloucestershire CC v EH (SEN) [2017] UKUT 0085 (AAC) para 43**, **RB Kensington and Chelsea v GG (SEN) [2017] UKUT 141 (AAC) para 5**.

If a student at an FE institution is enrolled in both a higher education course and non-HE education, the ALN regime will apply to the provision of all education which is not higher education: **s.86(4) ALNET**.

02.20 Does the LA have to provide information about ALN?

Yes. Local authorities must make arrangements to provide people with information and advice about ALN and the ALN system: **s 9(1) ALNET**. The information that needs to be provided is listed in paragraph 6.12 of the ALN Code 2021. Importantly this includes providing information on how to appeal or request reconsideration of a decision: **para 6.12(k) ALN Code**.

They must have regard to the principle that this information and advice must be provided in an impartial manner: **s 9(2) ALNET.** This should include a description of children, parents and young people's rights under the ALN system, the duties of maintained schools, FEIs and local authorities, and other information specified at **para 6.12 ALN Code 2021.** The information and advice should be easily accessible, and the ALN Code 2021 provides guidance on what this should involve: **paras 6.21–6.24**. LAs should involve children, their parents and young people in the design or commissioning of these arrangements: **para 6.25 ALN Code 2021.**

LAs, maintained schools and FEIs are under duties to take reasonable steps to make these arrangements known to children, parents of children and young people: **ss 9(3) – (5) ALNET**. The ALN Code 2021 provides examples of methods of communication that LAs should consider using, and states that LAs should have a dedicated webpage on their websites with advice and information on ALN: **paras 6.17–6.20 ALN Code 2021**.

This should include providing information on the right to appeal or right to seek reconsideration when providing the CYP/parent/independent reviewing officer of any relevant decision: see for example paras 11.15 & 12.10 (LA and Schools, decision not to reconsider whether a CYP has ALN); 11.18(d), 12.59 & 13.15 (LA's decision that a CYP does nto have ALN); 11.25(d) & 12.76 (when providing the IDP) of the **ALN Code 2021**.

02.21 Does the LA have to consult prior to making substantial changes to ALN provision?

Potentially, but the existence of a duty to consult will depend on the specific circumstances.

LAs are under a duty to keep under review the arrangements made by the LA and maintained schools in the area for CYPs with ALN, and to consider the extent to which those arrangements are sufficient: **s 63(1) and (2) ALNET**. They are specifically required to consider the sufficiency of Welsh-language provision, and the size and capability of the workforce when considering the sufficiency of ALN

arrangements: **s 62(3)**. These provisions are structured similarly to **s 27(1)-(2) CFA 2014**, which has been held to be a *"single duty" which "applies from time to time as the occasion requires",* rather than being expressly triggered by a particular event or decision: **R (D) v Hackney LBC [2020] EWCA Civ 518 para 41,** see also **para 7.5 ALN Code 2021**.

When carrying out that duty, LAs must consult with *"such persons, and at such times, as they consider appropriate"*: **s 63(5) ALNET**. The ALN Code 2021 notes that this could include children, young people and their families, amongst others: **para 7.13 ALN Code 2021**. As the s 63 review involves the LA's strategic planning, the duties to have regard to the **UNCRC** and **UNCRPD** will be engaged, and those Conventions ought to inform decisions about whether and how CYP and parents are consulted.
More: 01.11 What is meant by the duty to have "due regard" to the UNCRC and UNCRPD under ALNET?

If an LA makes budget cuts to ALN provision which are significant, it may be under a duty to consult at common law or under **s 63 ALNET** (see **R (D) v Hackney LBC para 48**)**.** It will also have to comply with the Public Sector Equality Duty **(**under **EqA2010 s 149),** which includes a duty to be properly informed before taking a decision (**R (Bracking) v SSWP [2013] EWCA Civ 1345 paras 25–26**); and may be required to comply with the socio-economic duty **(**under **EqA2010 s 1**) if the decision is a "strategic" one.

Where the LA makes a proposal about the organisation of schools (e.g. a proposal to discontinue or make a *"regulated alteration"* to a community special school), it must consult on its proposals in accordance with the School Organisation Code prior to publishing its proposals (**School Standards and Organisation (Wales) Act 2013, s 48(2)**).

Where any of those decisions are *"policy decisions"* then there may be additional consultation duties upon an LA by virtue of standards 88 to 97 of the Welsh Language Standards: **The Welsh Language Standards (No 1) Regulations 2015**. The Welsh Language Tribunal has interpreted "policy decisions" as being very broad: **The City and County of Swansea v Welsh Language Commissioner (WLT/21/01)**, **paras 55-61**. Therefore, the standards may apply even where there is no new written policy being implemented. Nodi thinks that making substantial changes to ALN provision may be sufficient to amount to a *"policy decision."*

03 Who is responsible for CYPs who have/may have ALN?

03.01 Do the same rules apply for 'looked after children' or 'detained children'?

No. Different rules apply for looked after children and for detained children compared to the majority of CYP.
GLOSSARY: **Looked after Child**

03.02 What responsibility do parents have in respect of their children's education?

Section 7 EA 1996 sets out that every parent must ensure their child receives a full-time education that is:

(a) Suitable for a child's age, ability and aptitude.
(b) Accommodates any ALN.

This can be provided either by the parent sending their child to a state or private school (aka independent school), or by **EOTIS** from the local authority, or by **EHE** provided or arranged by the parent themselves.

More: 02.09 Does the duty on parents to ensure their child receives suitable education apply in the same way to parents of children with ALN?

03.03 Do independent schools have any duties under ALNET?

No. Independent schools are not required by ALNET to decide whether a child attending the school has ALN, nor to maintain an IDP for pupils with ALN, nor are they subject to other duties under the ALNET. They are however subject to the standards regime for independent schools, which include standards about the quality of education and the provision of information by the independent school.

An independent school can only be named in an IDP where the LA (and on appeal the ETW) can be satisfied that the school can make the additional learning provision described in the CYP's individual development plan: **s 55(1)(b) ALNET**. The Local Authority deciding whether a child attending an independent school has ALN or preparing or reviewing an IDP for such a child should work with the independent school to identify any ALN and ALP. When maintaining an IDP for such a child, in order to

secure the ALP specified in it, the authority should work with the school to satisfy itself that it is being delivered: **para 18.25 ALN Code2021**.

To fulfil its obligations under ALNET the LA may seek a binding agreement from the independent school to secure the provision set out in the IDP. While independent schools will not have duties under ALNET it may well be that they will have similar duties as a result of such an agreement.

03.04 Who is responsible for deciding whether a CYP has ALN?

If a CYP is enrolled at a maintained school or further education institution, the starting point would be to ask the maintained school or FEI to decide whether the CYP has ALN.

Where it is brought to the attention, or otherwise appears to a maintained school or FEI that a CYP may have ALN they must gather information and make a decision, unless certain exceptions in **s 11(3) ALNET** apply or the CYP is a looked after Child (**s 11 (5) ALNET): ss.11(1) & (2).** The school must give notification of their decision promptly to the parent and child, and their reasons for that decision (**s 11 (4) ALNET**). This should be given no later than 35 school days from the school being made aware that a CYP may have ALN **(paras 12.12 and 12.21 ALN Code 2021),** or 35 days term time in the case of an FEI **(para 16.16 ALN Code 2021).**
GLOSSARY: Looked after Child

In all other cases it will usually be an LA who must decide whether a CYP has ALN: **s.13(1) ALNET** (general), **s.18(1) ALNET** (Looked after child) **s.40(2)(a) ALNET** (detained persons), unless certain exceptions apply, under **ss.13(2), 18(2) and 41(2)(a) ALNET**. Where it is the LA's responsibility to decide, notification of the decision must be given within 12 weeks (**paras 11.17 and 11.24 ALN Code 2021).**

The main exceptions to the duty to decide whether a CYP has ALN include:

- Where a Young Person does not consent to the decision being made about them **ss.11(3)(c), 13(2)(d), 41(2)(a) ALNET**.
- A previous decision on whether the CYP has ALN has already been taken and:
  - The CYP's needs have not materially changed since that decision was made; and
  - There is no new information that affects that decision.

- Where an IDP or EHCP is already being maintained and it has therefore already been decided that a CYP has ALN.

03.05 Who is responsible for deciding if a CYP has ALN if they are enrolled at more than one maintained school or FEI?

If the CYP is wholly or mainly resident in an LA in Wales, the responsibility will fall to the Welsh LA to decide whether a child has ALN.

If the CYP is wholly or mainly resident in England, then the maintained school or FEI who becomes aware that the CYP may have ALN should decide **ss.11(3)(d) ALNET**.

03.06 What does "responsible for a child or young person" mean under ALNET when referring to LAs?

An LA is responsible for a CYP where they are wholly or mainly, habitually resident in their area: **Hampshire CC v GC & Anor [2024] UKUT 128 (AAC).**

An LA is responsible for a CYP where they are "in the area" of the LA: **s.99(4) ALNET**. A CYP will usually be "in the area" of an LA if they ordinarily reside there: **para 1.24 ALN Code 2021**. But this is guidance only as a CYP may be ordinarily resident in more than one area and yet there can be only one body (School, FEI/LA) responsible for a CYP's ALN: **JG v Kent CC [2016] EWHC 1102 para 133-134**. In England **s.24 of the CFA2014** is the same as ALNET provisions, stating that the English LA is responsible for a CYP where they are in the LA's area.

The **EA 1996 s.579 (3A) and (3B)** partially define "*in the area"* in relation to Wales/England cross-border element, as being where the CYP is wholly or mainly resident (or would be so resident were it not for the provision in their IDP/EHCP).

An LA will not cease to be responsible for a CYP because of a temporary absence: **Hampshire CC v GC [2024] UKUT 128 (AAC).** In that case the UT found that the child remained the responsibility of the LA even though the child was temporarily absent by reason of the parent's overseas deployment as part of the armed forces.

Separate rules apply for looked after children and detained persons.
More: 03.01 Do the same rules apply for 'looked after children' or 'detained children'?

Note: There is no single definition for “in the area” of a local authority. Previous versions of the Additional Learning needs Bill made reference to “relevant local authority” instead of “responsible authority” (ALNET explanatory note para 36). “Relevant local authority” is defined in para 21 ALN Regs 2021. In general, this is where the CYP is ordinarily resident (excluding any periods of detention).

03.07 Which LA is responsible for a CYP who lives at different addresses?

The LA responsible for the CYP is likely to be the one in which the CYP is wholly or mainly resident: **EA 1996 s.579 (3A) and (3B).**

An LA will not cease to be responsible for a CYP because of a temporary absence: **Hampshire CC v GC [2024] UKUT 128 (AAC).**

03.08 Who is responsible for a CYP who lives in Wales, but attends a maintained school or FEI (or academy) in England?

The Welsh LA where the CYP is wholly or mainly resident, will be responsible for deciding whether the CYP has ALN and to prepare and maintain the IDP for them, under **para 18.6 ALN Code 2021**.

In the case of a young person with ALN, the entitlement to an IDP will depend on the LA’s decision about the necessity to maintain an IDP.

More: 04.12 When is it necessary to prepare and maintain an IDP for a Young Person?

03.09 Who is responsible for a CYP who lives in England but is enrolled in a maintained school or FEI in Wales?

In the first instance the maintained school or FEI will be responsible for determining whether the CYP has ALN, unless one of the exceptions in **s.11(3) ALNET** apply.

Where the maintained school or FEI considers a CYP has ALN it can request the LA in England to carry out an Education Health and Care needs assessment under **s.36(1) CFA 2014** with a view to issuing an **EHCP: s.12(d) ALNET**. This course of action would be appropriate where the maintained school or FEI considers that the CYP requires provision that it would not be reasonable for the Maintained School or FEI to make and would be necessary to make under an EHCP: **s.37(1) CFA 2014**. However, if the English LA informs the maintained school or FEI that it is not required to prepare an EHCP then the maintained

school or FEI must prepare and maintain an IDP: **s.12(5) ALNET**. Decisions by FEIs (on whether a CYP has ALN, the contents of parts of the IDP and a decision to cease to maintain an IDP) are appealable to the ETW: s. 70 ALNET.

The LA that maintains the maintained school in Wales is responsible for reconsideration:

- whether a CYP has ALN under **s.26 ALNET**;
- a request to revise the plan maintained by a maintained school in Wales under **s.27 ALNET**; and
- a decision by the maintained school to cease to maintain and IDP under **s.32 ALNET: s.87(2)(a) ALNET**.

Where the LA that maintains the maintained school in Wales on reconsideration decides the CYP has ALN it has the following options:

- direct the maintained school to prepare and maintain the IDP;
- prepare the IDP and direct the maintained school or FEI to maintain it; OR
- request the LA in England to prepare an EHCP.

The LA that maintains the maintained school in Wales:

- has no power to name a place at a particular school or other institution: **s.87(3)(f) ALNET**.
- May not maintain the IDP itself: **s.87(3)(c) ALNET**
- May not secure the ALP in the IDP: **s.87(3)(f) ALNET.**

The Welsh LA in which the maintained school or FEI is situated is responsible for making arrangements to resolve any disputes between CYPs/parents and any other LA, school or institution in Wales or England: **ss.68 and 87(4) ALNET**.

03.10 What happens if the English LA refuses to make an EHCP under s.37 CFA 2014?

The CYP or parent of a child could appeal against the English LA's refusal to issue an EHCP to the **First-Tier Tribunal (Health, Education and Social Care Chamber) (Special Educational Needs and Disability) in England**. Whether the English Tribunal has jurisdiction to consider the matter will depend on whether the tribunal considers that the English LA is responsible for the CYP under **s.24 of the CFA 2014** and **EA 1996 s.579 (3A) and (3B).**

03.11 Who is responsible for deciding whether a child in nursery has ALN?

If the child is in the nursery of a maintained school, then it will be the school's responsibility: **s.11(1) ALNET**.

If the child is in a non-maintained/private nursery, then the local authority bears the responsibility: **s 13(1) ALNET**. However, where a child receives nursery education funded by a local authority at a non-maintained provider, the provider should, where requested, help the local authority in the exercise of its ALN functions in relation to that child.

03.12 Who is responsible for deciding whether a child being Electively Home Educated has ALN?

The LA: **s.13(1) ALNET**.
More: 02.10 Does the LA have any duties towards a child who is electively home educated (EHE)?

03.13 Who is responsible for issuing an IDP for a child with ALN?

Where a maintained school or FEI decides that a CYP has ALN, it is the maintained school or FEI that must issue the IDP unless the circumstances in **s.12(2) ALNET** apply. In particular, the maintained school or FEI can refer the CYP to the LA where it considers that (**s.12(2)(a) ALNET**):

- The maintained school or FEI is not able to adequately determine the CYP's ALN or ALP; or
- The CYP's ALN, may call for ALP it is not reasonable for the maintained school or FEI to secure.
- If the CYP is resident in England, the maintained school or FEI can instead request the LA responsible for the CYP to secure an EHCP: **s.12(2)(c) ALNET**. A maintained school or FEI is not obliged to produce an IDP where an EHCP is already being maintained for the CYP: **s.12(2)(d) ALNET**.

In addition, a CYP or child's parent can also request that the LA take over responsibility for maintaining an IDP, which is maintained by a maintained school: **s.28(2) ALNET**. Where this request is made, the LA must inform the CYP, parent of a child, school and FEI and invite representations. It must decide whether to take over responsibility for maintaining the Plan usually within 7 weeks from receiving the request unless it is unable to do so before the end of that period due to circumstances beyond its control: **s.28 ALNET and para 26.30 ALN Code 2021.**

Where an LA decides that a CYP has ALN, it is usually responsible for issuing an IDP: **s.14 ALNET**. BUT where a CYP is registered at a maintained school or FEI in Wales, the LA can direct the maintained school or request an FEI to prepare and/or maintain the plan if it considers it "*appropriate*" to do so: **s.14(2) ALNET**. If the governing body does not agree to the request within a prescribed period, the LA may refer the matter to the Welsh Ministers: **s. 36(3) ALNET & para 28.21 – 28.29 ALN Code 2021**.

The LA is also not required to produce an IDP in the case of a young person (a person who would normally be in year 12 or above, but under 25: **s 99(1)** ALNET) where it is not necessary to do so: **s.14(1)(c)(ii) ALNET**.

More: 04.12 When is it necessary to prepare and maintain an IDP for a Young Person?

03.14 When would it not be appropriate for an LA to direct that a maintained school prepare and/or maintain an IDP?

The LA must not direct a maintained school to prepare or maintain a plan where a CYP is dual registered or where the reasonable needs of the CYP for ALP cannot be met unless the local authority secures a place at a particular school, institution or board and lodging: **para 12.88 ALN Code 2021**.

In other cases, the **ALN Code 2021** provides that an LA should not direct that the maintained school prepare or maintain the IDP unless:

- the CYP has ALN that call for ALP it would be reasonable for the school to secure,
-the school could adequately determine the extent and nature of the ALN, and/or
- the school could adequately determine the ALP.
Para 12.87 ALN Code 2021

03.15 What if the maintained school, parent (of a Child) or CYP disagrees with the LA's decision that the IDP should be prepared / maintained by a maintained school?

There is no right of appeal against a decision by the LA to direct that a maintained school prepare/maintain an IDP under **s.14(2) ALNET**.

However, the governing body of the maintained school, the CYP or parent of a child may request that the LA take over the plan under **s.28 ALNET**. A CYP or Child's parent can appeal against a decision of the LA to refuse to take over the plan: s.**28(2)(i) ALNET**.

There is no obligation on the LA to consider taking over the IDP where the LA has previously considered a request by the CYP/Parent/maintained school and the CYP's needs have not materially changed and there is no new information which would materially affect the decision: **s.29 ALNET**.

BUT a CYP or Child's parent can also appeal against a decision of the LA to refuse to take over the plan under s.29 ALNET: **s.28(2)(l) ALNET**.

03.16 Are there rules for determining which maintained school/FEI or LA is responsible for ensuring the ALP is made?

Yes. The body responsible will be the one responsible for maintaining the IDP/EHCP:

- The governing body of a maintained school FEI must secure the ALP for an IDP it maintains: **s.12(7) ALNET**.
- The LA must secure the ALN in an IDP it maintains: **s.14(10) ALNET**.

However, where an IDP is being maintained by an LA, the maintained school or FEI at which the CYP is registered, must also take all reasonable steps to help the LA secure the ALN specified in the IDP**:** **s.47(5) ALNET**.

The exception to this is where an NHS body is required to secure provision in the IDP under **ss.20 & 21 ALNET**.
More: 08.01 Can NHS bodies be made responsible for delivering ALP?

03.17 What happens when a CYP moves maintained school or FEI or to live in a different LA?

More: Chapter 10: IDP ceasing to maintain or transfer

03.18 When is it necessary for an LA to maintain an IDP?

The LA must maintain an IDP in cases where:

- The governing body of a maintained school or FEI is not able to adequately determine the CYP's ALN or ALP: s. 12 (2)(a)(ii) & (iii);
- The CYP's ALN, may call for ALP it is not reasonable for the maintained school or FEI to secure.
- The CYP is not in a maintained school or FEI (such as those below school age not in nurseries, electively home educated or receiving education otherwise than in school (EOTIS)).
- Looked after children.
- Those subject to detention orders,
- Those who are attending more than one provision (Dual Registered).

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04 IDP Issuing an IDP

Deciding if a CYP has ALN: Test, Timing and Challenge

04.01 Are there any particular rules about when the duty to decide whether a CYP has ALN arises?

Yes. The rules set out who is responsible and when that responsibility arises.

For a detailed discussion of **who** is responsible for making this decision (maintained school, further education institution or LA in Wales).
More: Chapter 03: Who is responsible for CYPs who may have ALN?

The duty to decide whether a child has ALN arises **when** it is brought to the attention or appears to the responsible body that the CYP ***may*** have additional learning needs:

- **s.11 ALNET (**governing body of a maintained school or an FEI**),**
- **s.13(1) ALNET** (local authority),
- **s.18(1) ALNET** (Looked after child),
- **s.40(2)(a) ALNET** (detained persons),

This is the case unless certain exceptions apply, under **ss.11(3), 13(2), 18(2) and 41(2)(a) ALNET**.
The main exceptions to the duty to decide whether a CYP has ALN include:

- Where a YP does not consent to the decision being made about them **ss.11(3)(c), 13(2)(d), 41(2)(a) ALNET**.

- A previous decision on whether the CYP has ALN has already been taken and the CYP's needs have not materially changed since that decision was made; and there is no new information that affects that decision: **ss 11(3)(b), 13(2)(b), 18(2)(b), 41(2)(b) ALNET.**

- A different authority is responsible for the CYP, for example a local authority in England (**s11(3)(e), s.18(2)(c) ALNET**), a local authority in Wales, when a CYP is a registered pupil or enrolled student at more than one school or FEI **(s.11(3)(d) ALNET)** or an institution in the further education sector **(s.13(2)(e) ALNET)**.

04.02 Does it matter how the possibility that a CYP may have ALN comes to the maintained school or FEI/LAs attention?

No. There might be a direct approach from the CYP, their parent or other family member. Alternatively, there might be a referral from an external body or professional or from another of the local authority's services, such as its social services. Once they are aware of the possibility, the duty to decide applies unless one of the exceptions are made out: **para 13.4 the ALN Code 2014**.

04.03 When will a CYP have ALN?

A CYP will have ALN if they have a learning difficulty or disability which calls for ALP: **s.2(1) ALNET**.

A CYP <u>of compulsory age or over</u> has a **learning difficulty or disability** where they (**s.2 (2) ALNET**):

- have a significantly greater difficulty in learning than the majority of others of the same age, or
- have a disability for the purposes of the **Equality Act 2010** (c. 15) which prevents or hinders them 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.

A child <u>under compulsory school age</u> has a learning difficulty or disability if:

- they are likely to have a learning difficulty or disability when they reach compulsory school age; or

- are likely to have a learning difficulty or disability when they reach compulsory school age if ALP is not made.

A CYP will have a significantly greater difficulty in learning where they require ALP. ALP is educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream nurseries, schools or institutions in Wales: **s. 3 ALNET**. When considering whether a person has a learning difficulty it is not necessary to consider if it is "significant," because if it is it will call for ALP: **s.2.20 ALN Code 2021**.

If the person is under 3, additional learning provision means, "educa*tional provision of any kind*." **s.3(2) ALNET**.

The Code (paragraph 20.16) says that where a CYP's progress continues to be less than expected and the application of differentiated teaching or standard targeted interventions have failed to address the attainment gap between the child or young person and their peers, this would usually indicate that the CYP may have ALN.

A person does **not** have a learning difficulty or disability solely because the language used to teach them will be different from language used at home: **s.2(4) ALNET**.

Being 'more able and talented' does not amount to a "difficulty in learning" for these purposes. These CYPs may require enhanced opportunities and challenge in order to reach their full potential, but this ought to be provided as part of differentiated teaching and is not ALN: **para 2.81 ALN Code 2021**.

Bringing all the guidance together, Nodi considers that a useful test to apply is as follows:

1) Does the CYP have a greater difficulty in learning than others of the same age? OR
2) Does the CYP have a disability, which prevents or hinders them 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?

If the answer to both these questions is 'no' then the CYP will not have ALN. If the answer to one or other of these questions is 'yes' then the second stage of the test is:

3) Does the learning difficulty or disability call for educational or training provision to be made that is additional to, or different from, that made generally for others of the same age in mainstream nurseries/schools/FEL's in Wales (or if under 3 education or training provision of any kind)?

If the answer is 'yes' then the CYP will have ALN.

04.04 Is the fact that the CYP's needs can be met from resources normally available in the school/FEI a sign that they do not have ALN?

No. There are several steps that can be taken by schools and FEIs that would amount to additional learning provision.

The test is whether the provision is additional to, or different from, that *made generally* for others of the same age in mainstream nurseries/schools/FEI's in Wales: **s 3 ALNET**. NOT whether the provision is normally *available* in mainstream nurseries/schools/FEIs. Consideration also needs to be given to what is *provided generally* for others of the same age and not what is generally available.

04.05 What is Universal Provision?

The non-legal term "universal provision" is used by some people to describe the provision made generally for others of the same age in mainstream nurseries/schools/FEIs in accordance with the curriculum for Wales.

It requires teachers, schools and FEIs to thoroughly plan the provision in each lesson to achieve the learning outcomes for the CYPs in the class.

A central aspect of universal provision is differentiated teaching. This is a way to modify instruction to meet the individual needs of all the students in the class. Teachers may differentiate the process of instruction, the content being taught, the resources used, or the learning environment.

This is not the same as providing an individualised curriculum for each pupil. It would be impractical for one teacher of a standard size mainstream class to achieve this (with help of teaching assistants or otherwise). While the aim is to make the teaching as inclusive as possible, but this is not always achievable with universal provision.

CYPs may require more targeted or specialist intervention for their needs to be met. This could include greater personalisation of the learning experience then what would be made generally for others of the same age, or more individual teacher/TA support. These interventions would fall outside of Universal Provision.

Care needs to be taken when using the term universal provision as it is sometimes used to refer to resources and approaches generally *available* in mainstream nurseries/schools/FEIs when those resources and approaches usually also include *additional learning provision*.

This term is also sometimes used to describe what is general practice for an FEI, a school or schools in a particular LA. The legal test for ALP however is the provision is additional to, or different from, that made generally for others of the same age in mainstream nurseries/schools/FEI's *in Wales*.

For these reasons, in practice use of the term universal provision does not always mean that a CYP does not have ALN. It is important to properly consider the legal test under **s. 3 ALNET**.

The **ETW in decision 15 of 2024** considered it wrong to approach the question of whether a CYP has ALN with reference to Universal provision stating that the correct comparator is the provision made for an ordinarily developing child of the same age (paragraph 14).

04.06 When does the decision whether a CYP has ALN have to be made?

In all cases the decision must be made promptly. Where it is considered that a CYP does not have ALN the **ALN Code 2021** requires maintained schools, FEIs and LAs to provide details of the decision and reasons for the decision to the following people:

- In the case of a child: the child and parents.
- In the case of a young person: the young person.

Reference: ss.11(4) ALNET for a maintained school or FEI or **s.13(3) ALNET** in the case of an LA

For an initial decision the **ALN Code 2021** requires this notification to take place within the following timescales (unless it is impractical to do so due to circumstances beyond the maintained school/FEI/LA's control):

- In the case of a maintained school, within 35 school days from it being brought to the attention of the maintained school that the child may have ALN: **para 12.12 ALN Code 2021**.

- In the case of an FEI, within 35 term time days from the date the young person consented to a decision on ALN being made: **para 16.16 ALN Code 2021**.

- In the case of an LA:
  - 12 weeks from when it is first brought to the attention of, or appeared to, the local authority, that a child or young person may have ALN or where the maintained school or FEI has referred the CYP to the LA under s.12(2)(a) ALNET: **para 12.63(b) ALN Code 2021.**
  - 7 weeks from receiving a request to reconsider the decision of the maintained school or FEI that the child does not have ALN (under s.26 ALNET): **para 12.63(a) ALN Code 2021.**

However, when it is considered that a CYP has ALN a final IDP needs to be produced within the same timeframes as above. As such, a decision on ALN needs to be made much sooner than the deadlines for notification of the decision to ensure that the various steps involved in producing the IDP can also be complied with.

04.07 What happens if the CYP or Parent disagrees with the decision that the CYP does not have ALN?

Where the decision is made by a maintained school, there is no right of appeal to the tribunal. Instead, the CYP or parent of a child can ask the LA to reconsider whether the CYP has ALN. The LA must then consider whether the CYP has ALN in accordance with **s.13 ALNET**: **s.26 ALNET**. A CYP or Child's parent can appeal against a decision of the LA that the CYP does not have ALN**: s.70(2)(a) ALNET**.

Before deciding, the LA must inform the governing body of the school and invite them to provide information and views on the issue. The LA is required to otherwise make the decision in the same way as under **s.13(1) ALNET**.

There is no obligation on the LA to consider whether the CYP has ALN where the LA has previously considered this and the CYP's needs have not materially changed and there is no new information which would materially affect the decision: **s.29 ALNET**. A CYP or Child's parent can appeal against a decision of the LA to refuse to decide to take over the plan under **s.29 ALNET**: **s.28(2)(l) ALNET**.

Where a CYP or parent of a child disagrees with the decision of an LA or FEI that the CYP has ALN, they can appeal to the Tribunal under **s.70(2)(a) ALNET**.

Issuing

04.08 Does a CYP automatically get an IDP following an ALN after an LA/School/FEI is notified that a child may have ALN?

No, if following the School, FEI, or LA decides that the child or young person does not have ALN no IDP will be issued.

If the CYP has ALN then an IDP must be issued (**ss.12 and 13 ALNET**) unless certain exceptions apply.

Exceptions: A CYP will not have an IDP where:

- They are a young person and do not consent to an IDP being maintained: **ss.12(2)(b) & 14(3) ALNET**.
- An LA in England should be responsible or already is maintaining an EHCP for the CYP: **ss.12(2)(c) & (d) ALNET.**
- In the case of YP's who are not in enrolled in a maintained school or FEI an IDP will only be prepared where the LA decides it is necessary to prepare and maintain a plan for the young person to meet their reasonable needs for education or training.
  More: 04.12 When is it necessary to prepare and maintain an IDP for a Young Person?

More:
03.07 Who is responsible for a CYP who lives in Wales, but attends a maintained school or FEI (or academy) in England?
03.08 Who is responsible for a CYP who lives in England but is enrolled in maintained school or FEI's in Wales?

04.09 Who should be given a copy of the IDP?

A copy of the IDP must be given to the CYP, a child's parent and, if the child is looked after, an independent reviewing officer**: s.22 of ALNET** and **s.23 ALNET** in respect of revised IDP's. This should be accompanied by information on rights of appeal and rigths to ask for review.

04.10 What are the timescales for Issuing an IDP?

If it is decided that the CYP has ALN then and IDP needs to be issued in the following timescales (unless it is impractical to do so due to circumstances beyond the maintained school or FEI/LA's control):

- In the case of a maintained school, within 35 school days from it being brought to the attention of the maintained school that the child may have ALN: **para 12.12 ALN Code 2021**.

- In the case of an FEI, within 35 term time days from the date the young person consented to a decision being made about their potential ALN: **para 16.26 ALN Code 2021**.

- In the case of an LA:
    - 12 weeks from when it is first brought to the attention of, or appeared to, the local authority, that a child or young person may have ALN or where the maintained school or FEI has referred the CYP to the LA under s.12(2)(a) ALNET: **para 13.22, 14.30, 15.79 (a) ALN Code 2021.**

    - 7 weeks from receiving a request to reconsider the decision of the maintained school or FEI that the child does not have ALN under s.26 ALNET: **para 15.79(b) ALN Code 2021.**

04.11 Does the LA have a duty to make provision under an IDP for a young person up to the age of 25 even where they may not obtain further qualifications?

Yes. The key question for the LA, having decided that a YP has ALN, is whether it is necessary to prepare and maintain a plan for the YP to meet his or her reasonable needs for education or training: **s.14(c) ALNET.** This question does not require that the YP obtain further qualifications. The emphasis is on outcomes, not qualifications.

There are certain circumstances, where it is deemed necessary to prepare and maintain an IDP to meet the YP's reasonable needs for education or training, and some circumstances where it is a matter for the LA's consideration.

More: 04.12 When is it necessary to prepare and maintain an IDP for a Young Person?

04.12 When is it necessary to prepare and maintain an IDP for a Young Person?

Where a young person is enrolled at a maintained school or FEI, the duty is the same as that applicable to a child, i.e. where it is determined that a young person enrolled at a maintained school or FEI has ALN, then an IDP must be prepared and maintained.

In the case of a YP who is not enrolled at a maintained school or FEI, the duty to prepare and maintain an IDP arises when the local authority decides (**s.14(c) ALNET**):

1. That the young person has ALN, and

2. That it is necessary to prepare and maintain a plan for the YP to meet his or her reasonable needs for education or training.

The YP *will* be deemed to have reasonable needs for education or training if the duration of the suitable programme of study that it is proposed the YP undertake, or continue to undertake, together with any further education or training to be undertaken, is not more than 2 years: **Regulation 9(1), ALN Regs 2021**.

The LA *may* determine that the YP has reasonable needs for education or training if any of the following circumstances apply: **Regulation 9(2) ALN Regs 2021**:

- The duration of the suitable programme of study that it is proposed the YP undertake is intended to take place over a period of more than 2 years: **paragraph 3(1) Schedule 1 ALN Regs 2021;**
- The YP has been unable to complete a programme of study within the programme's duration as intended at the outset, and it is proposed to extend the programme to enable to YP to meet the desired outcomes: **paragraph 4(1) Schedule 1 ALN Regs 2021;**
- The programme of study that it is proposed the YP undertake is additional to further education or training which the YP has already undertaken: **paragraph 5(1) Schedule 1 ALN Regs 2021;**
- The circumstances are substantially similar to the three scenarios described above: **paragraph 6(1) Schedule 1 ALN Regs 2021**.

In deciding whether the YP has reasonable needs for education or training in any of the scenarios described above (i.e. where the LA *may* decide the YP has reasonable needs for education or training) the LA must take into account the factors identified in paragraphs **3(2), 4(2), 5(2) and 6(2) of Schedule 1 of the ALN Regs 2021**.

Where the LA decides that the YP does not have reasonable needs for education or training, it is essentially finding that it is not necessary to prepare and maintain an IDP for a YP. The LA must notify the YP of the decision and the reasons for the decision (**Regulation 10(2) ALN Regs 2021**). The decision must be made promptly, and in any event before the end of the period of 12 weeks beginning with the day after the day on which the YP consented to the decision being made.

05 IDP general: production, challenge and review

Production: Form, Contents and General Considerations

05.01 Is there a prescribed form of IDP?

Yes. The standard form contained at **Annex A** of the Code must be used: **para 23.5 ALN Code 2021**.

An IDP must set out the following sections. Only sections: 2A, 2B (in part), 2C (in part), 2D are appealable to the ETW. **More: Chapter 5 Challenging an IDP**

- **Section 1A** Basic biographical information about CYP and contact details
- **Section 1B** responsibility for the IDP
- **Section 1C** Profile (About me)
- **Section 2A** Description of the CYPs ALN
  More: 06.07 What information on ALN needs to be included in the IDP?
- **Section 2B**: Description of delivery of ALP. Appealable in part.
  More: 07.08 What information needs to be included in Section 2B?
- **Section 2C:** Description and delivery of ALP to be secured by an NHS body
  More: Chapter 08: IDP Section 2C
- **Section 2D**: Place at a named school/institution or board/lodging
  More: Chapter 09: IDP Section 2D
- **Section 3A** Record of information used to develop the IDP
- **Section 3B** Timeline of key events
- **Section 3C** Transition
- **Section 3D** Travel arrangements

Each section of the standard form must be completed. Unless that section is not applicable to the child or young person in question, in which case it should be marked 'not applicable': **para 23.12 ALN Code 2021**.

05.02 Are there any rules about how an IDP should be drafted?

Chapter 23 of the **ALN Code 2021** provides detailed guidance on the contents of an IDP.

In all cases it should be written in plain language (whether that is Welsh or English or both), avoiding the use of jargon and explaining the relevance of any technical terminology that needs to be included, with a view to all who are likely to read the IDP being able to understand it, including, wherever possible, the child or young person: **para 23.8 ALN Code 2021**.

While the standard form must be used, further information, outside of Annex A, can be included as appendices, if that is considered appropriate: **para 23.5 ALN Code 2021**. Appendices could include interim or short-term targets or milestones, and to monitor the impact of the ALP (para 23.22 ALN Code 2021), professional reports, Individual Healthcare Plan or other document setting out other support being provided.

The following principles are relevant to producing an IDP:

- The description of the child or young person's ALN should be as clear and comprehensive as possible and include the impact of the need on the child or young person's learning in as much detail as possible: **Para 23.27 ALN Code 2021**. Reasons for deciding the CYP has ALN should also be included where this is not obvious or there has been a difference of opinion on the point: **para 23.28 ALN Code 2021**.
- All intended outcomes in section 2B.1 need to be SMART (Specific, Measurable, Achievable, Realistic and Time-Bound): **23.31ALN Code 2021**.
- ALP in section 2B.2 needs to be detailed, specific and quantifiable: **para 23.37 ALN Code 2021**.

Local authorities, FEIs and schools should consider whether any alterations are needed to suit the preferences or needs of the child or young person, e.g. changes in font size, the use of images, or avoiding the use of certain colours: **para 23.7 ALN Code 2021**.

05.03 Should the sections of an IDP be considered in a particular order?

Yes. Since the EA 1996 the approved procedure has been to first consider what the CYP's ALN is, then to decide what ALP is required to meet those needs: **R v Secretary of State for Education and Science ex p E [1992] 1 FLR 377, 388 – 399**, which was quoted in **The Learning Trust v MP [2007] EWHC 1634 (Admin)**: *"It is important… to identify or diagnose the need before going on to prescribe the educational*

provision to which that need gives rise, and only once the educational provision has been identified can one specify the institution or type of institution which is appropriate to provide it."

Nodi believes that this general principle will still apply to the new ALN framework.

However, previous SEN case law also noted that while provision must not be dictated to by a prior decision as to placement, the provision may be 'informed' by what is actually available at a particular school: **S v City and County of Swansea [2000] ELR 315 322H-323A**

This approach is reflected in **para 23.36 of the ALN Code 2021**, which notes that *"the ALP that best meets the ALN of the child or young person may be different depending on the type of institution they attend. For instance, the provision that a special school provides might be different to that which a mainstream school provides because of the different way that a special school is organised."*

05.04 Should consideration only be given to what the CYP requires now for the purposes of ALP?

No. Part of the description of delivery of a CYPs ALP includes setting out the outcome intended to result from the ALP in section 2B.1 of the IDP. Such intended outcomes should have a strong focus on enabling CYPs to move towards long-term aspirations.

In the case of young people there is a particular emphasis on preparation for adulthood and moving towards long-term aspirations: **para 7.33 ALN Code 2021**.

Challenging an IDP

05.05 What if a CYP or parent of a child disagrees with the content of an IDP?

They can appeal some sections of the IDP. These are:

- 2A: Description of the child or young person's additional learning needs (ALN).
- 2B.2: ALP to be provided.
- 2B.3: Should the ALP be provided in Welsh?
- 2B.5: Start date.
- 2B.6: End or review date.

- 2C.2: ALP to be provided by an NHS body.
- 2C.3: Should the ALP provided by an NHS body be provided in Welsh.
- 2C.5: Start date of the ALP to be provided by an NHS body.
- 2C.6: End or review date of the ALP to be provided by an NHS body.
- 2D: Place at a named school, other institution or board and lodging.

In the standard form, these elements are underlined, bold and in red.

Where an IDP is maintained by a maintained school, a request can be made to the LA to reconsider and change the plan under **s.27 ALNET**. A CYP or parent of a child has the right to appeal against the decision of an LA to refuse to change the IDP: **s.70(2)(h) ALNET**.

Review of IDP

05.06 What is a review and revision of an IDP?

To ensure that the IDP continues to accurately reflect the child or young person's needs and details the provision required to meet those needs, the **ALNET** requires IDPs to be reviewed at least annually and allows for them to be revised in the light of each review. The purpose of reviews include considering: whether the CYP's ALN has changed, whether the ALP may need changing, the continued suitability of the outcomes, if appropriate, deciding new or revised outcomes; and considering any other relevant matters affecting the IDP (such as transition): **para 25.29 ALN Code 2021**.

05.07 Does an IDP have to be reviewed?

Yes. An IDP must be reviewed within 12 months of the date on which a copy of the IDP is given to the child, YP or parent: **s.23(1) ALNET**.

Any subsequent review must take place by the end of the period of 12 months starting with the date on which a revised IDP, or notice of a decision not to revise the IDP is first given to the child, the child's parent, the independent reviewing officer for a looked after child, or the young person: **ss.23 & 24 ALNET**.

If none of those actions are taken, the 12 month period begins on the first day after the end of the preceding review period: **s.23(4) ALNET**. If the copy, revised copy, or notice that the IDP is not to be revised, is given late, the giving of the copy or notice is ignored.

If the IDP is given to different parties on different dates, it is the date on which it is first given that counts: **ss.23(3) and 24(3) ALNET**.

To be on time, the IDP or notice the IDP will not be revised has to be given within the 12 month period: **para 25.0 ALN Code 2021**.

05.08 Can an IDP be reviewed sooner than 12 months?

Yes. The governing body of a maintained school, FEI or an LA may review the IDP at any time and revise the plan following a review: **ss.23(9), 24(8) (for looked after children) ALNET**.

A review must also be carried out when:

- the CYP or child's parent requests this, unless the body maintaining the IDP considers a review to be unecessarry: **s.23(8) ALNET & ss.24(7) ALNET**.
- the plan includes ALP that an NHS body required to secure under s.20 ALNET and the NHS body asks for the IDP to be reviewed: **s.23(7) & 24(6) ALNET**.
- the child becomes looked after by the LA: **s.24(9) ALNET** & **s.83 of the Social Services and Well-being (Wales) Act 2014**.

05.09 Is there a limit to how often the IDP should be reviewed?

No. Reviews should be carried out as often as required by the circumstances: **25.3 ALN Code 2021**.

Para **25.14 ALN Code 2021** sets out a number of factors relevant to considering when to commence a review, which include:

- Changes which may affect the CYP's ALP, such as transition to a new stage of educaiton, school or institution.

- Evidence of changes to the CYP's ALN.
- Where another docment relevant to the CYP is going to be reviewed (such as a Individual Health Plan (IHP) or Care and Support Plan).
- The intended outcomes and target date for achievement of these.

However, simply because there is no limit does not mean a review must be carried out each time this is requested. A review need not be carried out where this is unecessarry: **s.23(8) ALNET & ss.24(7) ALNET**.

More: 05.11 When will it not be necessary for a maintained school or FEI or LA to review the plan at the request of the CYP or Child's parent?

05.10 What are the timescales for carrying out a review where this is requested by a CYP, parent of a child or NHS body?

Such a review must be completed promptly and in any event before the end of:

(a) In the case of a school, 35 school days
(b) In the case of an FEI, 35 term time days, or
(c) In the case of a local authority, 7 weeks.

Paras 25.22, 25.23 & 25.28 ALN Code 2021.

A review will be considered complete when a copy of the IDP or notificaiton of another conclusion is given to CYP, the child's parent or (where the child is looked after) an independent reviewing officer: **para 25.22 ALN Code 2021**

05.11 When will it not be necessary for a maintained school or FEI or LA to review the plan at the request of the CYP or Child's parent?

Whether a review is unnecessary will depend upon the circumstances. Factors which are likely to be relevant would include how long it has been since the plan was prepared or reviewed, whether there has been a change in circumstances which might affect the plan, or whether new evidence or information has come to light which might affect the plan: para **25.26 ALN Code 2021**.

Paragraph **25.14 ALN Code 2021** sets out various relevant factors a maintined school, FEI or LA need to consider when deciding when to review an IDP, which may also be relevant.

05.12 What steps does a maintained school/FEI or LA need to take if it decides a review is not necessary after it has been requested by a CYP or parent of a child?

A decision not to carry out a review and the reasons why this was not considered necessary should be sent to the CYP and parents of a child. In the case of a looked after child the decision also need to be sent to anindependent reviewing officer: **s 23(1) and 24(9) ALNET**. Information set out in **para 25.47 ALN Code 2021** should be provided at the same time.

05.13 Does the maintained school or FEI/LA have a deadline by which to review a plan where a CYP is transferring between phases of education?

No. However the ALN Code 2021 expects that planning for a known transition would usually coincide with when an IDP is reviewed: **para 27.20 ALN Code 2021**.

This is also listed in **para 25.14(c)** of the **ALN Code 2021** as being one of the factors to consider when deciding when to review the IDP.

05.14 What will be considered during a review?

A review should consider matters such as progress, changing needs, continued suitability of the outcomes, the suitability of the ALP, and any other matters related to the child or young person's education or training: **para 25.29 ALN Code 2021**.

06 IDP section 2A: description of CYP's additional learning needs (ALN)

06.01 Are there particular rules about whether a child or young person has Additional Learning Needs?

Yes. Section 2 of ALNET says that 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 additional learning provision***."

More: 04.03 when will a CYP have ALN?

06.02 Can a child under compulsory school age have ALN?

Yes. A child under compulsory school age will have ALN where:

- they are likely to have a learning difficulty or disability when they reach compulsory school age; or
- are likely to have a learning difficulty or disability when they reach compulsory school age if ALP is not made.

Additional learning provision is defined for people aged 3 or over as "e*ducational or training provision that is additional to, or different from, that made generally for others of the same age*" in a maintained school, nursery, or further education setting: **s.3 ALNET**.

If the person is under 3, additional learning provision means "educa*tional provision of any kind*": **s.3(2) ALNET**.

06.03 Do all disabilities within the EA2010 constitute ALN?

No. Not every disability (as defined by s.6 EA2010) falls within s.2 ALNET A disability which falls within s.2 ALNET must be such as to prevent or hinder the child or young person from making use of facilities for education or training of a kind generally provided for others of the same age.

'Facilities' are likely to be physical features rather than the way in which the school provides education for the pupil (which might not be the case if the child/young person only had, say, a physical impairment): **Hertfordshire v MC & KC [2016] UKUT 385 (AAC) para 14**. This is case law relating to English legal provisions, is likely to be helpful in interpreting the wording of ALNET.

06.04 Can health or social care needs be ALN?

Yes. Provided the needs meet the definitions in **s.3(1) ALNET**, health and social care needs can be ALN.

More:
07.02 Can health or social care support also be ALP?
02.02 What is Additional Learning Provision (ALP)?

06.05 Does the cause of a child or young person's ALN need to be known?

No, nowhere in the above definitions of ALNET does it state that the cause of a child or young person's ALN needs to be known for it to be considered that they have ALN.

s.2(1) ALNET makes clear that the learning difficulty or disability can arise from a medical condition or otherwise.
A child or young person's ALN 'may be accurately assessed without knowing their precise cause': English case of **SG v Denbighshire CC [2018] UKUT 369 (AAC).**

06.06 What different types of Additional Learning needs are there?

The Code reflects the English Upper Tribunal case **of EAM v East Sussex CC [2022] UKUT 193 (AAC)** in broadly identifying four areas of 'need' arising from learning difficulties or disabilities:

(a) Communication and interaction
(b) Cognition and learning
(c) Behaviour, emotional and social development
(d) Sensory and/or physical

Apart from the definition in the Act, the Code encourages consideration of the CYP's learning style, how their ALN is impacting on the way they function, whether any previous or current ALP has had or is having a positive impact on their progress.

06.07 What information on ALN needs to be included in the IDP?

The description of the child or young person's ALN should be as clear and comprehensive as possible and include the impact of the need on the child or young person's learning.

Where there is a relevant diagnosis, this should be included as part of the description.

This section could include the reasons for deciding that the child or young person has ALN and should do so where there are particular reasons for a decision that might not be obvious to someone considering the case in future, or where there was a difference of opinion as to the ALN. This might be a difference of opinion between professionals, or a difference of opinion between the child, child's parent or young person and professionals, or any other difference of opinion. It could explain how different opinions have been taken into consideration before a particular decision was reached.

Those responsible for drafting the IDP ought to ensure that they do not confuse the description of ALN with the ALP necessary to meet those needs.

07 IDP section 2B: description & delivery of Additional Learning Provision (ALP)

What is ALP?

07.01 Is there a rule specifying what counts as ALP?

Yes. For a CYP aged 3 or over the following questions need to be asked:

1. is it educational or does it train? **s.3(1) ALNET**; and
2. is it additional to, or different from, that made generally for others of the same age in mainstream nurseries, schools or further education institutions in Wales? **s.3(1) ALNET**

If both answers are 'yes' then it is additional learning provision (ALP).

ALP for a child aged under three means educational provision of any kind: **s.3(2) ALNET**.

The ETW does not have to follow English case law, but Nodi believes that a lot of English case law on what is SEP is likely to be considered by the ETW as useful guidance on what is ALP. Guidance from English cases that are likely to be followed by the ETW includes:

- there is no hard boundary between 'educational' and 'non-educational' – some things could be both: **A v Hertfordshire CC [2006] EWHC 3428.** However, just because some particular provision brings some educational benefit does mean there is a need to make this ALP.
- the question of whether any particular provision is educational or non-educational (or a mixture of both) is a question of fact and not a question of law: **LB Bromley v SENT [1999] ELR 260**
- educational need has a broad meaning, for example a child's education can require day-long and year-round attention to many physical needs: **LB Bromley v SENT [1999] ELR 260**
- education is *"about instruction, schooling or training, so one or more of these factors is likely to be discernible in provision which is asserted to be educational"*: **DC & DC v Hertfordshire CC [2016] UKUT 379 (AAC).**

Even though similar legal principles are likely to be applied, the results in practice may be different. This is because what is SEP in England depends on what is ordinarily available in mainstream settings in *England* and what is ALP depends on what is ordinarily available in mainstream settings in *Wales*. Wales has a completely different curriculum to England established under the **Curriculum and Assessment (Wales) Act 2021** and what is ordinarily available in mainstream settings in Wales may also be different. This could mean that something that would be considered SEP in England may not be considered ALP in Wales and vice versa.

07.02 Can health or social care support also be ALP?

Yes. Health or social support, which is educational, or trains will also be regarded as ALP and be contained in an IDP: **s.3(1) ALNET & para 2.31 ALN Code 2021**. Health or social support that does not meet this test will not be ALP and should not be included in the IDP. This support may instead be contained in an Individual Healthcare Plan or care and support plan.
More: 07.05 Are there any rules for coordinating health and social care support with ALP?

The principle set out in the English case of **The Learning Trust v MP [2007] EWHC 1634 (Admin)** is likely to apply equally in Wales: *"It is not the function of the special educational needs provision to provide for a child's social needs (at least not those which are not also educational needs)."*

Whether the health or social care needs impact on a CYP's ability to learn or access facilities for education generally provided in mainstream settings in Wales may be a relevant factor to consider: **para 2.31 ALN Code 2021.**

English cases may provide useful guidance on what would amount to ALP. BUT: the decision in these English cases will not automatically mean that the ETW will reach the same decision. This is because:

- social, health and education systems operate differently in Wales to those in England. These differences need to be taken into account.
- Whether something is ALP may depend on the CYP's individual circumstances.
- English cases need to be read carefully to see whether they provide useful guidance in the CYP's particular case.

With that warning in mind, it may be useful to take the following cases into account:

- A hearing aid enabling a pupil to hear the class can be educational provision even though it does not itself "educate" the pupil: **EAM v East Sussex CC [2022] UKUT 193 (AAC)**
- Even if medical and nursing support is essential for the child or young person to be educated, that does not of itself make it SEP: **East Sussex CC v KS [2017] UKUT 273 (AAC)** para 89, the UT approving the case of **City of Bradford v A [1997] ELR 417** and **OD v Gloucestershire CC [2013] UKUT 112 (AAC).**

More: 07.01 Is there a rule specifying what counts as ALP?

07.03 Is Speech and Language Therapy ALP?

Under the old SEN law, it was firmly established that speech therapy should be treated as educational unless there are 'exceptional reasons for not doing so': **X&X v Caerphilly BC [2004] EWHC 2140**. This is because effective communication is fundamental to education such that teaching a CYP to communicate would be educational and thus potentially ALP. An exception may be where the speech therapy was not related to communication. Nodi thinks that this rule will also apply to the framework under ALNET.

The **ALN Code 2021** specifically recognises communication and interaction as one of the four areas of 'need' that may arise from learning difficulties or disabilities: **para 2.35 ALN Code 2021**.

Consideration will need to be given as to whether this goes in 2C of an IDP.

More: 07.01 Is there a rule specifying what counts as ALP?

07.04 Can psychiatric input be ALP?

Yes. Psychiatric input is capable of being ALP, but whether it is in any particular case is a question of fact for the LA/ maintained school or FEI and (if a dispute arises) the ETW.

'Vague well-being sessions' are unlikely to be ALP: **DC & DC v Hertfordshire CC [2016] UKUT 379 (AAC)** (decided on the English law and so persuasive only for the ETW).

Such provision will likely need to be recorded in section 2C of the IDP.

More: 07.01 Is there a rule specifying what counts as ALP?

07.05 Are there any rules for coordinating health and social care support with ALP?

Yes. Health and social care support that does into meet the definition of ALP should not go in an IDP. Support to meet health and social care needs may be set out in other documents, such as:

- An Individual Healthcare Plan produced in accordance with the Welsh Government Guidance: Supporting Learners with Healthcare Needs **WG31248 (gov.wales)** issued under **s.176 of the Education Act 2002**.
- Issuing a care and support plan under **s.54: Social Services and Well-Being (Wales) Act 2014**. A care and support plan must usually include a record of the arrangements made to meet the child's needs in relation to education and training (a "personal education plan") and any individual development plan maintained for the child under **section 19: Additional Learning Needs and Education Tribunal (Wales) Act 2018** must be incorporated within the personal education plan: **s.83 Social Services and Well-Being (Wales) Act 2014**.

Statutory guidance encourages IDPs, IHPs and care and support plans to be reviewed together where it would be beneficial to do so: **para 25.14(g) ALN Code 2021**.

An IDP must be reviewed where:

- it contains ALP that an NHS body is required to secure under **s.20 ALNET** and the NHS body asks for the IDP to be reviewed: **s.23(7) & 24(6) ALNET**.
- the child in question becomes looked after by the LA: **s.24(9) ALNET** & **s.83 of the Social Services and Well-being (Wales) Act 2014**.

The ALN Code sets out that relevant information from health and social services should be sought for the purpose of determining what ALN a CYP has and what ALP is required to meet those needs where the circumstances require it: **para 20.20 ALN Code 2021**. Furthermore, other agencies and professionals should be invited to meetings about determining ALN or producing/reviewing IDPs where they are likely to make a relevant contribution: **para 22.17 ALN Code 2021**.

More generally:
The ALN Code encourages LAs to link reviews of arrangements for CYPs with ALN with the carrying out of wider strategic duties such as assessments of care and support needs by LAs and Local Health Boards: **paras 7.15 & 7.25 ALN Code 2021**. Such reviews require Health and Social services to be consulted: **para 7.13 ALN Code 2021**.

ALNCOs in maintained schools or FEIs are required to act as a key point of contact for the relevant local authority's inclusion and support services, external agencies, independent/voluntary organisations, health and social care professionals, educational psychologists: **para 8.21 ALN Code 2021**.

Local Health Boards must appoint a Designated Education Clinical Lead Officer (**DECLO**) to have responsibility for co-ordinating the health board's functions in relation to children and young people with ALN (**s.61 ALNET)** and have specific obligations to collaborate with others**: para 9.10 – 9.12 ALN Code 2021.** The DECLO should have oversight over any complaint or dispute relating to the local health board's functions under ALNET: **para 9.17 ALN Code 2021**

LAs, maintained schools and FEIs considering whether a CYP has ALN need to consider whether the evidence points to other underlying needs and not ALN and if so, whether there are other ways to support the child or young person's needs and other services which need to be involved in the child or young person's life such as an educational psychologist, education welfare services, social services or health bodies: **20.11 ALN Code 2021**.

More: Chapter 08: IDP Section 2C: the description and delivery of ALP to be secured by an NHS body

07.06 Will the institution attended by the CYP influence the ALP?

The ALP that best meets the ALN of the child or young person may be different depending on the type of institution they attend. For instance, the provision that a special school provides might be different to that which a mainstream school provides because of the different way that a special school is organised: **para 23.36 ALN Code 2021**.

More: 05.03 Should the sections of an IDP be considered in a particular order?

07.07 Is the CYP entitled to receive the 'best' ALP?

No. The Act does not give an entitlement to provision which goes beyond that which is called for by the child or young person's ALN: **para 2.40 ALN Code 2021**. The body responsible for preparing and maintaining the IDP can consider the efficient use of resources when deciding between different options for the ALP or different ways of delivering it, where each of those options or ways of delivery would meet the person's ALN and accord with any other restrictions under the Act which apply in the circumstances.

Case law under the old SEN system provided that the duty was to make the SEP that *"is reasonably required"* to meet a CYP's needs and what was reasonably required was a question of judgment for the expert Tribunal: **A v Hertfordshire CC [2006] EWHC 3428 para 25**. Nodi considers this to be useful guidance for the ETW.

07.08 What information needs to be included in Section 2B?

Section 2B needs to include the following (sections 2B.2/2B.3/2B.5/2B6 are appealable to the **Education** Tribunal Wales **(**ETW)):

2B.1: the outcome it is intended will result from the ALP: the intended outcomes should be Specific, Measurable, Achievable, Realistic and Time Bound: **para 23.20 ALN Code 2021**.

2B.2: the ALP to be provided: this should be detailed, specific and quantifiable: **para 23.37 ALN Code 2021**.

2B.3 Whether the ALP should be provided in Welsh.

2B.4 The organisation to provide the ALP.

2B.5 The date from which the ALP will be provided. In many cases, this will be from the date the IDP is finalised.

2B.6 This should set out the date for review of the IDP or, (where it is clear that ALP will not be required in the future) the date when the ALP will end.

2B.7 The rationale for the ALP: This section of the IDP might just refer to the record of information used to develop the IDP where there is no difference of opinion, nor other need to explain a decision: **para 23.41 ALN Code 2021**, but an explanation will need to be given where there is a difference of opinion: **para 23.42 ALN Code 2021**.

Where there are different elements to a person's ALP, each of the sub sections above must be given for each element of ALP: **para 23.29 ALN Code**.

Glossary: **Education Tribunal Wales**

07.09 Does section 2B have to include all educational provision that will be provided?

No, section 2B only needs to contain the provision that is additional to or different from that made generally for others of the same age in mainstream nurseries, schools and FEIs as it is only intended to include *additional* learning provision: **s.3 ALNET**.

07. 10 What level of detail does s.2B.2 need to go in to?

ALP needs to be specified in a way which is *"detailed, specific and quantifiable"*: **para 23.37 ALN Code 2021**.

What is sufficiently specific will depend on the facts of the particular case.

The UT in **Worcestershire County Council v SE [2020] UKUT 217 (AAC)** **para 74** provided a useful summary on the English law, which the ETW is likely to follow as there is similar guidance on specificity in the English **COP 2015**. UTJ West set out the following principles:

1. A primary consideration in relation to specificity are the statutory duties of the LA, maintained school or FEI.
2. The EHCP is a free-standing legal document which parties are entitled to rely upon if a question arises about provision being made.

3. Where there is a need for flexibility it should not be an excuse for lack of specificity where detail could reasonably have been provided.
4. The nature of the provision will often point towards the necessary level of detail.
5. Vague words like “support”, “input”, “interventions” and “opportunities” are unlikely to be sufficient.
6. If a SEN pupil is to attend a mainstream school the tribunal is likely to need more detail than if the pupil were at a special school.
7. The tribunal can be pragmatic if the evidence does not enable the tribunal to set out the detail, but it would be inappropriate to adjourn.
8. The FTT can use its expertise as a specialist panel.

Further relevant principles from English case law include:

1. A *“plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time”* (here the child was to change schools a few months later): **BB v LB Barnet [2019] UKUT 285 para 22**. The tribunal has the power to delete provision if they are too prescriptive: **FC v Suffolk CC [2010] UKUT 368 (AAC) para 33**.
2. It is important to bear in mind that the IDP is a legal document and so it needs to be sufficiently clear so that it can be enforced in the event there is a dispute: **London Borough of Redbridge v HO (SEN) [2020] UKUT 323 (AAC) para 16**.
3. The FTT will be pragmatic, particularly in cases where a child is to start at a new school – the statement will be *“realistic and practical”* where adjustments will be made to provision, and knowledge develops: **CL v Hampshire CC [2011] UKUT 468 (AAC) para 15-16.**
4. It may be necessary to specify the Staff qualifications/experience: e.g. “teacher who is experienced in working with pupils who have significant learning difficulties and autism/communication disorders”: **R v Wandsworth ex parte M [1998] ELR 424.**
5. The need for and amount of 1:1 work needs to be specified: **L v Clarke and Somerset [1998] ELR 129**.
6. Input from other professionals, such as sessions of speech therapy needs to be clearly set out and quantified: **R v Harrow ex parte M [1997] 3 FCR 761.**

Further useful guidance **in English case law on wording can be found here:**

1. Where small group work is involved, the size of the group, the length and frequency of the sessions should usually be included: **L v Clarke and Somerset [1998] ELR 129.** However, to say only that a child needs to be taught in "small groups" will not always be unlawful: **SB v Herefordshire CC [2018] UKUT 141 (AAC) para 35.** In that case neither party had advanced any argument on what size of teaching group was required.
2. It needs to be clear whether "small group teaching" requires a small class or being within a small supported group doing differentiated work in a whole class setting: **K&K v The Authority [2013] UKUT 624 (AAC)**
3. Words like "as appropriate", "as required", "regular", "periodic", "subject to review" are all likely to be considered not sufficiently specific.
4. In **B-M and B-M v Oxfordshire CC (SEN) [2018] UKUT 35 (AAC) para 5**, the following was found unlawful:
    a. "support from a learning support assistant" said nothing about how much or their training or experience;
    b. "programme to develop his social communication skills" failed to say anything about the nature/content of the programme;
    c. "opportunities for" is "vague, meaningless and unenforceable"; and
    d. "the equivalent of 25 hours of support to be used flexibly across the school day to include individual, small group and whole class teaching to meet the outcomes described" is vague and lacks the required specificity; what is meant by "equivalent"? who is to provide the support?

07.11 Does section 2B.2 have to specify things like how much provision a child or young person requires, and how often?

Yes. This is particularly important when setting out provision to be provided by external professionals. An important factor to consider is whether the provision is sufficiently clear to know what provision the CYP should be receiving. If it is not clear, then disagreements may arise over what the provision actually is: 23.37 ALN Code 2021. Provision should be detailed, specific and quantifiable.

Where appropriate, such provision can lawfully be worded to allow professionals a degree of freedom to use their judgment or provide for changing circumstances: **BB v LB Barnet [2019] UKUT 285 para 22**

More: 07.10 What level of detail does s.2B.2 need to go in to?

Examples from English case law include:

- saying that the therapist should give *"initially a visit once a week for a term thereafter reducing to once a fortnight"* was too vague, because it did not set out the length of each session or what it would consist of: **S v SENDIST [2005] EWHC 196**

07.12 Can an IDP state that ALP in section 2B.2 should be further specified following further assessment?

No. The IDP needs to set out the ALP that the CYP's ALN calls for: **s.10(b) ALNET**. Although exceptionally, the Court of Appeal accepted as lawful a statement which made provision for future assessment of therapy needs where the statement was seen as necessary to get the child back into school and his therapy needs could not be assessed until he was back in school: **E v Newham [2003] EWCA Civ 9 para 61-66**. In this case Nodi assumes that the results of the later assessment should form part of a review and amended IDP.

However, the IDP can, be less specific because the CYP's needs are changing:
More: 07.13 Can section 2B.2 be less specific because a CYP's needs are changing?

07.13 Can section 2B.2 be less specific because a CYP's needs are changing?

Yes, but it is still necessary to make sure that the provision is sufficiently clear and specific so that everyone knows what provision a CYP will be getting. It is important to bear in mind the possibility of reviewing an IDP at any time.

It will be unlawful to leave provision unspecified or unquantified simply to allow for flexibility in the school's approach/arrangements: **IPSEA v Secretary of State [2003] EWCA Civ 7 para 8**.

07.14 Does section 2B.2 have to be more specific if the child is receiving education otherwise than in school?

Possibly, but it will depend on the individual case. Guidance in the English case of **DM v Cornwall County Council [2022] UKUT 230 para 7** was that *"in some very general sense that educational provision which is bounded by a school building and the provision and rules that may apply to all pupils*

in that school may to an extent be assumed and not need to be stated whereas that provision may need to appear more explicitly in a case where the EHCP concerns a child being educated at home and otherwise than in school", but *"the degree of specificity that is required for an individual child in their EHCP will always have to depend on the facts of that child's case."*

07.15 Can section 2B.2 be less specific just because the CYP is in a special school?

Sometimes yes. The ALP that best meets the ALN of the child or young person may be different depending on the type of institution they attend. For instance, the provision that a special school provides might be different to that which a mainstream school provides because of the different way that a special school is organised: **para 23.36 ALN Code 2021**.

Guidance from English cases indicates that whether a CYP is at a special school or college rather than a mainstream placement, may be a factor to be taken into account in allowing greater flexibility: **East Sussex CC v TW [2016] UKUT 528 (AAC) para 41 (**English case but likely to be followed**)**, but there is no general principle that greater flexibility is permitted because a CYP is in a special school. Provision still needs to be sufficiently specific in a special school where that detail can reasonably be provided: **B-M and B-M v Oxfordshire CC (SEN) [2018] UKUT 35 (AAC) para 5**.

07.16 Can section2B.2 be less specific because the LA has a policy not to specify/quantify ALP?

An across-the-board LA policy not to properly specify/quantify is unlawful.

07.17 Does the provision set out in section 2B have to tie in with the needs set out in section 2A?

Yes. Section 2B needs to describe the provision called for by the ALN: **para 2.40 ALN Code 2021**

07.18 Does provision set out in section 2B.2 have to link to the outcomes set out in section 2B.1?

Yes. The **ALN Code 2021** describes section 2B.2 as being *"a description of the ALP to be provided with a view to meeting the intended outcome."*

07.19 Can the tribunal change the objectives set out in section 2B.1?

There is no specific appeal right to challenge the outcomes in section 2B.1.

This was also the case under the old system and remains the case in England. Where a tribunal makes amendments to provision, the English tribunal has held there is a power to make consequential amendments to the outcomes to fit with the amended provision: **S v Worcestershire CC (SEN) [2017] UKUT 0092 (AAC)** para **84-85**.

Examples of ALP

07.20 Can learning life skills be ALP?

Yes. Developing independent living skills is a legitimate outcome for which ALP can be made: **para 23.30 ALN Code 2021**.

The relevant question is whether the provision is educational or training. If what is being provided is simply helping with basic life skills this is more likely to be considered social care. If a CYP needs to learn those skills, has the potential to learn those skills and the provision is aimed to help them learn those skills it is likely to be ALP.

07.21 Can a requirement for parent/teacher meetings be ALP for the CYP?

Potentially, although the instances where this would be ALP are likely to be rare.

The English case of **HN v South Tyneside Council (SEN) [2019] UKUT 380 (AAC)** considered that regular liaison between the child's parents and class teacher could be SEP where child's SEN requires it: for example, in the form of daily discussions about strategies the parents could put in place at home or on the journey to school." But it was stressed that it was "likely to be rare if not very rare" for this to be SEP.

When considering this issue, it is worth bearing in mind the extent to which regular liaison between home and school forms part of what already takes place in schools in Wales as well as the statutory mechanisms for review of ALN. Significantly also, while it is usually assumed that parents will want to help do what is best for their children, nothing in an IDP should require them to make ALP for their

child unless the parent has elected to home educate their child: that is the responsibility of the LA/maintained school or FEI maintaining the IDP.

07.22 Can learned behaviour, such as sexualised behaviour, give rise to a need for ALP?

It is likely that learned behaviour, such as sexualised behaviour, may not itself be a learning difficulty, but that does not mean that the provision required in relation to it (including a residential placement) is not ALP if it is not directly related to a learning difficulty: **H v A London Borough [2015] UKUT 316** (decided on the English law and so not binding in the ETA, however Nodi considers that the reasoning is likely to be persuasive).

07.23 If a child is placed in a different year group is that ALP?

Yes. Placement in a different year group to that indicated by a CYP's chronological age is ALP: **AB v North Somerset [2010] UKUT 8 (AAC)** (decided on the old English law and so not binding, but Nodi considers that the ETA is likely to follow this reasoning).

07.24 If a child needs to be in small groups or small classes for some or all of the time is that ALP?

This depends on whether such provision would be additional to or different from that made generally for others of the same age in mainstream nurseries, School's or FEIs, because children are often grouped as part of the curriculum for Wales. If the child needs small group teaching when not all children in a mainstream school would be getting it, or to be in classes smaller than in a mainstream school, then that is likely to be ALP: **H v Leicestershire [2000] ELR 471** (decided on the old English law and so persuasive only for the ETW).

07.25 If a child or young person needs to be with a particular peer group other than that in a mainstream class, is that ALP?

Placement in a particular peer group can amount to ALP: **AJ v LB Croydon [2020] UKUT 246 (AAC)** (decided on the English law but likely to be followed by the ETW).

07.26 Does the term "waking day curriculum" have any legal meaning?

No. It is sometimes used as a non-legal label for when the CYP's ALN are such that they call for ALP to be delivered beyond normal school hours.

Provision beyond normal school hours, can take many different forms. For this reason, the Upper Tribunal in England has warned against using this term "waking day curriculum" as shorthand, because it distracts from proper consideration of the legal requirements. **LB Southwark v WE [2021] UKUT 241 (AAC)**. A proper evaluation of what out of school-hours provision the CYP needs and why this needs to take place outside of school hours needs to be carried out.

ALP outside of normal school hours does not always mean a residential placement/board/lodging is required: **East Sussex CC v TW [2016] UKUT 528 (AAC).**

More: 07.27 Is there a particular rule about when a child requires out of hours ALP?

07.27 Is there a particular rule about when a child requires out of hours ALP?

The central question to ask is what ALP the CYP requires, and when. If the ALP in question can only be made out of school hours, then that should be clearly set out in Section 2B.2.

Only once this has been properly set out should consideration be given to whether a residential placement/board/lodging is required to make that provision.

The following principles set out under the old SEN law/English cases are likely to provide useful guidance on whether ALP outside of school hours is required:

- Provision outside of normal school hours may be required where the circumstances for the CYP to learn only arise out of school hours (such as independent living skills). When considering education or training in relation to self-care or going into the community, it will be necessary to consider whether s**uch** opportunities can take place during the normal school day.
- ALP out of school hours may be justified where skills learned in school need to be generalised/translated into other areas of life, such as home life: **S v SENDIST [2007] EWHC 1139 (Admin)**BUT ALP out of school hours will not generally be required *simply* to generalise skills learned in school or college. Education or training needs to be taking place: **GL v West Sussex CC [2017] UKUT 414 (AAC) para 32** otherwise the support may be better classified as health care or social care and support.

- Only in very rare cases would a requirement of consistency of provision on its own justify programmes of learning beyond the ordinary school day: **T v Hertfordshire CC [2004] EWCA Civ 927 para 50 &** **Westminster CC v FTT [2023] UKUT 177 (AAC)**. Parents or carers becoming involved outside of the school day in reinforcing what has been done in school and by trying to act inconsistently with it is not in itself necessarily ALP (though it may be for the particular child/young person in question): **TA v Bowen & Solihull [2009] EWHC 5 para 39**, **TW and KW v Hampshire County Council [2022] UKUT 00305 (AAC) para 27.**There are procedures in place for ensuring social services carers maintain a consistency of approach.
- Where a CYP has issues with concentration and fatigue, ALP out of hours may be required so that more time for rest can be incorporated into the day. However, in such instances it should also be considered whether provision outside of school hours is denying the CYP adequate down time.
- Parents/carers cannot be expected or relied on to provide any ALP unless the learner is EHE. in such cases, if a need for ALP out of school hours has been identified, then the LA will have to make arrangements for this and cannot rely on parents/carers.

More: **07.30 Can parents be required parents to provide education?**

07.28 Is the duty to secure the provision in the IDP absolute?

Yes. English case law has found that the word *"secure is an ordinary English word and needs no gloss - what is plain is that the duty has no "reasonable endeavours" escape clause available to excuse failure to secure the provision specified"*: **ZK v LB Redbridge [2020] EWCA Civ 1597 para 13**, **R (BA) v Nottingham CC [2021] EWHC 13348 (Admin) para 27**. There appears to be no good reason why this would not also be the case under **ALNET**. This was also the case under the old Welsh law under the EA 1996: **N v North Tyneside BC [2010] EWCA Civ 135**.

Any complaint that the provision in the IDP has not been provided needs to be made to the Administrative Court by way of a claim for judicial review and not the ETW.

While the requirement to make the provision is absolute, the court in judicial review proceedings has discretion on whether it should order the provision to be made. The Supreme Court set out factors that would be relevant to whether a court should exercise its discretion to make a mandatory order in

the case of **R (Imam) v Croydon LBC [2023] UKSC 45 para 40-60, 66-71**. This was decided in the context of housing law, but the principles will be of equal relevance:

- The onus is on the LA to explain to the court why a mandatory order should not be made.

- A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure that it does so only where that course is clearly justified. But different types of order are available, and it may be that due enforcement of the law can be sufficiently vindicated by some order other than a mandatory order.

- The LA's ability to comply with a mandatory order is relevant. Where the LA does not have resources to comply with the order is a "highly material factor." However, "a public authority which has limited resources available for use to meet its statutory duties and to fulfil functions which are merely discretionary is obliged to give priority to using them to meet its duties."

- Consideration should be given to:
  - whether the LA has a general contingency fund, and the cost could be met by that fund.
  - The extent to which the LA had notice that it was not complying with its duty but failed to take the opportunity to react to that in good time.
  - The extent of the impact on the individual to whom the duty is owed. It is the vindication of their right which is being denied, and if the impact on them of the failure to comply with it is very serious and their need is very pressing it may justify a mandatory order.

- Whether the LA is taking any steps to address the gap in finances.

- Whether making the order would give the Claimant undue priority over others in a similar situation.

07.29 Is the LA under a duty to make ALP fit with Elective Home Education (EHE)?

No, but there is a duty to take it into account. The overall duty remains to make provision that the CYP's learning difficulty or disability calls for: **s.10(b) ALNET**. The duty is not to provide the best possible provision or that which the parents want: **para 2.40 ALN Code 2021**.

- Where a child is EHE, the LA will first need to identify the type of ALP called for and whether the parent will be able to deliver it as part of EHE. Where this is the case that provision will still be written into the IDP, and the LA is under a duty to secure it**: 14(10) ALNET**. The duty to secure the provision does not require the LA to provide the ALP. This will be provided by the parent. The LA needs to satisfy itself that such provision is being delivered: **para 18.23 ALN Code 2021.** This is different from EOTIS, which is provision that the LA must make if the test in s.53 ALNET is met. **More: 09.52 Is elective home education the same as EOTIS?**

- Where parents are not able to provide the ALP, the LA will need to consider how the ALP will be secured. This could be by way of providing training to the parent to deliver ALP at home, ALP to supplement EHE or making provision for ALP to be provided at a particular school: **18:23 ALN Code 2021 & p7 EHE Guidance**.

- Where a child requires specialist provision, the local authority would need to decide whether it would be reasonable for the support to be provided in the child's home or whether, for example, the provision needs to be made in a school or a specialist educational setting. **p7 EHE Guidance**. The LA is under a duty to have regard to the views, wishes and feelings of the CYP or child's parent: **s.6 ALNET**. The LA will therefore need to have regard to the desire for the CYP to be educated at home. However, it is unlikely that the LA will be required to make ALP fit with EHE where it is not reasonable to do so. The LA can consider the efficient use of resources when deciding between different options for the ALP or different ways of delivering it, where each of those options or ways of delivery would meet the person's ALN and accord with any other restrictions under the Act which apply in the particular circumstances: **para 2.40 ALN Code 2021**. For example, the LA can only provide education otherwise than in a school where it is satisfied that it would be inappropriate for ALP to be made in a school: **s.53(2) ALNET**.

More:
09.53 Can parents insist on a hybrid arrangement between EHE and EOTIS?
09.47 When will it be inappropriate for ALP to be made in a school?
09.51 Can parents agree to provide some EOTIS?

09.52 Is elective home education the same as EOTIS?

07.30 Can parents be required to provide ALP?

No. ALNET places no duties on parents to provide ALP. Where the CYP has ALN then the duty falls on the body maintaining the IDP to secure provision: **ss.12(7) or 14(10) ALNET**, unless the relevant NHS body is obliged to secure provision under **ss.20 and 21 ALNET**.
More: 08.01 Can NHS bodies be made responsible for delivering ALP?

However, parents can ***choose*** to provide ALP as part of EHE. Where they choose to do so, this will be written into the IDP. The duty remains on the LA to secure the ALP, but this will be satisfied by agreeing with parents that they should provide it and satisfy itself that such ALP is being delivered. The LA is under a duty to monitor that suitable education is being provided: **s.436A EA 1996 & R (Goodread) v Portsmouth City Council [2021] EWHC 3057.** In order to fulfil these obligations and LA will usually be required to see and communicate with the CYP: **para 4.2 EHE Guidance**:

Parents or carers becoming involved outside of the school day in reinforcing what has been done in school and by trying to act consistently with it is not in itself necessarily ALP (though it may be for the particular child/young person in question: **TA v Bowen & Solihull [2009] EWHC 5** para 39, **TW and KW v Hampshire County Council [2022] UKUT 00305 (AAC) para 27.**

07.31 Can the IDP require other bodies to arrange/fund the required ALN?

Yes. Sections 20 & 21 ALNET set out circumstances where NHS bodies can be made responsible for delivering/funding ALP.

More: 08.01 Can NHS bodies be made responsible for delivering ALP?

No charge can be made and parents or CYPs are not required to pay for anything done by an LA or maintained school or FEI under their ALN obligations: **s.49 ALNET**.

08 IDP section 2C: description and delivery of ALP to be secured by an NHS Body

08.01 Can NHS bodies be made responsible for delivering ALP?

An LA - or in the case of a Young Person not registered at a maintained school (s.a. FEI or specialist college placement) the body preparing or maintaining the IDP - can make a referral to an NHS body asking it to consider whether there is any relevant treatment or service that is likely to be of benefit in addressing the ALN of the CYP: **s 20 ALNET & para 21.24 – 21.39 ALN Code 2021**.

Where such a referral is made the NHS body must consider whether there is a relevant treatment or service that is likely to be of benefit in addressing the CYP's ALN**: s.20(4) ALNET**.

Where the NHS body identifies such a treatment or service:

- It must inform the body preparing the IDP and this must then be included in section 2C: **s.21 (1) – (3) ALNET**.
- The NHS body is responsible for securing this treatment or service for the CYP (**s.20(5) ALNET)** and so the IDP should specify this in section 2C.4: **para 21.34 ALN Code 2021**.
- The NHS body also must decide whether the treatment or service should be provided in Welsh, and (if so) take all reasonable steps to secure that the treatment or service is provided in Welsh: **s.20(5) ALNET**.
- The description of this ALP must not be removed from the IDP or revised except on review of the IDP and with the agreement, or at the request, of the NHS body: **s.21(6) ALNET**.
- The Maintained School or LA has no duties in relation to securing the provision an NHS body is responsible for: **s.21(5) ALNET**.

The LA also has the power to request information or other help for the purpose of exercising its ALN functions from various bodies including other LAs in England and Wales and NHS Bodies in England or Wales. **Section 65 ALNET** sets out that this request must be complied with unless doing so would be incompatible with the body's own duties or otherwise adversely affect the body's exercise of its functions.

08.02 Is an NHS body required to secure ALP ordered by the tribunal?

No. In such cases the NHS body is not required to secure the revised ALP unless it agrees to do so: **s.21(9) ALNET**. If this happens, the body maintaining the IDP should work with the NHS body to see what agreement can be reached: **para 21.39 ALN Code 2014**.

08.03 Can a maintained school or FEI/LA be obliged to fund health care provision under an IDP?

Generally, where there is a relevant treatment or service that is likely to be of benefit in addressing the child or young person's ALN, it is for the NHS body to secure and fund this.

More: 08.01 Can NHS bodies be made responsible for delivering ALP?

However, where the ETW orders ALP to be provided then there is no obligation on the LA to fund the ALP. In such instances the LA, maintained school or FEI will need to try and secure agreement from the NHS body and will be required to provide the funding itself if no such agreement is reached.

More: 08.02 Is an NHS body required to secure ALP ordered by the tribunal?

09 IDP section 2D: place at a named school/Institution or board/lodging

General

09.01 Does the IDP always have to name a school/placement?

No. In fact the ALN Code states that section 2D should only be used in very specific circumstances: **para 23.48 ALN Code 2021**.

These specific circumstances are where, the body preparing/maintaining the IDP is the LA and either:

1. The purpose of naming a maintained school is to secure admission of the child to the school named in section 2D.1: **s.48(4) ALNET**.

OR

2. The ALP can not be met unless a place at a particular school/board/lodging is named in section 2D.2/.3: **s 14(6) & (7) ALNET**, or for looked after children, **s 19(4) & (5) ALNET**.

09.02 What information needs to be provided in section 2D?

If naming a placement in section 2D is not required, then the section should be marked *"not applicable."* If naming a placement has been considered (for example, where parents have requested that a placement be named) but this has been decided not to be required, section 2D should also record the reasons for the decision: **para 23.53 ALN Code 2021**.

Otherwise, the placement should be named in 2D with brief reasons why it was appropriate to name a placement, applying the test in s.48(4) ALNET**: para 23.58 ALN Code 2021**.

Where there was a disagreement as to which placement should be named, brief reasons should be given as to why the placement named in 2D was preferred: **para 23.66 ALN Code 2021**.

09.03 What are the differences between section 2D.1, 2D.2 and 2D.3 in the IDP?

Section 2D.1 of the IDP relates to the function under **s 48 ALNET**, and sections **2D.2 and 2D.3** of the IDP relate to the function under **s 14 ALNET** (or **s 19 ALNET** when discharging this function for a looked after child) **para 23.50 ALN Code 2021**. Only maintained schools can be named in 2D.1: **s.48 ALNET.**

After naming a placement for the purpose of securing admission in 2D.1 the LA can transfer responsibility for preparing and maintaining the plan to the school in question: **s.14 2(b) ALNET**. This is not the case for sections 2D.2 & 2D.3 where the LA may not direct that the governing body of the school to prepare or maintain the plan: **s.14(9) ALNET**.

Specific rules relating to each section are covered in Chapter 09.
More: Chapter 09: IDP section 2D: place at named school/Institution or board/lodging
See sections:
Naming a maintained placement in 2D.1
Naming a particular school or institution in 2D.2
Naming board/lodging in section 2D.3 IDP

09.04 Can the IDP simply name a type of placement, such as a mainstream or special school?

No. The provisions enabling section 2D of the IDP to be completed both require a school to be named:

1. **S.48 ALNET** refers to naming a maintained school and not a type of school.
2. **Ss.14(6) & (7) ALNET; 19(4) & (5) ALNET** all refer to *"a place at a particular school or institution"* and not at a particular type of school or institution.

09.05 Can a decision be made on placement before considering ALN or other ALP?

No. Cases decided under the **EA 1996** considered that it was first necessary to identify or diagnose the need before going on to prescribe the educational provision to which the need gave rise. Only once the necessary ALP has been identified can the school/institution to provide that provision be properly chosen: **Learning Trust v SENDIST and MP [2007] EWHC 1634 (Admin).** This is also the approach taken in the English system. Whether a particular school or institution can make the ALP required is a significant factor in whether it should be named in 2D (**paras 23.59 and 23.67 of the ALN Code 2021**) and so this principle should also apply under **ALNET**.

More:
05.03 Should the sections of an IDP be considered in a particular order?
07.06 Will the institution attended by the CYP influence the ALP?

09.06 What is a "maintained school"?

A "maintained school" is either (**s.99 ALNET**):

(a) a community, foundation or voluntary school,
(b) a community or foundation special school not established in a hospital,
(c) a maintained nursery school, or
(d) a pupil referral unit.

09.07 What is a further education institution (FEI)?

"*Further education institution*" or *"FEI"* means an institution falling within **s 91(3) of the Further and Higher Education Act 1992 (s.99(1) ALNET)**, which are:

(a) institutions conducted by further education corporations, and
(b) an institution that has been designated as an FEI under s.28 of the Further and Higher Education Act 1992.
(c) sixth form colleges,

The obligations under Welsh law on further education institutions only apply to those in Wales. An FEI will be (**s 99(3) ALNET)**:

(a)in Wales if its activities are carried on wholly or mainly in Wales;
(b)in England if its activities are carried on wholly or mainly in England.

The Welsh Government list of FEIs in Wales: **Further Education Institutions: contact details.**

09.08 Must the LA consult with a placement before naming it in section 2D?

Yes. When naming a placement in section 2D.1 **s.48(3) ALNET** specifically provides that the LA must consult:

(a) the governing body of the school, and

(b) in the case of a maintained school where neither the local authority nor its governing body is the admissions authority for the school, the local authority for the area in which the school is located.

No specific duty to consult is set out in respect of naming a placement under **ss 14 and 19 ALNET**. The LA cannot be compelled to name at placement at a school or institution that is not a maintained school in Wales unless the person or body responsible for admissions has consented: **ss.14(8)(a) & 19(6)(a) ALNET**. Furthermore, there is no power to compel such a placement to admit the CYP without consent and evidence that the school can make ALP is required. As such, not consulting a placement in respect of **ss 14 & 19** will make it difficult to lawfully name the placement in section 2D.

More broadly, consultation with any school or FEI (maintained or not) would be in keeping with the principle of collaboration in the **ALN Code 2021**. Furthermore, it may well be practically necessary to consult with any maintained school or FEI to gather sufficient evidence to be able to decide whether the reasonable needs of the CYP for ALP can be met there.

09.09 Can a placement decision be made without evidence about the school in question?

No. The decision to name a particular school must be based on proper evidence.

Before naming a particular school, the ETW should normally have (at the very least) the prospectus, ESTYN or equivalent school inspection report and written statement from a member of the school's staff. It is also helpful if a relevant member of the school staff can attend any discussion between LA and parents or the tribunal hearing so they can respond to any specific queries as to the facilities and provision that can be made at the school.

The decision as to whether a particular CYP should be placed at a particular school must be based on the particular CYP and their particular needs. The fact that there are other children with greater ALN whose needs are being met by the school has not been considered useful evidence to support that this will also be the case for the CYP in question: **MMB v Hillingdon [2004] EWHC 513 para 24** (a case decided under the EA 1996**)**.

More: 01.04 Why does the Nodi Guide refer to the Education Act 1996 and Children and Families Act 2014, and cases decided under those Acts, when Wales has moved from an SEN system to an ALN system?

Neither inclusion in the register of independent schools nor the fact that other LAs place children is likely to be considered evidence of its suitability for children in general, let alone for the particular child in question: *"a Tribunal may draw reassurance or comfort from those facts, but no more…"*: **LB Southwark v Animashaun [2005] EWHC 1123 para 21** (another case decided under the EA 1996, but likely still good guidance on that point).

09.10 Should placement in a unit or special resource base within in a school be considered provision in section 2B or a place in section 2D?

Placement within a unit or specialist resource base within a school will generally amount to provision that should be set out in section 2B and not in 2D, but not always.

If the base or unit is a school/institution in its own right, it will be named in section 2D instead. Whether this is the case is a question of fact considering the factors listed in **TB v Essex CC [2013] UKUT 534 (AAC) para 34**, and **MA v Kensington and Chelsea [2015] UKUT 186 (AAC) para 28** and any other relevant factors. This may for example arise where the unit is on land of a particular school but is run in partnership with several schools and has its own management structure and chain of command.

09.11 Can the CYP/Parents of a child, request a particular placement?

Yes. A person exercising functions under ALNET must have regard to the views, wishes and feelings of the CYP or the child's parent: **s.6 ALNET**. The CYP or the parents can ask for a placement outside of the LA's area and the fact that it is outside of the LA's area will be a factor relevant to deciding whether it is appropriate to name the school in section 2D.

When it comes to pupils, the LA and ETW also must have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure: **s.9 EA 1996**.

More: 02.15 Does s 9 of the Education Act 1996 apply in relation to ALN law?
02.16 Will the operation of section 9 be the same under ALNET?

"Pupils" are those for whom education is being provided in school unless: they would normally be in year 12 or above and are in part-time education or are age 19 or above: **s.3 EA 1996.**

However, the duties under **s.6 ALNET** and **s.9 EA 1996** do not mean that the LA must name the placement simply because the CYP or parents ask for it. In relation to section 9, see: **C v Buckinghamshire (1999) ELR 179** and **WH v Warrington BC [2014] EWCA Civ 398 para 31**.

09.12 Is there a presumption in favour of the CYP going to the school/institution that they or their parents want them to?

No. The duty to have regard to the views, wishes and feelings of the CYP or child's parent under s.**6 ALNET**, is not a duty to achieve a particular result, but instead to take the wishes and feelings of the CYP or child's parent into account as part of the decision-making process.

Similarly, **section 9 EA 1996** does not impose an obligation to act in accordance with parental wishes but to have regard to them (unless they are incompatible with the provision of efficient instruction

and training and the avoidance of unreasonable public expenditure): **WH v Warrington BC [2014] EWCA Civ 398 para 31**

More: 02.15 Does s 9 of the Education Act 1996 apply in relation to ALN law?
02.16 Will the operation of section 9 be the same under ALNET?

Such a presumption in favour of the child going to the school of the parent's preference did exist under the old law in Wales (**Sch 27 paragraph 8, EA 1996**) and still does in England (**s.39(3) & (4) CFA 2014**). Under those other frameworks, the LA was/is legally obliged to name a maintained school unless the school was unsuitable for the child or the child's attendance was incompatible with the efficient education of others or efficient use of resources.

Case law relating to the English system and old system in Wales therefore needs to be treated with caution as it may no longer be good guidance in respect of the obligations under **ALNET**.

09.13 Is the reference to "efficient instruction and training" in s 9 EA 1996 limited to the education of the child whose IDP it is?

No. The question of "*incompatibility with the provision of efficient instruction and training is entirely general and at large and unlimited…There is no limitation whether by reference to the pupil whose parents' wishes are in issue, whether by reference to children with whom such pupils might be educated if the principle were to be given effect to, or otherwise:*" **Hampshire v R & SENDIST [2009] EWHC 626 para 28 – 30**.

As such, consideration could be given to the efficient instruction and training of the pupil whose parents have made the request, the pupils in the class or school the parents have requested or efficient instruction and training more generally.

09.14 When will having regard to the wishes of the parents under s.9 EA 1996 be "incompatible with the avoidance of unreasonable public expenditure"?

The following questions need to be considered:

1) Is the parent's requested placement suitable for the pupil? In particular will the pupil's needs (including ALN) be adequately met? If the parent's choice of placement is not suitable, this will be a good reason to depart from the principle that children should be educated in accordance

with the wishes of their parents whether it is incompatible with unreasonable public expenditure or not. A failure to decide this issue is likely to be an error of law (**EC v North East Lincolnshire [2015] UKUT 0648 (AAC) paras 18–21**).

2) Will the parent's requested provision/placement result in greater public expenditure?
    a. What needs to be considered is the actual difference in cost to the public purse over the likely duration of the choice of placement. This will require evidence.
    b. In order to assess the difference in public expenditure, there needs to be evidence of an appropriate alternative to the parent's proposals that will be able to meet the pupil's ALN.
    c. If there is an appropriate alternative, what would be the additional cost to the public purse of making the provision requested by the parents?

3) Is the difference in cost unreasonable when weighing up the advantages of the parental choice against the extra cost to the public purse? **Oxfordshire County Council v GB and Others [2001] EWCA Civ 1358 para 16.** All benefits (including thus health, social, etc.), and not just educational benefits arising from the extra cost must be taken into account: **SK v Hillingdon [2011] UKUT 71 (AAC) para 29**, **LB Croydon v K-A (SEN) [2022] UKUT 135 (AAC) para 51** (note in this case, the UT doubted comments to the contrary in **KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC) para 20-21**, see **K-A para 40-45**). Where there is a significant cost difference a clear explanation as to the additional benefit would likely be required.

09.15 What does "public expenditure mean"?

"Public Expenditure" includes:

1) Public expenditure by all public bodies, such as schools, the entire LA (not just the ALN/education department), social care costs and NHS costs: **WH v Warrington BC [2014] EWCA Civ 398 para 27**; **O v Lewisham [2007] EWHC 2130 para 17**. See also **EH v KCC [2010] UKUT 376 (AAC) para 21** and **KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC) para 15-16**.

2) It also involves taking into account the positive or negative financial impact on another LA. This was the case in **CM v Bexley [2011] UKUT 215 (AAC)** where the child being placed in a school maintained by another LA would lead to an inter-authority payment by the 'home' LA.

3) Additional expenditure by a maintained school arising from placing a pupil there also should be taken into account: **X City Council v SENDIST, AB, MB & GB [2007] EWHC 2278 para 12-13**.

What needs to be considered is the *actual* difference in cost to the public purse in educating the pupil in accordance with the wishes of the parents compared to the viable alternative being proposed by the LA. For example, if a taxi to a particular school is already provided or a learning support assistant could look after a second pupil at no extra cost, then there will be no additional public expenditure: **Oxfordshire v GB [2001] EWCA 1358 paras 17–19.** However, if adding the pupil would increase the cost of a service already being provided this would need to be considered.

Any savings made from parents having previously not sent the child to school at public expense should not be taken into account when weighing up the cost to the public purse: **EC v North East Lincolnshire [2015] UKUT 648 (AAC) para 11**.

When considering the public expenditure for the purposes of **s 9 EA 1996**, the LA (and on appeal, the Tribunal) needs to consider the cost over the likely duration of the choice of placement and not just the year the IDP will be in force before it must be reviewed: **Southampton v G [2002] EWHC 1516 (Admin).**

In **LB Richmond upon Thames v AC (SEN) [2017] UKUT 173 (AAC)**, the Upper Tribunal set aside a decision of the First-tier Tribunal, in a case where the First-tier Tribunal had held that the mother would refuse to send her child to the LA's placement if named. The First-tier Tribunal had reached a perverse decision in naming the mother's placement, having wrongly taken into account the "wasted provision" and the costs of prosecuting the mother for non-attendance if the LA's school was named. This approach subverted the legislative intention of s 9 and allowed a parent's "extreme intransigence" to prevail.

09.16 What does "unreasonable" mean in s 9 EA 1996?

This is a question of judgment for the LA and on appeal the ETW. There are no hard and fast rules about how much extra expenditure counts as "unreasonable" **EA1996 s9**.

- A difference of £7,000 was not necessarily unreasonable: **Wardle-Heron v Newham [2002] EWHC 2806 (Admin)**
- In **Ealing v SENDIST & K [2008] EWHC 193 (Admin)** a difference of £4,000 was not necessarily unreasonable given the benefit that arose.
- In **MM & DM v Harrow [2010] UKUT 395 (AAC)** **para 35** the UT declined to decide whether £17,000 (an extra 60%) would inevitably be unreasonable public expenditure
- Even a £71,000 difference was still analysed on the facts and not dismissed as inevitably unreasonable **KE v Lancashire CC (SEN) [2017] UKUT 468 (AAC)** **para 22-29.**
- In **LB Croydon v K-A [2022] UKUT 106 (AAC)** **para 54-55** the UT found an extra £70,000 in the context of two placements costing over £200,000 might be expected to require "quite exceptional circumstances" to justify, but the FTT had not erred in finding advantages in health provision justified the extra expenditure

Conversely:

- In **JI and SP v Hertfordshire CC (SEN) [2020] UKUT 200 (AAC)** **para 48,** the UT considered a cost difference of £2,661 compared to £19,000 would have constituted unreasonable public expenditure.

09.17 Is the tribunal/LA obliged to name the parents' choice of school where the LA's proposed choice is unsuitable?

No. Even if the ETW considers that the school proposed by the LA is not suitable, it does not follow that it should automatically name the school requested by parents if there is a good reason not to. In England there is the option of naming a type of school or adjourning to consider further options. Under **ALNET**, it does not appear that the Tribunal can name just a type of school, and so the options will be naming no school or delaying the hearing to another day (adjourning) for further evidence:
More: 09.04 Can the IDP simply name a type of placement, such as a mainstream or special school?

Parents and LAs are able to put forward a fall-back option on placement for the tribunal to consider. A tribunal can adjourn to allow a party to put forward such an alternative: **Rhondda Cynon Taff County Borough Council v SENDIST [2001] EWHC Admin 823** **para 14; LB Bromley v SENT [1999] ELR 260; KC v LB Hammersmith and Fulham [2015] UKUT 177 (AAC)** **para 23**. Whether it is appropriate to adjourn will depend on the circumstances of the case including the considerations of the overriding

objective, viability of the options on the table, the best interest of the pupil and cost to the public purse.

09.18 Surely parents/young people have a human right to the placement they want?

No. **Article 2 of Protocol 1 to the European Convention on Human Rights** protects the right to education, but it does not require states to provide education of a kind the CYP or parent wants.

More: 01.15 Does the Human Rights Act 1998 have any additional relevance?

09.19 If parents disagree with each other about placement, is the LA/ETW obliged to resolve the dispute?

No. **ALNET** does not specifically provide for cases where two parents disagree on choice of school. It is open for one parent to argue that their chosen placement would provide a more appropriate education than the other and the ETW can undertake a comparative exercise.

Some practical guidance on the interaction between the jurisdiction of the SENTW (as it was) and the Family Court was provided by the Upper Tribunal in **SG v Denbighshire CC [2016] UKUT 460 (AAC)**, but this may need some adaptation in light of the fact that under **ALNET**, it appears that it is no longer possible to name a "type of school" as a placement.

The outcome of Family Court proceedings may well be a relevant factor which would justify a review of the IDP.

Duty to favour maintained mainstream schools

09.20 What is the duty to favour education for children at mainstream maintained schools?

Section 51 ALNET states that the LA must secure that the child is educated in a mainstream maintained school and can not name a maintained special school, PRU or other institution in section 2D of the IDP unless one of the circumstances named in **s.51(2) ALNET** apply. These are:

a) That educating the child in a mainstream maintained school would be incompatible with the provision of efficient education for other children. The local authority can only rely on this exception where there are no reasonable steps the authority could take to prevent the incompatibility: **s.51(2)(a) & (3) ALNET**. Paragraph **23.101** of the **ALN Code 2021** details some of the factors that might inform what steps are 'reasonable' in the circumstances.

b) That educating the child otherwise than in a mainstream maintained school is appropriate in the best interests of the child and compatible with the provision of efficient education for other children: **s.51 (2)(b) ALNET**.

c) The child's parent wishes the child to be educated otherwise than in a mainstream maintained school: **s.51(2)(c) ALNET**.

This creates a presumption to educate a child at a mainstream maintined school unless certain exceptions apply. In legal circles this is sometimtes referred to as a "qualified presumption."

09.21 Does the presumption to educate at mainstream maintained school apply to young persons?

No. s.51 applies only to a child of compulsory school age (reception to year 11).

09.22 Can the LA/ETW take into account whether a mainstream school is appropriate for the child?

Yes. The LA/ETW is not obliged to order the naming of a maintained mainsteam school if educating the child otherwise than in a mainstream maintained school is appropriate in the best interests of the child and compatible with the provision of efficient education for other children: **s.51(2)(b) ALNET**.

This is a marked difference between Welsh law and English law. In England, the LA/FTT cannot decline a requested mainstream placement on the basis of a view that such a placement is not suitable for the CYP (it must instead order such additional SEP as is required to deal with any perceived deficiency).

More in Noddy No-nonsense Guide to SEN law (England): 09.30 But surely the LA/FTT can ask whether the requested mainstream placement is suitable/appropriate?

09.23 What does "incompatibility with the efficient education of others mean"?

"Efficient education" is not the very highest desirable standard or the basic minimum but something in between: **NA v LB Barnet [2010] UKUT 180 (AAC).**

"Incompatibility with the efficient education for others" requires more than showing that the Child's attendance would have a negative effect on other learners: **Hampshire v R & SENDIST [2009] EWHC 626 para 48**.

Where a placement is full, admitting more learners may be incompatible with the efficient education of others, but it will usually be necessary to identify the children with whom the child will be educated and identify clearly the impact which the child's admission will have: **NA v LB Barnet [2010] UKUT 180 (AAC)**

Naming a maintained placement in 2D.1

09.24 When can an LA name a placement in section 2D.1?

An LA may only name a placement in section 2D.1 if the following conditions are met (**para 23.57 ALN Code 2021):**

a) The placement is a *maintained* school: **s.48(4) ALNET**.
More: 09.06 What is a "maintained school"?
b) The naming of the placement is *for the purpose of securing admission* for the *child*: **s.48(4) ALNET**.
c) The authority is satisfied that the *child's interest* requires the *additional learning provision identified in his or her plan to be made at the school*: **s 48(4)(a) ALNET**.
d) it is *appropriate* for the child to be provided with education or training at the school.

09.25 Does section 2D.1 apply to a person over compulsory school age?

No. section 48 only applies to a "child" and a child means a person not over compulsory school age: **s.90(1) ALNET**.

Section 2D.1 therefore only applies to people whose age would ordinarily put them in reception up to and including year 11.

GLOSSARY: Compulsory School Age

09.26 Can section 2D.1 name an independent school or Further Education Institution?

No. Section 2D.1 relates only to naming a maintained school.

More: 09.06 What is a "maintained school"?

09.27 Can section 2D.1 name a special school?

Yes, provided that it is a maintained school: **s.48 ALNET**.

09.28 What factors will an LA and tribunal take into account considering whether to name a school in 2D.1?

Paragraph **23.59 ALN Code 2021** sets out that the following factors may be relevant (but there may be other relevant considerations, depending upon the circumstances):

a) whether specific characteristics of the school make it especially good at securing the required ALP – this might include a variety of different matters, including the school's physical characteristics;
b) whether the school has members of staff with specialist expertise or training;
c) whether the school has the required specialism in a low incidence provision, such as visual or hearing impairment;
d) it would be unreasonable for a more local school to provide the child's ALP.

In addition to these considerations regard must be had to the thoughts, wishes and feelings of the child and parents: **para 23.52 ALN Code 2021**.

Furthermore, if the intention is to name a maintained special school as opposed to a mainstream school, the circumstances **in s.51(2) ALNET** will need to apply.

More: 09.20 What is the duty to favour mainstream maintained schools?

09.29 Are there any other factors that may be relevant to deciding whether the child's interest requires ALP to be made at the school and it is appropriate to do so?

Paragraph 23.59 ALN Code 2021 states that considerations other than those listed may be relevant depending on the circumstances.

Such considerations must include the views, wishes and feelings of the child which will be relevant as to whether the placement is appropriate**: TM & SM v Liverpool City Council [2024] UKUT 201.** The duties under **s.9 Education Act 1996** may also be relevant. **More: 02.16 Will the operation of section 9 be the same under ALNET?**

Such considerations may also include:

- Efficient use of resources: **para 2.40 ALN Code 2021**
- The resources available within the school and the demand on those resources.
- The impact of placing the child at that particular school.

09.30 Are considerations under s.9 EA 1996 relevant to s.48 ALNET?

Nodi considers that the duty to have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents (so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure) under **s.9 EA 1996** is potentially relevant to whether it is *appropriate* and in the *child's interest* for ALP to be made at a particular school.

As only a maintained school can be named under **s.48 ALNET**, it is unlikely that **s.9 EA 1996** will be relevant if parents are asking for a school to be named that is not a maintained school.

More: 02.16 Will the operation of section 9 be the same under ALNET?
Chapter 09 Section: Wishes of the CYP and Parents (s.9 Education Act 1996)

09.31 If the LA/Tribunal names a placement in section 2D.1, what information needs to be set out in section 2D.1?

The name of the school or institution and reasons why it is satisfied that the child's interest requires ALP to be made at the school and why it is appropriate for the child to be provided with an education there: **para 23.58 ALN Code**.

09.32 Is the LA obliged to prepare/maintain an IDP if it names a school in 2D.1?

No. Provided that the child is not a 'looked after child', the LA has the power to direct that the maintained school in Wales prepare or maintain the plan under **ss.14(2)(b) or (4) ALNET**.

This should be contrasted with the duty to name a school, institution or board of lodging in **sections 2D.2/3 IDP** under **s.14(6)** where the LA is specifically precluded from transferring the duty to prepare and/or maintain the IDP**: s.14(9) ALNET**. If it had been intended that duties to prepare and maintain could not be transferred in relation to **s.48 ALNET** Nodi considers that this would have been clearly set out in the Act as it is in s.14.

The LA is obliged to prepare and maintain an IDP for a looked after child whether a school is named in section 2D.1 or not.

09.33 What are the consequences of naming a school in section 2D.1 IDP?

Where a maintained school in Wales is named in section 2D.1 IDP, the governing body of the school must admit the child: **s.48(2) ALNET**.

09.34 Does the fact a maintained school has been named in section 2D.1 IDP prevent the child being excluded?

No: **s.48(6) ALNET**. However, the exclusion would still need to be lawful and compliant with the legal framework relating to school exclusions in Wales.
See further:

Welsh Government Guidance: **Exclusion from Schools and Pupil Referral Units (April 2024).** Schools should avoid permanently excluding learners with an IDP other than in the most exceptional circumstances: **Exclusions Code para 1.16.3**.

More: Chapter 14: Exclusions

Naming a particular school or other institution in 2D.2

09.35 When should an LA name a place at a particular school or institution in section 2D.2 IDP?

An LA must name a school or institution in section 2D.2 if:

- the reasonable needs of the CYP for ALP;
- cannot be met unless;
- the LA also secures a description of provision of *a kind* to be named in section 2D.

Reference: ss 14(6) & (7) ALNET; 19(4) & (5) ALNET, ss.40(7) & (8) ALNET.

Where the particular school or other institution (including board and lodging) is not a maintained school in Wales, a local authority must obtain the consent of that school or institution before including a description of the provision and securing the provision**: ss 14(8)(a) ALNET & 19(6)(a)** (for looked after children).

09.36 What factors should be considered when deciding a place at a particular school or institution is required in order to meet a CYP's reasonable needs for ALP 2D.2?

Relevant factors include (**para 23.67 ALN Code 2021**):

(a) whether the ALP that is reasonably required by the child or young person's needs is such that it cannot be delivered in full at any maintained school or FEI;
(b) whether specific characteristics of the school or other institution make it especially good at making the required ALP – this might include a variety of different matters, including the school or institution's physical characteristics;
(c) whether the school or institution has members of staff with specialist expertise or training;
(d) whether the school or institution has the required specialism in a low incidence provision, such as visual or hearing impairment;
(e) whether it would be unreasonable for another school or institution to provide the child's ALP.

In addition to these considerations regard must be had to the thoughts, wishes and feelings of the CYP or child's parents: **para 23.52 ALN Code 2021**.

09.37 Is the fact that a particular placement will cause stress to the pupil/young person relevant to choice of placement?

Para 23.59 ALN Code 2021 states that there may be other considerations that are relevant depending on the circumstances: **para 23.59 ALN Code 2021**. Where the stress is related to a CYP's ALN or would impact on the ability to make reasonable ALP, this is likely to be a relevant factor to consider.

Cases under old Welsh law/English law that are potentially relevant include:

In **B v Vale of Glamorgan [2001] ELR 529**, a 16-year-old suffering from mental ill-health refused to attend the school specified her statement of SEN. Her parents' appeal was allowed because there had been a failure to address how, given her refusal, the FTT had concluded that the school could provide for her needs. **This case was applied by the ETW in decision 16 of 2024**.

The reasoning in **MW v Halton BC [2010] UKUT 34 (AAC)** **para 37**, implies a need to consider the impact (if any) of attendance at that school on the child and how (if at all) ALN can be managed and monitored in such an environment. In that case, it was established that a CYP whilst attending or being expected to attend a school, experienced symptoms (from whatever cause) consistent with stress sufficient to be of evident concern to his medical advisers. The UT considered that under such circumstances, it would need to be able to form a conclusion that the school proposed was nonetheless "appropriate". **This case was applied by the ETW in decision 16 of 2024**.

In **St Helens BC v TE and another [2018] UKUT 278 (AAC)** **para 14, 23**, the UT held that it was lawful for the FTT to conclude that a school was not suitable solely by reference to its conclusion that the child "has formed an entrenched and currently intractable opposition to attending [R] school or any mainstream provision" given that it recognised that *"his attitude to the proposed placement is part of the significant and complex needs that must be met by the provider"* and given EP advice which linked his attitude to his SEN. On the facts (so the UT held) this was not unlawfully giving the child or young person a veto. **This case was applied by the ETW in decision 16 of 2024**.

09.38 Is the fact that the relationship between the parent and school has

Potentially. English case law considered that the FTT is entitled to take account of the breakdown in relationship in considering suitability of a placement and "give some weight to it": **L v Wandsworth**

broken down relevant to deciding placement?

[2006] EWHC 694 (QB) para 25. This may be relevant to the question of whether reasonable ALP can be made at a school.

09.39 What about having regard to parental preference under s.9 EA 1996?

There are differing views on this point.
More: 02.16 Will the operation of section 9 be the same under ALNET?

This is an area that would benefit from clarification from the ETW. The legal test for when an LA must name a school or institution in section 2D.2 centres around meeting the reasonable needs of the CYP for additional learning provision. The guidance also makes no reference to parental preference.

If the threshold test under **s.14 (6) ALNET** is met (i.e. it is established that the CYP's ALN cannot be met unless a placement of a particular kind is named), Nodi considers that parental preference in **s.9 EA 1996** is likely to be relevant where parents and LA disagree on which school should be named.

Furthermore, under the old Welsh system and English system, there is a requirement to separately consider **s.9 EA 1996** where the primary statutory tests for parental preference are not met. The tests under **ss 14(6) & (7) ALNET; 19(4)& (5) ALNET, ss.40(7) & (8) ALNET** are for when an LA must name a school/institution. The question arises as to whether there is a residual discretion/requirement to consider **s 9 EA 1996** under **s.10 (b) ALNET**. Again this is an area that would benefit from clarification from the tribunal.

Naming board/lodging provision in 2D.3

09.40 When should an LA name board or lodging in section 2D.3 IDP?

An LA must specify board or lodging provision in section 2D.2 if the reasonable needs of the CYP for ALP cannot be met unless the LA also secures a description of provision of *a kind* to be named in section 2D: **ss 14(6) & (7) ALNET; 19(4)& (5) ALNET, ss.40(7) & (8) ALNET).**

Where reasonable needs of the CYP cannot be met unless the LA names a board or lodging provision in the IDP, the LA must specify the board and lodging provision in Section 2D.2: **14(6) & (7) ALNET; 19(4)& (5) ALNET, ss.40(7) & (8) ALNET.**

09.41 What factors should be considered when deciding whether to name board/lodging in section 2D.3?

Relevant factors include (para **23.68 ALN Code 2021**):

(a) a conclusion that the child or young person's needs for ALP cannot be met in day provision;
(b) evidence demonstrates that an essential element of the child or young person's education or training can only be provided in a residential setting (for example, the learner requires a consistent programme during and after school hours that cannot be provided by non-residential schooling when combined with support from other agencies)

More: 07.27 Is there a particular rule about when a child requires out of hours ALP?
07.26 Does the term "waking day curriculum" have any legal meaning?

The duty to involve and support children, young people and their parents will be of particular importance as specifying board or lodging may involve the child or young person being resident away from their family: **para 23.69 ALN Code 2021**. The need to ensure that appropriate support arrangements are in place, such as those which enable the child or young person's continuing contact with their family also need to be considered: **para 23.69**.

09.42 When <u>can</u> an independent school/institution be named in section 2D?

The criteria for naming an independent school in section 2D depend on whether the cost is being met by the LA or otherwise.

Where the cost is not being met by the LA (but if, for example, being met by parents) then the LA/ETW will still need to be satisfied of the following before an independent school ***<u>can</u>*** be named in section 2D (**s 51(5) & 55 ALNET**):

- The school is on the appropriate register in Wales or England; and
- The LA is satisfied that the school can make the ALP specified in the CYP's IDP.

Where the cost of the independent school/institution is to be met by the LA then it can only be named if:

- The school is on the appropriate register in Wales or England; and
- The LA is satisfied that the school/institution can make the ALP described in the child's or young person's IDP (**s 55 ALNET**);

- In the event the LA wants to name an independent school, but patents want the child to be educated in a mainstream school, one of the following tests need to also be satisfied (**ss 51 ALNET**):
    - educating the child in a mainstream maintained school is incompatible with the provision of efficient education for other children; OR
    - educating the child otherwise than in a mainstream maintained school is appropriate in the best interests of the child and compatible with the provision of efficient education for other children.

Where the particular school or other institution (including board and lodging) is not a maintained school in Wales, a local authority (and ETW) must obtain the consent of that school or institution

before including a description of the provision and securing the provision**: ss 14(8)(a) ALNET & 19(6)(a)** (for looked after children). BUT just because an LA or ETW **can** name an independent school does not mean that they **should** name it.

More: 09.43 When should an LA/ETW name an independent school?

09.43 When should an LA/ETW name an independent school?

Firstly, the criteria for being able to name an independent school in sections 2D must be met.
More: 09.42 When can an independent school/institution be named in section 2D?

Second, an LA/Tribunal is only obliged to name a placement at an independent school in section 2D where:

- the reasonable needs of the CYP for ALP;
- cannot be met unless the LA also secures a description of provision of *a kind* to be named in section 2D.

Reference: ss 14(6) & (7) ALNET; 19(4)& (5) ALNET, ss.40(7) & (8) ALNET.

09.44 Can the LA/ETW ignore the parental preference?

No. As with the exercise of any function in relation to any child or young person, when considering a placement, the local authority must have regard to the child, the child's parent, or young person's views, wishes and feelings: **para 23.52 ALN Code 2021**.

The LA/Tribunal must always have regard to the principle that education for pupils is in accordance with parental wishes unless that involves unreasonable public expenditure **under section 9 of the EA 1996**. This does not however impose a duty to act in accordance with parental preference but merely have regard to it. There is no obligation (as such) to give effect to parental preference under **EA1996 section 9**: **C v Buckinghamshire (1999) ELR 179**.

More: Chapter 09 see Section: Wishes of the CYP and Parents (s.9 Education Act 1996)

02.16 Will the operation of section 9 be the same under ALNET?

09.45 Can the LA provide ALN outside of a school or educational institution?

Yes. An LA may arrange for ALP or part of the ALP to be made otherwise than in a school (often called EOTIS) but only if satisfied that it would be inappropriate for the additional learning provision to be made in a school: **s.53(2) ALNET**.

Examples of EOTIS provision include PRUs, schools established in hospitals, FEIs, and individual tuition at home: **para 18.9 ALNET**.

This is not the same as where a parent decides to electively home educate their child (EHE).

More: 09.52 Is elective home education the same as EOTIS?
Glossary EOTIS, EHE

09.46 Is EOTAS the same as EOTIS?

Education otherwise than in a school (EOTIS) is also often referred to as education otherwise than at school (EOTAS). There is a school of thought that the correct term is "EOTIS" as this properly reflects the statutory wording. However, "EOTAS" is the abbreviation used in the **ALN Code 2021**. Nodi uses the term EOTIS but does not seek to argue that one term should be preferred over the other.

09.47 When will it be inappropriate for ALP to be made in a school?

In determining whether it is inappropriate for ALP to be made in a school, all the relevant circumstances need to be taken into account, not just whether the school/institution can provide the ALP in the IDP: **TM v Hounslow [2009] EWCA Civ 859 para 26**. For example, a child's anxiety may make it "inappropriate" for provision to be made at school: **M v Hertfordshire CC [2019] UKUT 37 (AAC) para 45**.

In **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) para 47(b)**, the English tribunal provided a useful summary on the law that is likely to be useful for the ETW in deciding whether it would be inappropriate for ALP to be made in a school:

1. the LA/ETW needs to take into account all the circumstances of the case with might include:

    a. the child's background and medical history;
    b. the particular educational needs of the child;
    c. the facilities that can be provided by a school;
    d. the facilities that could be provided other than in a school;
    e. the comparative cost of the possible alternatives to the child's educational provisions, either at school or elsewhere;
    f. the parents' wishes are also relevant, but they could not be determinative except in the very rare case where there were otherwise equally balanced alternatives for the child's needs.

2. If the ETW is satisfied that it would be inappropriate for *any* such special educational provision to be made in any school, then no school or institution should be named in section 2D.
3. Conversely, if the ETW is not satisfied that it would be inappropriate for any ALP provision to be made in any school, it would be appropriate for the child to be enrolled in school (**Derbyshire County Council v EM and DM (SEN)**) for at least part of the provision to be made there.
4. Any ALP which will be made otherwise than in a school or type of school will be set out in Section 2B.
5. Attending provision provided by the school as part of a bespoke package outside a conventional classroom setting will nonetheless mean that the school is to be attended by the child.
6. Education in a child's home cannot be named in section 2D.

09.48 Is it enough to show it is inappropriate for ALP to be made in the LA's preferred school or educational institution?

No. **s.53(2) ALNET** creates a presumption in favour of school-based provision.

The appropriate test is whether it would be inappropriate for ALP to be made in any school: **Derbyshire CC v EM and DM [2019] UKUT 240 (AAC) para 18**, **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC) para 28**. To put it another way, the question is *"whether, in general, it would be inappropriate for the provision required...to be made in a school"*: **AA & BB v Bristol City Council [2023]**

UKUT 52 (AAC) para 48. While these are both English cases, the wording in the test under **s.61(2) CFA 2021** is the same as the wording in **s.53(2) ALNET** and the ETW will likely shar the same view.

09.49 Can only some ALP in Section 2B be made otherwise than in a school or educational institution?

Yes. The power in **s. 53 ALNET** includes the power for the LA to arrange for "any part of" ALP to be made otherwise than in school.

09.50 Does EOTIS provision go into Section 2B or 2D of the IDP?

The ALP to be delivered otherwise than in school would be set out in section 2B.2. The organisation or service will provide the ALP can be set out in section 2B.4. The same goes for sections 2C.2 and 2C.4 in relation to ALP to be secured by an NHS body, which could also potentially take place outside of school.

Depending on who is making the provision, it may be necessary to name a school/institution in Section 2D.2/3 if the child will attend such a school/institution at least part of the time. This is only if the requirements for naming a placement in those sections is met.

This could be the case where the CYP still attends school part time, but also has part-time ALN provision made otherwise than in school. Another example is where a CYP attends a PRU (a PRU is within the definition of a maintained school for the purposes of the ALN system).

More:
Chapter 09
see Section: Naming a school Institution in s.2D2
and Section: Naming board/lodging in section 2D.3

An IDP would not say in section 2D that education was to be made otherwise than in school or words to that effect. Similarly, the IDP cannot require that the provision is to be made at home.

09.51 Can parents agree to provide some EOTIS?

The IDP cannot require parents to provide or pay for **EOTIS**: **s.49 ALNET**. Parents can choose to make that provision themselves under their right to electively home educate their child, but then this will be considered elective home education (**EHE**) and not **EOTIS.**

Where a parent has elected to deliver the ALP as part of the child's home education then the LA will need to satisfy itself that this is being delivered: **para 18.23 of the ALN Code 2021**.

More: 03.01 What responsibility do parents have?
09.45 Can the LA provide ALN outside of a school or educational institution?
02.09 Does the duty on parents to ensure their child receives suitable education apply in the same way to parents of children with ALN?
02.10 Does the LA have any duties towards a child who is electively home educated (EHE)?

09.52 Is elective home education the same as EOTIS?

No. Parents have a duty to ensure their child receives efficient full-time suitable education: **EA 1996 s7**. This can be either by paying for an independent school, making use of the facilities provided by the LA, such as attendance at school or EOTIS or by educating their child at home. Elective home education is where parents choose to provide education for their children at home.

EOTIS provision may take place in the family home, but it remains provision the LA is responsible for maintaining under its duties under **ALNET**.

More:
09.45 Can the LA provide ALN outside of a school or educational institution?
02.10 Does the LA have any duties towards a child who is electively home educated (EHE)?
07.29 Is the LA under a duty to make ALP to fit with Elective Home Education (EHE)?

09.53 Can parents insist on a hybrid arrangement between EHE and EOTIS?

No. There is no duty to provide a hybrid arrangement per se. However, LA has the power to agree a hybrid arrangement: **para 18.23 ALN Code 2021**. An LA may be under a legal duty to provide a hybrid arrangement where it would be inappropriate for ALP to be made in a School: **s.53(2) ALNET**

Even if that is the case, there is no duty to provide a hybrid arrangement per se. The duty remains to make provision that is called for by the ALN. It will therefore be necessary to distinguish between what is called for by the ALN and what is parental choice.

Where a child is EHE:

- Consideration firstly needs to be given to whether the parent will be able to deliver (or arrange for someone else to deliver) the ALP.

- Where parents are not able to provide all the ALP called for by the child's needs, the LA will need to consider how the ALP will be secured. This could take various forms such as: extra provision arranged by the LA to supplement education at home, provision or training to the parent to deliver the ALP required at home or securing provision for the CYP at a particular school: **para 18.23 ALN Code 2021**.

- Provision otherwise than in school can only be made where it is inappropriate for ALP to be made in a School: **s.53(2) ALNET.**

- The LA can consider the efficient use of resources when deciding between different options for the ALP or different ways of delivering it, where each of those options or ways of delivery would meet the person's ALN and accord with any other restrictions under ALNET circumstances: **para 2.40 ALN Code 2021**.

More: 07.29 Is the LA under a duty to make ALP to fit with Elective Home Education?

09.54 Is the LA's duty to provide suitable education under s 19A EA 1996 the same as EOTIS under s 53 ALNET?

No. Each LA in Wales is under a duty to make arrangements for the provision of suitable education at school or otherwise than at school for children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not receive suitable education unless such arrangements are made for them: s.19A **EA1996**

This is different from the duty to the duty to secure ALN in an IDP in respect of an individual child under **ss.12, 14 etc ALNET**, which is a routine duty to secure ALP set out in an IDP and so applies only to children with ALN. By contrast the duty under **s.19 EA 1996** is exceptional provision to ensure continued education in cases of temporary illness, exclusion or where children may not receive suitable education.

However, where a child has an IDP but is unable to attend the named placement, the LA duties under both s 19A **EA1996** and **ALNET** are likely to be engaged.

09.55 What happens if a child's IDP is being maintained by a maintained school or FEI and EOTIS is then arranged?

If the pupil remains registered at the school while receiving EOTIS as a registered pupil then the school can continue to maintain the IDP, unless the school considers that it would not be reasonable for the maintained school or FEI to secure the ALP the child requires: **s.12(2) ALNET**. Attending provision provided by the school as part of a bespoke package outside a conventional classroom setting will still mean that the school is to be attended by the child: **NN v Cheshire East Council (SEN) [2021] UKUT 220 (AAC)**. This could be the case where for example weekly attendance at a therapeutic farm setting is considered appropriate ALP.

If the child ceases to be registered at a school (**s.31(1) ALNET**) or becomes registered at more than one school (**s.30(2) ALNET**), then a maintained school or FEI will need to refer the child to the LA will need to take over responsibility for the IDP: **para 18.12 & 18.13 ALN Code 2021**.

09.56 What about learners who are too ill to go to school?

A learner who is unable to attend their education setting because of their healthcare needs should have their educational needs identified and receive educational support quickly so they continue to be provided with suitable education. The nature of the provision should be responsive, reflecting the needs of what may be a changing health status, see: **The Additional Learning Needs Code for Wales 2021 (gov.wales) Supporting Learners with Healthcare Needs (p.19).**

- If a CYP has an IDP and is admitted to hospital for a sustained period, it may be appropriate or necessary to review the IDP: **para 18.18 (a) ALN Code 2021**.

- Where EOTIS provision is required for a sustained period, it may be appropriate for the LA to take over the IDP: **para 18.18 (b) ALN Code 2021**.
- If a CYP is returning to a maintained school or FEI following a period of absence, it may be appropriate for the LA to direct the maintained school or FEI to take over responsibility for the IDP.

More: 09.54 Is the LA's duty to provide suitable education under s 19A EA 1996 the same as EOTIS under s 53 ALNET?

09.57 Where a child is placed at a residential school outside its home area, can the placing LA be responsible for the cost of accommodation?

Yes. An LA may make arrangements for the provision of primary and secondary education for pupils at schools not maintained by them or another LA: **s.18 EA 1996**. Under such circumstances the LA shall pay fees in respect of education: **s.517 EA 1996**.

If board and lodging is set out in s.2D.3, then the LA is under an obligation to secure this provision: **s.14(10) ALNET**.

09.58 Can an LA name a placement outside of England and Wales?

Yes. **Section 59 ALNET** provides that: *"A local authority may exercise its functions under this Part to make arrangements for a child or young person with additional learning needs to attend an institution outside England and Wales, but only if the institution is organised to make the additional learning provision described in the child's or young person's individual development plan."*

09.59 Can the Tribunal name a placement outside of England and Wales?

Probably. Placements outside of England and Wales have been named by the Tribunal under the **EA 1996**: **R v Cheshire County Council ex parte C (1998) ELR 66** & **White v London Borough of Ealing (1988) ELR 203**. In the case of **White** the LA argued that it was not obliged to pay fees on a school outside of its jurisdiction where this had been named by the Tribunal. Dyson J however considered that the LA was in breach of its duties to secure provision in not paying the fees of the school in Boston (MA USA) named in the SSEN.

10 IDP: ceasing to Maintain or Transfer

10.01 Does an IDP expire automatically?

No. A maintained school's duty to prepare or maintain an IDP for a CYP only ceases when either the CYP ceases to be a registered pupil at the school or (in the case of a child) if the child becomes looked after by a local authority: **s.31(1) ALNET.**

In the case of an FEI, the duty to maintain an IDP only ceases if the young person ceases to be enrolled as a student at the FEI: **s.31(2) ALNET 31(2)**.

If the LA is the body responsible for maintaining the CYP's IDP (under s 14 ALNET), the duty will cease if the LA ceases to be responsible for the CYP or, in the case of a child, if the child becomes looked after by an LA.

In the case of a looked after child, the duty on the LA to maintain an IDP (under **s.19 ALNET**) will cease if the child ceases to be a looked after child for the purposes of ALNET Part 2 (see **s.15 ALNET**), or they cease to be in the area of an LA in Wales: **s.31(4) ALNET**.

Further, the duty of the LA or FEI to maintain an IDP will cease to apply at the end of the academic year during which the young person attains the age of 25: **s.34(1) ALNET 34(1)**.

10.02 Can an LA/maintained school or FEI just cease to maintain (i.e. terminate) an IDP?

No. In the case of a maintained school or FEI, where the governing body has a duty to maintain an IDP, the governing body may cease to maintain the plan if it decides that the child or young person no longer has additional learning needs: **s.31(5) ALNET.**

In the case of a local authority which has a duty to maintain an IDP, the authority may cease to maintain the plan if the authority—

(a)decides that the child or young person no longer has additional learning needs, or

(b)in the case of a young person who is neither a registered pupil at a maintained school nor enrolled as a student at an institution in the further education sector in Wales, decides in

accordance with regulations under section 46 that it is no longer necessary to maintain it to meet the young person's reasonable needs for education or training: **s.31(6) ALNET.**

In either of the above cases, before making such a decision, the governing body or LA must notify:

(a)the child or young person,
(b)in the case of a child, the child's parent, and
(c)in the case of a looked after child, the child's independent reviewing officer,
that it proposes to make such a decision: **s.31(7) ALNET**.

Once the decision has been made, the governing body or LA must notify the same persons of the decision and the reasons for it: **s.31(8) ALNET**. Further, the governing body of a maintained school must also notify the CYP and, in the case of a child, the child's parent of his or her right to request the LA to reconsider the matter under section 32: **s.31(9) ALNET**.

The ALN Code sets out further information that the notification **must** include, such as:

(a) Contact details for the school/FEI/LA,
(b) Information about how to access the LA's arrangements for providing people with information and advice about ALN and the ALN system,
(c) Details of the LA's arrangements about disagreements and its independent advocacy services,
(d) In the case of an FEI or LA decision, information about the right to appeal to Tribunal.

The Code also suggests that the notification **should** provide information about ongoing support that may be available to the CYP.

When deciding whether a CYP no longer has ALN, the relevant question is always whether the definition of ALN in section 2 and that of ALP in section 3 of ALNET are met at that time. Just because a CYP has an IDP does not mean they will have or need one until they leave education.

10.03 Does the IDP remain in force where an appeal is made to the ETW

Yes. If an appeal is made to the ETW against the decision to cease within the relevant period, the IDP continues pending determination of the appeal: **s.33 ALNET**.

against a decision to cease to maintain an IDP?

10.04 Can a maintained school or FEI/LA cease (i.e. terminate) an IDP just because a child/young person has come to the end of a particular academic course?

No, unless it has been the subject of a review under **s.23 ALNET**.

10.05 Can an LA cease (i.e. terminate) an IDP just because a young person turns 19?

No. Where an LA maintains an IDP for a YP who is neither a registered pupil at a school or an enrolled student at an FEI, the LA **may** cease to maintain an IDP if it decides that it is no longer necessary to maintain the IDP to meet the YP's reasonable needs for education and training: **s.31(6)(b) ALNET**.

Such a decision should only be reached at the conclusion of a review, and the LA must decide the matter in accordance with regulations.

Per Schedule 1 of **ALN Regs 2021**, when deciding whether there is a realistic prospect that undertaking a proposed programme of study or continuing to undertake a programme of study would enable the YP to meet the person's desired outcomes, the LA must take into account factors such as:
(a)the young person's ability to undertake the programme of study, and
(b)the suitability of the programme of study to meet the young person's desired outcomes.

10.06 When does the duty on a school/FEI to maintain an IDP cease?

The duty to maintain will come to an end in the case of a school or FEI where:

(a) The school or FEI decides that the child or young person no longer has ALN;

(b) The pupil is a young person who no longer consents to the IDP being maintained, or is a child becoming a young person who does not consent;

(c) The child or young person ceases to be a registered pupil at the school or an enrolled student at the FEI;

(d) In the case of a school or FEI, the child or young person becomes dual registered, and a local authority is responsible for the pupil;

(e) The local authority decides to take over responsibility for the IDP;

(f) The pupil is a child who becomes looked after;

(g) A local authority in England starts to maintain an EHCP for the child or young person;

(h) The child or young person becomes subject to detention orders, or

(i) The young person attains the age of 25, in which the duty to maintain will cease at the end of the academic year in which the person attains that age.

10.07 When does the duty on a LA to maintain an IDP cease?

The duty on the LA to maintain an IDP will cease where:

(a) The local authority decides that the child or young person no longer has ALN;

(b) In the case of a young person, the young person no longer consents to the IDP being maintained, or is a child becoming a young person who does not consent;

(c) The local authority ceases to be responsible for the child or young person because they cease to be in the area of the local authority;

(d) In the case of a looked after child, where the child ceases to be a looked after child and the local authority is not responsible for the person;

(e) In the case of a looked after child, the child ceases to be in the area of a local authority in Wales;

(f) Where the local authority directs the maintained school at which the child or young person is registered to maintain the plan;

(g) In the case of a young person enrolled at an FEI, the FEI agrees to a request to become responsible for maintaining the IDP or Welsh Ministers have determined that the FEI should maintain the plan,

(h) In the case of a YP, the YP reaches the age of 25; or

(i) In the case of a YP who is neither a registered pupil at a maintained school nor enrolled as a student at an FEI, the local authority decides that it is no longer necessary to maintain the IDP to meet the YP's reasonable needs for education or training.

10.08 When will and IDP transfer?

To ensure continuity an IDP usually moves with the CYP. **ALNET** places a duty to transfer the IDP in the following cases:

i. an in-year move between maintained schools: **s.35(1) and (3) ALNET**- in such cases the new school must maintain the IDP unless it is a dual registration case in which case the IDP transfers to the LA: **para 12.88 ALN Code 2021**.
ii. a move into a maintained school at the start of an academic year, having been in another one in the previous year – in such cases the new school; must take over the IDP: **section 35(2) & (3) ALNET**.
iii. a move into an FEI at the start of an academic year, having been at a maintained school in the previous year - the FEI must maintain the IDP where this was being maintained by the school on the last day of education or training provided to the pupil at that school: **s.35(4) & (6) ALNET**.
iv. a child or young person becomes dual registered – the LA responsible for the CYP must take over the IDP: **para 28.11 ALN Code 2021**.
v. Where a CYP has an IDP maintained by an LA then moves their main residence to another LA, the IDP should transfer to the new LA: **s.35(7) & (8) ALNET**.
vi. a child becomes looked after the LA must maintain the IDP: **s.35(11) – (13) ALNET**.
vii. a child or young person ceases to be looked after: please see paragraphs **28.17 – 28.20 ALN Code 2021**; and
viii. from a local authority to an FEI by agreement or following determination by the Welsh Ministers: see paragraphs **28.21 to paragraph 28.28 of the ALN Code 2021**.

A few other situations involve the transfer of responsibility for an IDP, but these are dealt with elsewhere as follows:

- a transfer of responsibility from a local authority to a maintained school following the local authority directing the school to maintain it
  More:
  03.11 Who is responsible for issuing an IDP for a child with ALN?
  03.12 When would it not be appropriate for an LA to direct that a maintained school or FEI prepare and/or maintain an IDP?
  03.13 What if the maintained school or FEI, a parent (of a Child) or CYP disagrees with the LA's decision that the IDP should be prepared/maintained by a maintained school or FEI?

- a local authority's decision to take over responsibility for a plan maintained by a school or FEI, following a request that it consider doing so, in the course of reconsidering an IDP maintained by a school, or following an order of the Tribunal:
  More:
  03.11 Who is responsible for issuing an IDP for a child with ALN?
  03.13 What if the maintained school or FEI, a parent (of a Child) or CYP disagrees with the LA's decision that the IDP should be prepared/maintained by a maintained school or FEI?
- In some detention situations, including detention under **Part 3 of the Mental Health Act 1983 – see Chapter 19.**

10.09 What happens when an IDP is transferred?

The body that was maintaining the IDP must give a copy to the new body maintaining the IDP: **Reg 15 ALN Regs 2021**. Where a local authority becomes responsible for maintaining an IDP for a looked after child that was previously being maintained by another body the IDP must also be given to the child's reviewing officer: **s.22(3) ALNET**.

The new body must inform the CYP and parent of a child that it has become responsible for maintaining the IDP: **s.22(2) ALNET**.

The new body is then required to maintain the IDP just as if it had prepared the IDP itself.

In all cases the new body should consider whether to conduct and early review of the IDP once it has become responsible for maintaining it: **para 28.32 ALN Code 2021**.

11 Transport

11.01 What is the relevance of transport to an IDP?

Those preparing or reviewing an IDP should, where relevant, consider and record any arrangements for travel between the child or YP's home and the education institution.

If a question arises as to whether the LA will make travel arrangements pursuant to the **Learner Travel (Wales) Measure 2008** **(LTM 2008)** then the LA preparing or reviewing the IDP should raise the matter with the relevant transport officers and invite them to discuss the options available: **para 23.92 ALN Code 2021**.

As part of planning for transition, an LA should, where relevant, consider the travel arrangements. Where a school, FEI or LA decides to record travel arrangements in an IDP, then it must record them in section 3D: para **23.90 ALN Code 2021**.

11.02 Can the contents of section 3D in respect of travel arrangements be appealed to the ETW?

No. **Section 70 (2) ALNET** lists the matters that a CYP or child's parent can appeal against to the ETW (in respect of ALN). Travel arrangements is not one of them.

11.03 Can an LA be obliged to provide home to school transport?

Yes, in some cases. In each academic year, and LA must assess the learner travel needs of their area: **s.2 LTM 2008**. That requires specific regard to be had to the needs of learners including those who are disabled and those with learning difficulties: **s.2(4) LTM 2008**.

The LA will be required to provide free home to school transport in the following circumstances:

- Learners in primary education will be entitled to free transport if they live two miles or more from their nearest suitable maintained school or non-maintained special school: **s.3 LTW 2008.** This also applies to an independent school 2 miles or more from the learner's home where the learner has an SSEN**: 1.23 LTSPOG 2014.**
- Learners in secondary education will be entitled to free transport if they live three miles or more from their nearest suitable maintained school or non-maintained special school: **s.3 LTW 2008.**

This also applies to an independent school 3 miles or more from the learner's home where the learner has an SSEN**: 1.24 LTSPOG 2014.**

- Where such arrangements are necessary to facilitate the attendance of the child each day at the relevant place where the child receives education: **s.4 LTW 2008.** This could be for example where a learner of compulsory school age cannot safely walk (accompanied or unaccompanied) to their nearest suitable school, because of a disability or learning difficulty which they have**.**

When considering whether a child is attending their nearest suitable school an LA must have regard to the child's ALN when assessing whether the school is suitable: **s.1 LTSPOG 2014.**

11.04 Can an LA choose to provide transport?

Yes **section 6 LTM 2008** gives local authorities the power to make any arrangement they think fit to facilitate the travel of learners to and from a place where they receive education or training. This could be used for learners not attending their nearest suitable school: **para 1.100 LTSPOG 2014.**

11.05 Can an LA ever be required to provide home to school transport for sixth formers?

There is no statutory duty on a local authority to provide free transport to a learner with a disability or learning difficulty in post-16 further education or training, although in assessing learner travel needs under section 2(4) of the Measure, a local authority "must have regard in particular" to the needs of learners who are disabled or with learning difficulties: **para 1.67 LTSPOG 2014.** However, although there is no duty to provide transport, there remains a power to do so.

11.06 Does an LA ever have to provide home-school/college transport for 18-25s?

No. There is no duty to provide transport to 18 to 25-year-old learners.

Though the **LTM 2008** requires local authorities to assess the needs of those up to the age of 19 in post-16 education, there is no such requirement for any learners over the age of 19 who did not begin their course or training before attaining that age **section 7 Measure**.

11.07 In looking at the cost of a placement, does it make a difference

Nodi thinks that it is likely that the source of funding for transport would be a material consideration.

if parents are prepared to pay the costs of transport?

The body responsible for preparing and maintaining the IDP can consider the efficient use of resources when deciding between different options for the ALP or different ways of delivering it: **para 2.40 ALN Code 2021**.

The approach to the issue in England has identified 3 distinct stages: (1) the parental/young person preferred placement should be named alone (pursuant to CFA2014 section 39) if the additional cost is not incompatible with the provision of efficient resources or such inefficiency is outweighed by educational benefit, (2) if there is no duty to name the requested placement, the FTT should determine whether the extra transport costs are unreasonable public expenditure (EA1996 section 9) – if not the requested placement should be named alone, (3) if the costs are unreasonable, is it still incompatible if the parents/young person pay for transport – if not, then both placements can be named subject to parents/young person paying travel costs to their preferred school: **Dudley MBC v S [2012] EWCA Civ 346 para 27**.

Nodi thinks that a similar approach is likely to be correct in Wales. Where parents propose to arrange transport to a school, thus removing the transport cost from their proposed placement, the UT concluded that the Tribunal erred because it had not considered (under the old law in Wales) (1) naming more than one school in Section I or (2) naming one school in Section I, subject to a condition that the parents arrange transport at their own expense: **S-MR v Carmarthenshire CC [2021] UKUT 294 (AAC) para 7**.

12 Tribunal Procedure

12.01 Can my appeal be heard through the medium of Welsh?

Yes. **Section 22(1)** of the **Welsh Language Act 1993** gives the right for any "party, witness or other person" who desires to use Welsh in any legal proceedings in Wales to use it. Proceedings before the ETW would be "proceedings in Wales" for the purpose of the 1993 Act.

It is sensible to raise the matter with the ETW at an early stage to ensure that practical arrangements for the translation of documents and/or interpretation of hearings can be put in place.

It is unclear what the position would be in respect of the Upper Tribunal. If sitting in Wales, then appellate proceedings before it are likely to be "proceedings in Wales" also.

However, in **Williams v Cowell [2000] 1 WLR 187,** the Court of Appeal held that an appeal before the Employment Appeal Tribunal, sitting in London hearing an appeal from the Employment Tribunal sitting in Cardiff, were separate proceedings to the underlying claim and so there was no right to use the Welsh language. Applying the decision in Williams were the Upper Tribunal (or any appellate Court hearing an appeal from the ETW) to sit outside of Wales then a party would not be permitted to use the Welsh language.

Nodi thinks that there is a real possibility that if a party requested that they be permitted to use the Welsh language that the Upper Tribunal would either sit in Wales or alternatively exercise its discretion to hear them through the medium of Welsh.

The right to use the Welsh language within the proceedings is separate to the co-equal status of both the Welsh and English language of any legislative text.

Glossary: **Education Tribunal Wales**

12.02 Who can appeal a decision to the ETW?

Where the decision concerns a child, the appeal can be brought by the child or their parents: **s.70 (2) ALNET.**

Where the decision concerns a person over compulsory school age but under 25 (a young person) it is usually only the Young Person that can appeal to the Tribunal: **s.70(2) ALNET.** It is wrong to refer to a parent 'bringing a claim on behalf of' a Young Person: **Buckinghamshire CC v SJ [2016] UKUT 254 (AAC)** & **LB Hillingdon v WW [2016] UKUT 253 (AAC).**

A case friend appointed on behalf of a child, or a representative appointed on behalf of a Young Person or parent of a CYP will also have a right of appeal: **para 41 ALN Regs 2021**. A case friend must act fairly and competently, not have any interests adverse to the child, ensure all steps are taken for the benefit of the child and take account of the child's views as far as possible: **s.85(6) ALNET**.

Anyone bringing an appeal can appoint another person to represent them, by giving written notice to the Tribunal, which includes the name, address and contact details of the representative: **r.16 EdTW Regs 2021**. They can change representative or represent themselves by giving similar notice in writing. Where a representative is appointed, it is still the CYP, parents or case friend that is the appellant and makes the decisions in respect of the appeal.
12.
Glossary: **Education Tribunal Wales**

12.03 What if the child, parent or young person does not have the capacity to understand matters relevant to an appeal?

Where a child lacks capacity to understand information, documents given or what it means to exercise their legal rights under **Part 2 ALNET** the **ETW** has the power to appoint a case friend to represent the child and take decisions on their behalf: **s.85 ALNET**.

Where a case friend has been appointed, they will be able to exercise most of the rights under ALNET that the child would have done: see **85(5) ALNET** for a list which includes the right to be informed, be able to discuss referral to an NHS body, ask for a review, ask the LA to take over the IDP, request a reconsideration of a finding the Child does not have ALN or the IDP should no longer be maintained and right to appeal to ETW.

There may also be occasions where a parent or Young Person lacks capacity. Lacking capacity has the same meaning as set out in the Mental Capacity Act 2005: **s.83 (4) ALNET**.

In those cases, the LA is under a duty to provide for a representative to engage in arrangements for the child's parent or Young Person: **para 40 ALNRegs2021** and that representative can appeal to ETW on their behalf: **para 41 ALNRegs2021**. The LA must refer the representative to an independent advocacy service if the representative requests it: **para 40 ALNRegs2021**.

Glossary: **Education Tribunal Wales**

12.04 Can the ETW make a decision on anything it wants to?

No. The ETW can only act where it has the statutory power to do so. In relation to ALN, it only has the power to decide matters set out in **s.70 ALNET**:

(a) Decision of an LA or institution in the further education sector as to whether a CYP has ALN
(b) Decisions on whether it is necessary to prepare and maintain an IDP for a CYP who is not at a maintained school in Wales or enrolled in and institution in the further education sector in Wales.
(c) The description of ALN in an IDP
(d) The description of ALP in an IDP
(e) A place at a particular school or institution and/or the board and lodging provided in the IDP or the decision to not to name a particular school/institution and/or provide for board and lodging.
(f) The maintained school named in the IDP (if one is named)
(g) The decision not to name a maintained school in the IDP
(h) A decision not to revise an IDP following a review
(i) A decision by an LA not to take over responsibility for an IDP from a maintained school or FEI
(j) A decision of an LA or FEI to cease to maintain an IDP
(k) A decision by an LA to agree with a maintained school's decision to cease to maintain an IDP
(l) An LA or FEI's refusal to decide a matter on the basis that there is no material change in needs or no new information that materially affects the decision

The ETW also has jurisdiction to consider claims alleging breaches Chapter 1 of Part 6 of the Equality Act 2010 by the responsible body for a school in Wales: **s 116 EquA2010** and **para 3A Schedule 17 EquA2010**. These types of claims are not covered in this guide.

Glossary: **Education Tribunal Wales**

12.05 Can a person appeal to the ETW against a decision by the Maintained School as to whether a CYP has ALN?

No. Under those circumstances the child, parent or CYP needs to make a request to the LA to reconsider the matter under **s.26 ALNET**. The LA must make its own decision as to whether the CYP has ALN.

The LA's decision following reconsideration can be appealed to ETW under **s 70(2)(a) ALNET**.

Glossary: **Education Tribunal Wales**

12.06 Can the ETW determine a dispute between LAs on responsibility for an IDP, or funding provision in an IDP?

No. There is no right of appeal nor a power of the ETW to determine, disputes relating to responsibility or funding of an IDP.

The only dispute as to an LA's responsibility to maintain an IDP which the ETW may determine is where a governing body of a maintained school or an institution in the further education sector requests that a local authority takes over responsibility for maintaining a plan **s.28 ALNET**.

Where there is a dispute as to responsibility between LA's then this will need to be resolved either through the arrangements for resolving disagreements under **s.68 ALNET** or by way of a claim for judicial review.

Glossary: **Education Tribunal Wales**

12.07 Can a person appeal to the tribunal at any time?

No. An appeal to the Tribunal must be received on the first working day after expiry of 8 weeks beginning on the date when a notice of decision and right of appeal was given: **reg 10 ETW 2021**. This time can be extended by a further 8 weeks if the matter is referred to dispute resolution under **s.68 ALNET**, before the original time for making an appeal to ETW expires.

Such notice will be given **s.88 ALNET, para 3 ALN Regs 2021 & s.7 Interpretation Act 1978**.

- Where it is left at the person's last known address, the day it was left there.
- Where it was sent by electronic communication, the day on which the communication was sent, unless the person can prove it was not received or received at a later date.
- Where it was sent by post, the time which it would normally have arrived, unless the person can prove it was received on another date.

The President of the Tribunal may consider any claim which is out of time if the President considers it fair and just to do so: **r. 14 ETW2021**.

Glossary: **Education Tribunal Wales**

12.08 Are there particular rules about what goes in an ETW appeal application notice?

Yes. The application notice must comply with the requirements of **r.11 EdTW Regs 2021**. It must be signed by the applicant or representative and must include—

a) the name and address of the person making the appeal;
b) the name and date of birth of the child or young person,
c) if relevant, the relationship or connection of the person making the appeal to the child or young person,
d) the names and addresses of all persons who
    i. have parental responsibility for the child, or
    ii. share parental responsibility for the child, or
    iii. have care of the child, or reasons why the names and addresses of such persons are not provided,
e) the name and address of any representative or case friend for the person making the appeal,
f) an address and, if available, an e-mail address, where notices and documents for the person making the appeal should be sent,
g) the name and address of the local authority or FEI governing body which made the disputed decision,

h) the date on which the person making the appeal received written confirmation of the disputed decision,
i) the reason or reasons for making the appeal,
j) the result sought,
k) the steps, if any, already taken to resolve the dispute, and
l) any communication requirements and preferences of the child or young person.

It is unlikely that a notice that does not comply with this information will be invalid for failing to comply with the requirements in an application notice in **r. 20(2)** may not mean it is invalid - a defective notice can be sufficient to register an appeal. Only where the application notice is so incoherent or lacking in specifics that it cannot properly be construed as "disclosing an intention to start proceedings", the ETW may conclude that it is not an application notice at all. In that situation, if the time limit has expired by the time the individual has prepared a valid notice, the individual will face the presumption against admission of a late application notice set out in **para. 20(4):** **KD v Essex CC [2018] UKUT 147 (AAC)**

Glossary: **Education Tribunal Wales**

12.09 Do all ETW appeals involve a hearing?

No. **r.39 EdTW Regs 2021** provides that the ETW may determine an appeal or any particular issue without a hearing where the parties agree.

The ETW may also determine an appeal without a hearing by **r.23 EdTW Regs 2021** when the Tribunal does not receive a statement of case from the LA, FEI governing body or the responsible body within the required time; where the LA, FEI governing body or the responsible body informs the Tribunal in writing that it does not resist the appeal or that it withdraws its opposition to the appeal.

The ETW may also dismiss or determine the appeal without a hearing where a party fails to comply with directions: **r.33(1) EdTW Regs 2021**
Glossary: **Education Tribunal Wales**

12.10 Does the ETW have to make reasonable adjustments for those participating?

Yes. **r. 24 EdTW Regs 2021** requires the Secretary of the Tribunal to make enquiries as to whether any party or witness has any disabilities that may require reasonable adjustments to be made.

Any failure to make special arrangements or reasonable adjustments would likely have to be shown to be material in order to give rise to a ground of appeal as is the case in England: **AA and BA v A Local Authority (SEN) [2021] UKUT 54 (AAC) para 4-7, 13, 22-23**.

The ETW must conduct proceedings in a fair way. This would include making reasonable adjustments for those participating. However, the Tribunal is also entitled to respect individual autonomy: those attending should raise any difficulties they have at the time and not after the event. Where someone has said, at the beginning of a hearing that they would manage it is reasonable to expect that person to raise an issue if this changes: **TC and BW v LB Islington [2021] UKUT 196 (AAC) para 28-29**.

Glossary: Education Tribunal Wales

12.11 Does the ETW have to listen to the child/young person themselves?

Yes. The rules require that a statement of case include the views of the child on the issues raised in the appeal; or provide an explanation as to why the views of the child are not included: **r. 18 EdTW Regs 2021**

The respondent's statement of case must also include the views of the child; or provide an explanation as to why it has not established the child's views: **r. 19 EdTW Regs 2021.**

After the ETW has received the appeal application the Secretary to the Tribunal must ask the parties whether any person wishes to attend the hearing to communicate the views and wishes of the child: **r. 24 EdTW Regs 2021.** At the hearing this person may give evidence and address the Tribunal on the child's views and wishes: **r. 43 EdTW Regs 2021.**

Although the ETW's rules are drafted slightly differently to the FTT's, Nodi thinks that the proper approach to the views of the child is likely to be similar. In England, the UT said that the FTT had to expressly deal with a child's views (albeit not extensively and a paragraph or two should normally be sufficient, or even less where there is no mismatch between the child and parental views): **M & M v**

West Sussex CC (SEN) [2018] UKUT 347 (AAC) **para 39-44, 59**. In the case of a young person who brings the appeal, the FTT is not under a duty to give reasons for departing from their views over and above why it rejected their appeal: **S v Worcestershire [2017] UKUT 92 (AAC)** **para 71**.

The older and more mature the child, the greater weight the LA (and Tribunal) should place on a child's views: **West Sussex CC v ND [2010] UKUT 349 (AAC)** **para 33**. In the case of **TM & SM v Liverpool City Council [2024] UKUT 201** the FTT made an error of law by not having sufficient regard to the views of a 7-year-old. The views of the child are relevant to whether a school is appropriate for them.

In **St Helens BC v TE and another [2018] UKUT 278 (AAC)** para **14, 23**, the UT held that it was lawful for the FTT to conclude that a school was not suitable solely by reference to its conclusion that the child *"has formed an entrenched and currently intractable opposition to attending [R] school or any mainstream provision"* given that it recognised that *"his attitude to the proposed placement is part of the significant and complex needs that must be met by the provider"* and given EP advice which linked his attitude to his SEN. On the facts (so the UT held) this was not unlawfully giving the child or young person a veto.

Glossary: **Education Tribunal Wales**

12.12 Does the ETW have to listen to the views of the parent(s)?

r.18 EdTW Regs 2021 states that where the appellant is the child then the statement of case must include the views of the child's parent on the issues raised in the appeal; or must give an explanation as to why the appellant has not established the parent's views.

Glossary: **Education Tribunal Wales**

12.13 Does the ETW just decide between competing positions and competing evidence?

No. In **LB Bromley v SENT [1999] ELR 260** the Court of Appeal considered that the creation of a specialist tribunal, made up of a legal chair and lay members empowered the tribunal to *"take a closer look and the content of the [SSEN] … for many purposes [the Tribunal] stands in the [LA's] shoes, re-evaluating the available information in order if necessary to recast the [SSEN]."*

Although ALNET introduces significant changes to the framework for ALN in Wales, the constitution of the ETW (with a specialist panel) remains the same. For this reason, Nodi considers it likely the ETW will adopt the same inquisitorial approach to making a decision under this new framework as it did under the old system and in the FTT in England.

The ETW's task on appeal is to 'stand in the LA's shoes' exercising its inquisitorial jurisdiction as appropriate to ensure it has the necessary information before it to fairly determine the appeal: **LBI v A Parent [2024] UKUT 252.**

The inquisitorial approach may require the tribunal panel *"making sure they have the necessary information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties. The FTT will usually have much greater expertise than the parents who appear before them"*: **W v Gloucestershire CC [2001] EWHC Admin 481 para 15.**

When deciding whether an adjournment is required the overriding objective needs to be applied. Applying the overriding objective will involve balancing the competing needs of adopting an inquisitorial approach and the cost and delay (in particular to the CYP having a decision made) of an adjournment. This would include whether further evidence is needed for the parties to participate fully, whether the Tribunal's special expertise would assist, and whether the parties have provided all the evidence available to them: **DH & GH v Staffordshire CC [2018] UKUT 49 (AAC)** para 22-25.**DH & GH v Staffordshire CC [2018] UKUT 49 (AAC)** para 22-25.

The tribunal panel may, if it is satisfied it is fair and just to do so, permit the appellant, LA, maintained school or FEI to rely on grounds or evidence not in the case statements: **r. 42 (4) EdTW Regs 2021.**

More:
12.19 Does the ETW just have to decide which expert is right?
12.18 Do the LA and CYP/parents have to 'play fair'?

Glossary: Education Tribunal Wales

12.14 Should ETW consider whether the decision of the maintained school/FEI/LA was right at the time it was made or should the ETW look at the position at the time of the hearing?

The ETW is likely to be required to consider the position at the date of the hearing, and not when the decision being appealed was made: **DH & GH v Staffordshire CC [2018] UKUT 49 (AAC)** para 19. **Gloucestershire CC v EH (SEN) [2017] UKUT 85 (AAC)** para 47.

Glossary: Education Tribunal Wales

12.15 Can the ETW simply rubber stamp an agreement between the parties?

The **EdTW Regs 2021** do not impose specific obligations on the ETW to consent to a party withdrawing its case or to consider whether it is appropriate to conclude proceedings by consent.

This is different to the situation in the English tribunal which is required to consent to a party withdrawing its case (r. 17) or consider whether it is appropriate to make a consent order (r. 29).

However, where the ETW makes an order for an IDP to be revised under **s.71(d) ALNET** it should not adopt or accept suggested wording without at least checking the legality of it. This was an observation made in the English case of: **East Sussex CC v TW [2016] UKUT 528 (AAC) para 38**. In that case the parties had incorrectly agreed the wording "residential care home" instead of "residential setting"

Glossary: Education Tribunal Wales

12.16 Can an ETW judge be involved in two cases involving the same child/young person?

Yes. An ETW must always avoid 'bias'. The 'fair minded and informed observer' test applies as set out in **Porter v Magill [2001] UKHL 67 para 103**.

But bias was not established where a judge who sat on an earlier unsuccessful disability discrimination appeal sat on a SEND case, even though he raised inconsistencies between evidence he heard in the previous case and evidence in the present case: **SG v LB Bromley [2013] UKUT 619 (AAC) para 42-55**.

Glossary: Education Tribunal Wales

12.17 Can a parent who did not take part in an ETW appeal, then appeal its decision to the UT?

The ETW has the power to add or substitute a party pursuant to r. 36. In England, a parent who has not taken part in proceedings before the FTT seeks permission to appeal, the FTT has discretion to add that parent as a party pursuant to **FTT (HESC) Rules 2008 r 9**, and then consider a permission application. Nodi thinks that the ETW 2021 are sufficiently broad to allow a similar approach to be adopted before the ETW.

Glossary: Education Tribunal Wales

12.18 Do the LA and CYP/parents have to 'play fair'?

Yes. **r.5 ETW 2021** makes clear that the parties have a duty to co-operate with each other and to help the ETW to further the overriding objective.

Although the proceedings are in part adversarial because the LA will be responding to the parents' appeal, the role of an LA as a public body at such a hearing is to assist the ETW by making all relevant information available. Its role is not to provide only so much information as will assist its own case.

There is case law in England which says that at the hearing, the LA should be *"placing all its cards on the table,"* including those which might assist the parents' case. Its role *as a* public body is to assist the ETW by making all relevant information available. It is not an adequate answer to a failure to disclose information to the ETW for an LA to say that the parents could have unearthed the information for themselves if they had dug deep enough: **JF v Croydon [2006] EWHC 2368 para 11 & 129 - 130**.

As an example of that, it was incumbent on the LA to tell the FTT about the impending conversion into an academy of the school it was proposing: **LS v Oxfordshire CC [2013] UKUT 135 (AAC) para 50-52**.

"[W]here a local authority is in doubt about whether such material in its possession would assist the [FTT] in reaching a just decision it should play safe and produce it": **AC v LB Richmond on Thames [2020] UKUT 380 (AAC) para 4, para 17**. Given the duty to co-operate and the overriding objective in Wales, a similar approach is likely to be adopted by the ETW.

More: 12.13 Does the ETW just decide between competing positions and competing evidence?
Glossary: Education Tribunal Wales

12.19 Does the ETW just have to decide which expert is right?

No. In England, the High Court has held that *"A specialist tribunal, such as the SENDIST, can use its expertise in deciding issues [including rejecting expert evidence], but if it rejects expert evidence before it, it should state so specifically. … where the specialist tribunal uses its expertise to decide an issue, it should give the parties an opportunity to comment on its thinking and to challenge it*.": **L v Waltham Forest [2003] EWHC 2907 para 14**.

The ETW is, a specialist tribunal and Nodi thinks that that approach is likely to apply to the ETW also.

It has been held that the FTT can use its expertise in deciding between competing expert views and, for example, in ordering a level of provision in between that contended for by competing experts: **Wiltshire CC v TM and SENDIST [2005] EWHC 2521 (Admin) para 27; T & A v London Borough of Wandsworth [2005] EWHC 1869 para 16-23**; **D v SENDIST [2005] EWHC 2722 para 13**. The extent to which the ETW is required to put its thinking to the parties depends on the circumstances and considerations of procedural fairness.

More: 12.20 Can the ETW reach a decision on a point which the parties have not had a chance to respond to?
Glossary: Education Tribunal Wales

12.20 Can the ETW reach a decision on a point which the parties have not had a fair chance to respond to?

No. Where the specialist tribunal uses its expertise to decide an issue, it should give the parties an opportunity to comment on its thinking and to challenge it.": **L v Waltham Forest [2003] EWHC 2907 para 14**. Whether a party has had a fair chance to respond will depend on all the circumstances:

1. In **BB v LB Barnet [2019] UKUT 285 para 18**, it was not unlawful under the circumstances for the FTT to disagree with the parental OT evidence without canvassing this with the parties, even where the LA had not put in any OT evidence of its own: *"The tribunal is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing and that further reference back to the parties is not necessary unless something new arises that has not been fairly covered. The tribunal is entitled to expect the representatives to anticipate the likely range of options that the tribunal will consider and present their case accordingly."* This was a case where both parties had been represented by experienced counsel before the FTT.

2. In **(1) BK (2) AK v. Hackney LBC [2020] UKUT 329 (AAC) para 60-61** the UT held that it was not unfair for the FTT to make decisions about the disadvantages of attendance at the parent's preferred school (which the LA had accepted as suitable) without putting the same to parents' witnesses or their representative at the hearing*: "If there is an entirely new issue which no one contemplated during the hearing, fairness will require the FTT to put it to the parties. By contrast, in other cases where the FTT's thinking has been effectively, albeit not perhaps directly, addressed putting any new idea to the parties for comment and perhaps more evidence would prolong the proceedings. In the latter event the FTT is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing. Further reference back to the parties is not necessary unless something new arises which has not been fairly covered. The FTT is entitled to expect the representatives to anticipate the likely range of options that it will consider and present their case accordingly…"*

3. By contrast, in **NE and DE v Southampton CC (SEN) [2019] UKUT 388 (AAC) para 13**, the FTT had acted unlawfully when considering progress in the context of suitability of a placement when it relied on a review which whilst in the bundle was never cited by the Tribunal or the LA: *"In all the circumstances it seems that the proceedings were fundamentally unfair because a central evidential plank on which the FTT based its decision was not one which either of the parties or the FTT had ever raised as having any importance to the issues the FTT had to decide…This is not diluted in my judgment by the fact that the March 2018 additional annual review was in the bundle and 'viewed by' two of the witnesses. The issues before the FTT were framed by the parties' submissions and the evidence they called in support of them, as supplemented by probing and questions from the tribunal. It is uncontested before me that at no stage was a case advanced prior to the tribunal's decision that founded the answer to current progress significantly or at all on the March 2018 additional review. To then find as the FTT did was unfair to the parents and amounted to a material error of law on the part of the FTT in coming to its decision."*

Those principles are likely to apply equally to the ETW.

Glossary: Education Tribunal Wales

12.21 Are there particular time limits for appeals?

Yes. An appeal must be made in writing in accordance with the **EdTW Regs 2021** and be received by the Tribunal no later than the first working day after the expiry of 8 weeks beginning with the date when (1) notice of the decision and (2) the right to appeal under Part 2 of ALNET was given: **r.10 EdTW Regs 2021.**

Where the dispute has been referred for dispute resolution then that period is extended by a further 8 weeks **r.10 (8) EdTW Regs 2021**

The President may consider any appeal which is out of time if in all of the circumstances of the case the President considers that it is fair and just to do so: **r. 14 EdTW Regs 2021.**

Glossary: Education Tribunal Wales

12.22 Is mediation compulsory prior to appealing?

No. The legislation does not place a duty on the parties to mediate. However, LAs must make arrangements with a view to both avoiding and to resolving disagreements: **s.68 ALNET**

12.23 Does a parent have a right to mediation?

No. Although an LA must take steps to bring arrangements for the avoidance and resolution of disputes to the attention of parents there is no absolute right to mediation: **s.68 ALNET**

12.24 Are there rules about what amounts to 'evidence' in the tribunal?

Yes. **r.2 EdTW Regs 2021** defines "evidence" as including material of any description recorded in any form.

The ETW has a wide discretion on the evidence it considers. It has the power to consider whether or not the evidence would be admissible in a civil trial in England or Wales: r. 28 **EdTW Regs 2021.**

The Upper Tribunal has given conflicting decision in relation to the status of what is said by representatives:

1. In **JS v Worcestershire [2012] UKUT 451 (AAC) para 20**: *"It is trite law that submissions are not evidence and if a representative puts forward alleged facts that are not otherwise in evidence, the FTT should elicit how far the facts alleged are within his personal knowledge or based on some other evidence that can be produced. Little, if any, weight should normally be attached to assertions by the representative on instructions where there is no other evidence to back up those instructions."*
2. In **CB v Birmingham [2018] UKUT 13 (AAC) para 22**: *"Tribunals are not required to distinguish rigidly between information coming from witnesses and representatives"*, in respect of the LA's *"confirmation"* of the cost of the provision which was set out in an expert report.

In England, a school witness cannot be excluded from giving evidence just because they have a financial interest in the school, although it may be a factor that goes to the weight to be given to the evidence: **DH & GH v Staffordshire CC [2018] UKUT 49 (AAC) para 48**.

Glossary: Education Tribunal Wales

12.25 Can the ETW 'strike out' an appeal?

Yes. Under **r. 26 EdTW Regs 2021** where the Tribunal proposes to strike out the appeal then the parties must be given notice. An appeal may be struck out where the appeal is:

(a) made otherwise than in accordance with these Regulations;
(b) is not, or is no longer, within the jurisdiction of the Tribunal;
(c) discloses no reasonable grounds; or
(d) is an abuse of the Tribunal's process.

However, striking out is generally seen as a harsh action taken only when there are no other options. This is particularly the case in an ALN context *"where the participation of both parties is most likely to contribute to achieving the "correct" outcome"*: **RBKC v MJ [2017] UKUT 102 (AAC) para 23**.

12.26 Do parties have to comply with directions issued by the ETW?

Yes. There is a duty to co-operate with each other and to help the Tribunal to further the overriding objective and generally. A failure to comply with those duties, which are likely to include compliance with directions, may lead to the ETW drawing an adverse inference: **r.5 EdTW Regs 2021**

r.33 EdTW Regs 2021 outlines the ETW's powers where a party fails to comply with directions. Where a party has failed to comply within the time required then the Tribunal may:

(1) dismiss the appeal or the claim without a hearing where it is the Claimant who has failed to comply;

(2) Where the party in default is the local authority, FEI governing body or the responsible body, determine the appeal or the claim without a hearing; or

(3) hold a hearing—
(i)without notifying the party in default, and proceed without the party being represented, or
(ii)where the parties have already been notified of the hearing direct that neither the party in default nor any person that intends to represent that party or give evidence on that party's behalf is entitled to attend the hearing.

Glossary: **Education Tribunal Wales**

12.27 Can evidence be submitted after the deadline set by the ETW?

Yes. The ETW may give directions as to the time by which any evidence is to be provided and retains a discretion to admit evidence which is provided late: **r. 28 EdTW Regs 202**. The rules provide that the Tribunal may exclude evidence that would otherwise be admissible where the evidence was not provided in time: **r. 28 (4) EdTW Regs 2021**

Glossary: **Education Tribunal Wales**

12.28 Can the ETW proceed where a party is not present?

Yes. Paragraph s. **51 ETW 2021** permits the ETW to proceed in the absence of a party where that party has been notified of the hearing. If the ETW is satisfied that there is sufficient reason for such absence, it may not proceed to hear and determine the appeal in that party's absence. Before disposing of an appeal in the absence of a party the ETW must consider any representations made in writing by that party, together with the appeal application and the parties' case statements.

Glossary: Education Tribunal Wales

12.29 Are there particular rules for parties who want to rely on expert evidence?

Yes. The Secretary of the Tribunal must ask each party whether they intend to call any expert witnesses: **r.24 EdTW Regs 2021**

The Tribunal may give directions as to whether parties are permitted or required to provide expert evidence and if so whether they must jointly appoint an expert: **r.28 EdTW Regs 2021**
Glossary: Education Tribunal Wales

12.30 Does the ETW have to give reasons for its decision?

Yes. A tribunal must give its decision and reasons in writing**: r.52 EdTW Regs 2021.** The ETW may give its decision orally at the end of a hearing, but written reasons still need to be given: **r.52 (1) & (3) EdTW Regs 2021.**

The reasons need to be sufficient so that each party knows why their case has won or lost on significant points: see e.g. **JJ & EE v Buckinghamshire Council [2022] UKUT 345 (AAC) para 33**.

In **H v East Sussex CC [2009] EWCA Civ 249 para 16-17**, the Court of Appeal explained that the FTT *"is not required to be an elaborate formalistic product of refined legal draftsmanship [sic], but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts."* That approach is likely to apply to the ETW, because the **EdTW Regs 2021** refer to the statement of reasons being *"in summary form"*.

It would appear as if the obligation on the ETW to give reasons is not distinct from that of a court, as any rate where there is a duty to address expert evidence: *"Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the [FTT] (having no doubt summarised the evidence) to indicate simply that [it] believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the [FTT] must enter into the issues canvassed before [it] and explain why [it] prefers one*

case over another. That is likely to apply particularly in [appeals] where, as here, there is disputed expert evidence; but it is not necessarily limited to such cases": **Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377**, applied in **Hampshire CC v JP [2009] UKUT 239 (AAC)** **para 39**.

It is likely that the limitations which the UT has identified in respect of the FTT will apply similarly to the ETW, for example: the FTT is *"entitled to limit its consideration to the matters identified in the working document"*: **DL v LB Redbridge [2010] UKUT 293 (AAC)** **para 13**.

In **A J v. LB of Croydon [2020] UKUT 246 (AAC)** **para 93** the UT considered: *"If parents say that a move to another school would be devastating for their child, the FTT is not bound to accept that assertion, but it must explain why it does not agree with it and the basis on which it disagrees with those assertions. It is not sufficient merely to say baldly and without supporting reasons that it was satisfied that (a) both in terms of its overall experience in supporting young people with ASD and consideration of [G's] specific learning difficulties the proposed school was capable of meeting his needs and that (b) it further determined that the proposed placement was able to meet his needs."*

Glossary: **Education Tribunal Wales**

12.31 Does the ETW decision dictate to the family courts and vice versa?

No. The ETW and any Family Court proceedings are separate and distinct.

However, where decisions of the Family Court amount to a change in circumstances that may lead the LA to undertake a review. Such a review would then have to consider the updated position in light of any relevant conclusions arrived at by the Court.

The Family Division exercising its powers under the **Children Act 1989** could not dictate to the FTT how it was to exercise its statutory jurisdiction under CFA2014 in relation to a child who happened to be subject to a care order. The family court was no more bound in practical terms by a decision of the FTT than was a parent, and if the family court was able to make other "suitable arrangements" for the child's education then the family court was not obliged to agree that the child be sent to the school identified in the EHCP: **X CC v DW, PW and SW [2005] EWHC 162** **para 20**. As the ETW has a broadly analogous statutory jurisdiction in Wales Nodi thinks it likely that a similar approach would apply here.

It would appear equally likely that the Family Court does not have any power to prevent parents from accessing the ETW. The Court of Appeal found that a family proceedings court did not have the power to make an order under the **Children Act 1989 s91(14)** to prevent a mother from applying to the FTT without permission from the family court for the further assessment of the educational needs of her son who was in care. **Re: M (a child) [2007] EWCA Civ 1550 para 19**.

Even though her child (being M in the case above) was in care, MG could still appeal to the SENDIST against the Statement of Special Educational Needs made for him by the LA. And, where the SENDIST directed that the LA make him available for assessment, the LA (having not challenged the legality of that direction) was obliged to do so – it had no residual discretion to decide not to obey the direction in the light of its view that further assessment was "abusive" (of which, as it happened, it offered no evidence) **MG v Tower Hamlets [2008] EWHC 1577 para 66-68**.

In **Bedfordshire CC v Haslam and others [2008] EWHC 1070**, the child's parents wanted him to attend a residential special school. The LA wanted him to attend a day special school which (because his parents were no longer able to look after him) he could only do so if accommodated by the LA. The parents sought to exercise a power of veto in **Children Act 1989 s20(7)** over the accommodation, thus blocking the LA's preference. The SENDIST acceded to that. The Court ducked the issue, which thus remains to be decided in respect of both the English and Welsh regime.

Glossary: **Education Tribunal Wales**

12.32 Does the LA have to comply with an ETW decision?

Yes. Regulation 58 of the **EdTW Regs 2021** sets out the time limits that apply:

(a) against a local authority to prepare an individual development plan, it must prepare and give a copy of the individual development plan to the child, child's parent or young person within 7 weeks;
(b) against a FEI governing body to prepare an individual development plan, it must prepare and give a copy of the individual development plan to the young person within 35 term time days;
(c) against a local authority to revise an individual development plan, it must revise the individual development plan and give a copy of it to the child, child's parent or young person within 7 weeks;

(d) against an FEI governing body to revise an individual development plan, it must revise the individual development plan and give a copy of it to the young person within 35 term time days;
(e) to continue to maintain an individual development plan (with or without revisions), with immediate effect;
(f) against a local authority to take over responsibility for maintaining an individual development plan, beginning with the date specified by the tribunal;
(g) against a local authority to review an individual development plan, it must undertake the review and notify the child, child's parent or young person of the outcome of the review, in writing, within 7 weeks;
(h) against an FEI governing body to review an individual development plan, it must undertake the review and inform the young person of the outcome of the review, in writing within 35 term time days;
(i) to remit the case to the local authority responsible for the matter for it to reconsider whether, having regard to any observations made by the tribunal, it is necessary for a different decision to be made or a different action to be taken, the local authority must do so, and notify the child, child's parent or young person of the outcome of that reconsideration within 7 weeks;
(j) to remit the FEI governing body responsible for the matter for it to reconsider whether, having regard to any observations made by the tribunal, it is necessary for a different decision to be made or a different action to be taken, the FEI governing body must do so, and notify the child, child's parent or young person of the outcome of that reconsideration within 35 term days.

Glossary: **Education Tribunal Wales**

12.33 Can one party be ordered to pay another party's legal costs following an ETW appeal?

Yes, however costs orders are very rare. The Tribunal does have the power to make such an order when:

(a) a party has been responsible for improper, unreasonable or negligent action or omission, or for any failure to comply with a direction or any delay which with diligence could have been avoided or that the party's conduct in making or resisting the appeal or claim was unreasonable;
(b) against a representative if the representative is responsible for improper, unreasonable or negligent action or omission, or for any failure to comply with a direction or any delay which with diligence could have been avoided;

(c) against a party who has failed to attend or be represented at a hearing of which that party has been duly notified;

(d) against the local authority, FEI governing body or responsible body where it has not submitted a case statement, or where the tribunal considers that the disputed decision was unreasonable: **r67 EdTW Regs 2021.**

The Tribunal is likely only make a costs order in exceptional circumstances. The reason behind this is to ensure that parties are not deterred from bringing or defending appeals due to fear of costs applications.

An application for such an order must be made in writing and submitted to the ETW, with a copy being provided to the other party.

Cases will turn on their own facts, but the following are indicative of the approach before the FTT in England:

- just because one party wins a case does not mean it was unreasonable to defend it – the reasonableness of conduct must take into account the ongoing and evolving nature of proceedings: **HJ v LB Brent [2011] UKUT 191 (AAC) para 17** and **NS & RS v Kent CC [2021] UKUT 311 (AAC) para 146-148.**
- An example of unreasonable conduct is where the LA had provided inaccurate evidence to the FTT in oral evidence at the hearing: **NK v LB Barnet [2017] UKUT 265 (AAC) para 22**.
- Another example is where a parent appealed to the UT on the basis of wanting a mainstream school where the UT found it "could not really have been believed by her" that mainstream school was suitable and that she "wanted to thwart the [FTT]'s decision by whatever means necessary", her grounds of appeal relied on an inaccurate account of proceedings, and that appeal was subsequently withdrawn: **LW v Hertfordshire CC (SEN) [2019] UKUT 109 (AAC) para 15**.
- However, where the LA conceded the appeal the day before the hearing, and only minor issues of wording remained but the parent (represented by an advocate) pressed ahead with the hearing, this was not unreasonable – but it may have been unreasonable had the concession occurred earlier: **Walsall MBC v SPC and KU (SEN) [2018] UKUT 37 (AAC)**.

- Likewise, it was not unreasonable for the LA to propose a school which was a "poor" choice where that was later ruled out of contention before the evidence deadline: **NS & RS v Kent CC [2021] UKUT 311 (AAC)** para **116-120.**
- Where the LA repeatedly raised the issue of placement in a section B and F appeal, this constituted unreasonable conduct: **JW v Wirral MBC (SEN) [2021] UKUT 70 (AAC) para 60-65**.

An appeal to the UT against a costs decision will only succeed where *"the Judge's discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong"*: **NS & RS v Kent CC [2021] UKUT 311 (AAC) para 153**. That high threshold is likely to apply to any challenge of a decision of the ETW on costs.

12.34 Are there particular rules about reviews/appeals?

Yes. See **r. 53 -55 EdTW Regs 2021**

A party may apply for the President or the chair of the tribunal to review the decision on the grounds that:

(a) the decision was wrongly made as a result of a material error on the part of the Tribunal administration,
(b) a party, who was entitled to be heard at the hearing but failed to appear or to be represented, had good and sufficient reason for failing to appear,
(c) there was an obvious and material error in the decision, or
(d) the interests of justice so require.

The President or the Chair of the tribunal may, of their own initiative, review and set aside or vary a decision of the tribunal on any of those grounds, too. A party may appeal to the Upper Tribunal on a point of law: **s.81 ALNET**. Permission is required, from either the ETW or the UT, to bring such an appeal.

An application for permission must be made in writing no later than 28 days after notification of the decision, notification that an application for a review had been unsuccessful, or notification that the decision had been varied following a review: **r. 55 EdTW Regs 2021**

12.35 Is an ETW decision automatically suspended pending a UT appeal?

No. **r. 56 EdTW Regs 2021** provides that the President or the chair of the tribunal which decided the case may suspend the effect of the tribunal's decision pending an application for permission to appeal and any appeal or review.

The usual position in court proceedings and before the FTT in England is that a stay is the exception, not the rule. Nodi thinks that that is likely to be the same before the ETW.

Glossary: **Education Tribunal Wales**

12.36 Is a UT appeal just a re-run of the ETW?

No. Section 12 **TCEA 2007** and the **Tribunal Procedure (Upper Tribunal) Rules 2008** apply to an appeal from the ETW, but as if references to the FTT are references to the ETW**: s. 81 ALNET.**

An appeal is against a "point of law". On a point where the ETW has exercised judicial discretion, the UT will not substitute its discretion unless the ETW has acted outside the bounds of reasonable disagreement: by analogy, see **NS & RS v Kent CC [2021] UKUT 311 (AAC)** **para 96-97.**

The UT is badly placed to adjudicate on what was said by witnesses before the ETW – in the absence of a transcript, the hand written note of the Chair is the only authoritative guide to the evidence adduced: **NC and DH v Leicestershire CC [2012] UKUT 85 (AAC)** **para 17-19**.

The UT has criticised attempts by the FTT to become involved in UT proceedings. In **SG v Denbighshire CC and MB [2018] UKUT 158** **para 3**, the Tribunal President of SENTW sought to make written submissions, and the UT said it was "quite wrong" in principle for the FTT to "dogmatically advance a particular standpoint" before going on to criticise the substance as demonstrating "no discernible chain of reasoning to support the Tribunal's assertions".
At a hearing following an appeal, a second FTT panel is not entitled to simply uphold the first FTT's decision if it has been found to include an error of law: **JS v FTT and LB Greenwich [2011] UKUT 374 (AAC)** **para 11**.

The fact that an annual review of the Statement has been undertaken in the meantime, or is pending, does not mean that the UT appeal is rendered academic or that no relief should be given in the appeal: "its decision on whether errors were made may be important": **SG v LB Bromley [2013] UKUT 619 (AAC)** **para 6**.

12.37 When the UT remits a case to the ETW, does it require a complete rehearing of all the issues?

No. See **NW v Poole & SENDIST [2007] EWCA Civ 1145** **para 21**: Where a case had been remitted to the FTT for it to provide additional specificity in the SSEN, that did not necessarily require that there should be a complete rehearing of all the issues.

12.38 Can you argue before the UT a point which was not in issue before the ETW?

Yes. However, there are limits to the points which may be taken on appeal, one of which is that permission to take a new point will not generally be granted where the new point would have affected the course of evidence in the FTT: **PM v Worcestershire CC [2022] UKUT 53 (AAC) para 49, para 54-55**, **Westminster CC v FTT [2023] UKUT 177 (AAC) para 104** (referring to **Singh v Dass [2019] EWCA Civ 360**).

12.39 Are UT authorities binding on the ETW and UT?

Yes. However, where there is a conflict between two UT authorities, the UT will follow a decision which is *"reported"* (i.e. is reported in the AACR) rather than *"published"* (only uploaded to the UT website): **LB Croydon v K-A [2022] UKUT 106 (AAC) para 48-49**.

12.40 Does the ETW have to consider what a placement must provide by way of 'reasonable adjustments' when considering ALN?

No. Although the definition of ALN borrows the meaning of "disability" from the **EqA2010**, the statutory regimes under ALNET and EquA 2010 are separate: **RB v Calderdale MBC (SEN) [2022] UKUT 136 (AAC) para 46-49.**
However, the ETW also has jurisdiction to hear some disability discrimination claims under **s.116(1)(b) EquA 2010**.

13 Admission Appeals

13.01 Is a Child's ALN a factor the Independent Appeal Panel will consider?

An 'ordinary prejudice' admissions appeal is split into two stages:

- In the first stage, the Panel decides whether the school's admissions procedures have been carried out correctly.
- In the second stage, the Panel will consider all of the circumstances that are particular to the child.

The question the Panel considers in the second stage of an 'ordinary prejudice appeal' is whether there would be more prejudice to the school in admitting the child or whether there would be more prejudice to the child in not admitting them to the school: **School admission appeals code, November 2023, paragraph 5.18**.

One ground on which the Panel can allow an 'ordinary prejudice appeal' is 'compelling medical and social reasons.' A child's ALN is a potentially relevant factor the Panel can consider in relation to this.

However, the fact that a child has ALN is not in itself likely to be sufficient to lead to a successful appeal.

The test that the Panel has to consider when dealing with an 'infant class size' (Reception, Year 1 and Year 2) appeal is different.

The Panel has to consider whether the admissions arrangements were properly implemented, whether the arrangements were lawful, and finally whether or not the decision was one which a reasonable admission authority would make in the circumstances of the case. In this final stage, the Panel may take into account a child's ALN in a similar way as described above: **School admission appeals code, November 2023, paragraph 5.15**.

13.02 A child has an IDP, but it doesn't name a school. Does that mean the CYP or parent can choose

No. If a school is not named in the IDP, the admissions criteria will be applied in the usual way to the child: **School Admissions Code, July 2013, paragraphs 3.53 - 3.54**.

which school will best suit the child's needs?

13.03 Can a CYP be refused a place on the basis they have ALP?

No, a child who has ALN but does not have an IDP must be treated as fairly as other applicants. An admission authority must not refuse to admit a child because they consider themselves unable to cater for a child's ALN. By the same token, the Independent Appeal Panel cannot refuse an appeal simply because a child has ALN: **School admission appeals code, November 2023, paragraph 5.38.**

14 Exclusions

14.01 Can a child or young person with an IDP which names a school be excluded from that school?

Yes, a child or young person with an IDP which names a school can be excluded from that school: **s48(6) ALNET**. But it should be a last resort.

14.02 What factors does a school have to consider before excluding a child or young person with an IDP?

Other than in the most exceptional circumstances, schools should avoid permanently excluding learners with an IDP.

In practical terms, that means trying every means to maintain the child or young person in the school, seeking local authority and other professional advice and support through an IDP.

It could also mean the school should liaise with their local authority about initiating a formal review of the learner's IDP.

The school should continue to try and seek support that could be made available in the time between the initial decision to exclude and the meeting of the discipline committee.

The school should also liaise with the local authority to see whether the IDP can be changed to name a new school. If either of these options is possible, the headteacher should normally withdraw the exclusion.

Per **'Exclusion from schools and pupil referral units' (document number 294/2024) paragraphs 1.16.3 - 1.16.6**.

Further, the **Equality Act 2010** prohibits schools from excluding learners because of their protected characteristic (learners with ALN may be considered to have a disability under the **Equality Act 2010**) or discriminating unlawfully during the admissions process.

Schools are also required to demonstrate that the decision to exclude a learner with a recognised condition that is more likely to result in a tendency to physical abuse was a proportionate means of achieving a legitimate aim: **C & C v. Governing Body of a School and others [2018] UKUT 269 AAC**.

14.03 Can a child or young person with an IDP which does not name a school be excluded from their school?

Yes.

More: 14.02 What factors does a school have to consider before excluding a child or young person with an IDP?

Schools should also make every effort to avoid excluding learners who are engaged with a process under the ALN system, such as where a decision is being made or an IDP is being prepared.

14.04 If a child or young person with ALN is excluded from their school, what obligations does the school have towards that child or young person?

The guidance **'Exclusion from schools and pupil referral units' (document number 294/2024), paragraph 1.16.6** says that it is, "*extremely important*" that parents or carers of learners with ALN who are excluded from school receive advice on the options available for their child's future education.

Schools should advise parents or carers that advice and information on ALN is available from the local authority.

15 Moving between SEN and ALN

15.01 When was the ALN system introduced?

The ALN system has been introduced in a phased approach over four school years between September 2021 and August 2025. Different year groups have been brought over to the new system in different years. For those who have not yet been brought over to the ALN system, the SEN system will still apply.

15.02 What is the relevant legislation under the old SEN system?

The relevant legislation for the old SEN system is Part IV of the Education Act 1996, and regulations made under that Act, including the Education (Special Educational Needs) (Wales) Regulations 2002 and the Special Educational Needs Tribunal for Wales Regulations 2012. The relevant code of practice is the **Special Educational Needs Code of Practice for Wales 2002**. For young people in Year 11 and above, the Learning and Skills Act 2000 applies.

15.03 How have children and young people been brought over to the new system?

Most children and young people who have a school action plan, school action plus plan or statement of SEN will have been given an IDP notice by their school or local authority. This notice confirms that the child or young person has been assessed as having additional learning needs and the new law will apply to them from the date of the notice. The timeline for issuing an IDP (usually 12 weeks for local authorities, 35 school days for schools) will begin from the date the IDP notice is given.

If a child or young person's learning needs have changed, the school or local authority may give a "no IPD notice", which states that the child or young person has been assessed as not having additional learning needs. The new law will apply to the child or young person from the date of the notice. Parents can ask the local authority to reconsider the decision.

In some specific circumstances, local authorities may issue an "ALN notice". This brings the child or young person over to the ALN system without the local authority taking a decision about whether the child or young person has additional learning needs.

Where a child was due to be given an IDP notice or a no IDP notice by the end of a school year as part of the phased approach, and the school or local authority has not given them a notice, they will automatically be brought over to the ALN system on 31 August of that year under the automatic end of year transfer provisions contained within the Commencement Orders for the ALNET. see: **Moving additional learning needs (ALN) Parents Guide**

15.04 Which children and young people might still fall under the SEN system?

The phased introduction of the ALN will be completed by August 2025. Many learners have already been brought across but for some year groups, schools were able to issue IDP notices either in the school year 2023/2024 or 2024/2025.

Children and young people may still fall under the ALN system, if they:

- were assessed as having special educational needs under the SEN system as of 1 September 2022, or were part of an ongoing process under the SEN system; AND
- have not yet been issued with an IDP notice, no IDP notice or ALN notice; AND
- they fall within one of the following year groups for the school year 2024/2025. (These are different depending on whether the learner has a statement of SEN or not.)

If they are in a maintained school, pupil referral unit or educated other than at school and have special educational provision through school action/school action plus.:

- Year 3, 5 or, 9.

If they have a statement of SEN:

- Year 3, 4, 5, 6, 9 or 10.

These learners must be issued with an IDP or no IDP notice by 30 August 2025. Even if a notice has not been given by that date, they will automatically move to the ALN system on 31 August 2025. (After 31 August 2025, there may still be some learners under the SEN system if there are ongoing Tribunal appeals, or the local authority has not yet complied with an order made by the Tribunal under the SEN system.)

15.05 Will CYPs who had a statement of special educational needs under the old system automatically have their IDP maintained by the LA?

No. There is nothing in the law or guidance that says this is the case. Whether the LA should prepare and maintain the IDP needs to be determined by applying the legal principles under ALNET and the accompanying regulations and guidance.

Under the old system those attending a special school would usually have a statement of special educational needs. However, sections **11 & 12 ALNET** do not preclude a maintained special school preparing and maintaining an IDP.

While there are many similarities to when the LA will maintain an IDP and when a statement of special educational needs should be issued, the test and guidance under the old system is different. A statement of special educational needs will be issued where *"in the light of an assessment under **section 323** of any child's educational needs and of any representations made by the child's parent in pursuance of **Schedule 27** , it is necessary for the [local authority]**1** to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs"*: **s.324 Education Act 1996**.

The test set out in the Special Educational Needs: Code of Practice 2004 states that: *"In deciding whether to make a statutory assessment, the critical question is whether there is convincing evidence that, despite the school, with the help of external specialists, taking relevant and purposeful action to meet the child's learning difficulties, those difficulties remain or have not been remedied sufficiently and may require the LEA to determine the child's special educational provision."*

More: For the legal tests under ALNET see **Chapter 03**, in particular:
03.11 Who is responsible for issuing an IDP for a child with ALN?
03.12 When would it not be appropriate for an LA to direct that a maintained school or FEI prepare and/or maintain an IDP?
03.13 What if the maintained school or FEI, a parent (of a Child) or CYP disagrees with the LA's decision that the IDP should be prepared/maintained by a maintained school or FEI?

In addition to the different legal tests,

	The warnings from the Upper Tribunal in England in relation to the use of the phrase “waking day curriculum” in **LB Southwark v WE [2021] UKUT 241 (AAC)** be born in mind. Whether a CYP had a statement of special educational needs is a good indication that the LA may be required to prepare and maintain an IDP, but this should not be used as a rule to distract from proper consideration of the legal requirements.
15.06 Does the Nodi Guide apply to SEN cases?	No. This guide has been drafted based on the ALNET 2018 and the ALN Code.

Civitas Law
Education Team

The Education Law team is composed of highly skilled and experienced lawyers who offer comprehensive legal services covering all areas of Education Law. Their diverse expertise ensures they can handle cases at all levels, from local disputes to high-profile judicial reviews and appellate work. Each member brings a unique skill set that strengthens the team as a whole, creating a cohesive unit capable of delivering exceptional results for their clients.



Cathrine Grubb is a specialist in Public and Administrative Law, with extensive experience representing government bodies, local authorities, and individuals. Her work spans the Court of Appeal down to first-instance tribunals. Cathrine has a deep interest in Equality and Human Rights issues and has significant experience in both English and Welsh Education Law. She is particularly adept at handling cases involving SEN/ALN provision and discrimination claims. Her ability to navigate complex legal frameworks makes her a cornerstone of the team.



Owain James brings a wealth of experience, representing public bodies at the highest levels. A native Welsh speaker, Owain is passionate about Welsh law and devolution, and regularly provides legal advice and representation in Welsh. His practice spans all areas of Education Law, including school closures, transport decisions, admissions, and exclusions, as well as ALN appeals and discrimination cases. Owain’s bilingual abilities and his expertise in public law challenges make him an invaluable asset to the team, particularly for Welsh-speaking clients.



Alys Williams' highly regarded for her ability to simplify complex legal issues, has earned her recognition from the Legal 500. A native Welsh speaker, Alys specialises in Education and Police Law, regularly advising on school admissions and exclusion appeals. She also provides strategic guidance to public bodies, ensuring compliance with procedural requirements. Alys has delivered training on admissions and Education Law to local authorities, helping them improve their understanding. Her clear, thorough approach makes her an essential part of the team, enhancing its capacity to manage intricate legal challenges.



Isabelle Knight has quickly established herself as a rising star, as recognised by the Legal 500. Known for her analytical and logical approach to complex issues, she is often instructed to advise admission and exclusion panels. Isabelle's expertise in panel advisory work ensures the integrity of judicial processes in Education Law, leading to fair and compliant outcomes. Her growing experience in Additional Learning Needs (ALN) cases, where her attention to detail and strategic thinking are key, makes her a versatile asset, ensuring compliance across a range of education law matters.



Crash Wigley is committed to improving access to justice and public understanding of the law. Previously serving as interim chair of Young Legal Aid Lawyers, she is also Chair of Trustees and a founder of North Wales Community Law. She recently returned from a prestigious role as Judicial Assistant at the Supreme Court, working on high-complexity cases. Crash's growing practice in Education, Housing, Immigration, and Public Law makes her a valued addition to the team. She also serves as legal clerk to school admission appeal panels, offering expert legal guidance. As a Welsh speaker, Crash enhances the team's capacity to serve clients across Wales.

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Together, this team of dedicated professionals offers a full-service approach to Education Law, ensuring that clients receive expert advice and representation at every stage of the legal process.

Nodi No-nonsense Guide to ALN law in Wales

2024 version 1

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Alys Williams, Isabelle Knight and Crash Wigley

Parents and professionals - we invite you to visit the **Support SEND Kids** charity website. They host this Guide as interactive Q&A allowing you to bookmark, share with others or comment on individual questions.

Support SEND Kids produce the No-nonsense Guide series.

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