

## **Torbay Council Policy guidance on Section 41 (s41) and Non-s41 (non s41) Schools and Naming in Education, Health and Care Plans (EHCPs)**

### **1. Introduction**

**1.1** This guidance sets out Torbay Council's statutory duties and decision making approach when considering requests for s41 and non-s41 independent placements. Providers and families are welcome to share information relevant to suitability, quality assurance, safeguarding, capacity and contractual terms to support that decision-making (see section 4.2 Decisions about the content of an EHCP and the placement named in Section I are statutory decisions made in line with the Children and Families Act 2014 and the SEND Code of Practice, and any formal challenge must go through the statutory routes available to parents and young people (see section 7 onwards).

**1.2** This procedure adheres to the following legislation and guidance:

- Children and Families Act 2014: This act includes provisions for the approval of independent special schools and special post-16 institutions under Section 41.
- Education Act 1996: Provides a legal framework for the education of children and young people
- Special Educational Needs and Disability (SEND) Regulations 2014: Sets out the duties of local authorities and other bodies in relation to children and young people with special educational needs and disabilities.
- SEND Code of Practice 2015 (CoP): Provides statutory guidance on the duties of local authorities, health bodies, schools, and colleges to provide for those with special educational needs under part 3 of the Children and Families Act 2014.
- Procurement Act 2023 (and additional primary and secondary legislation): Governs how the procurement of public goods, services and works contracts must be undertaken.
- Torbay Council's Contract Procedures (and additional local policy and guidance): Rules and procedures in place to ensure

the Council is compliant with legislation, fair and accountable in its dealings with economic operators and obtains value for money.

**1.3** Torbay Council is committed to ensuring that educational placements for children and young people with an Education, Health and Care Plan (EHCP) plan are appropriate, safe, and in line with national regulations.

## **2. What is a Section 41 (s41) School?**

**2.1** Section 41 of the Children and Families Act 2014 allows certain independent special schools and special post-16 institutions to be approved by the Secretary of State for Education. These schools are recognised for their ability to cater to children and young people with special educational needs and disabilities (SEND).

**2.2** If a school is approved under Section 41, it means that the school has met specific standards set by the government. These schools are regularly monitored to ensure they provide a high quality education and support for children with SEND.

**2.3** The s41 list is updated and published by DfE on a regular basis. The current list can be found here; [Independent special schools and post-16 institutions - GOV.UK](#)

## **3. Parents' Rights to Request**

**3.1** Section 38 of the Children and Families Act 2014 sets that a parent may require the LA to consult and name one of the following schools:

- maintained nursery school
- maintained school and any form of academy or free school (mainstream or special)
- non-maintained special school<sup>1</sup>
- further education or sixth form college

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<sup>1</sup> Non-maintained special school: Schools in England approved by the Secretary of State under section 342 of the Education Act 1996 as special schools which are not maintained by the state but charge fees on a non-profit-making basis. Most non-maintained special schools are run by major charities or charitable trusts.

- independent school or independent specialist colleges (where they have been approved for this purpose by the Secretary of State and published in a list available to all parents and young people i.e. S41).

Section 39 states that the local authority must comply with that preference and name such a school or college in the EHC plan unless:

- it would be unsuitable for the age, ability, aptitude, or SEN of the child or young person, or
- the attendance of the child or young person there would be incompatible with the efficient education of others, or the efficient use of resources.

When judging the efficient use of resources Torbay will consider on the basis of a holistic assessment on need and resource required rather than purely monetary decision.

#### **4. What is a Non-S41 (non-s41) School?**

- 4.1** Non-s41 school refers to an independent school which has not been approved under s.41. While they may still provide education for children with SEND, they do not have the same formal recognition and regulatory oversight as s41 schools.
- 4.2** While parental preference is considered, Torbay Council is not obligated to consult with or name a non-s41 independent school in an EHCP. Such schools do not come within Section 38 Children & Families Act. Parents may request an independent non-s.41 school is named, but as set out at paragraph 9.84 of the SEN Code of Practice “The local authority is not under the same conditional duty to name the provider but must have regard to the general principle in section 9 of the Education Act 1996 that children should be educated in accordance with their parents’ wishes, so long as this is compatible with Guidance on Section 41 and non-s41 Schools and Naming in Education, Health and Care Plans (EHCPs) the provision of efficient instruction and training

and does not mean unreasonable public expenditure<sup>2</sup>.” Where a parent makes such a request the LA will consider:

- **Inspection Status:** The current inspection status of the school will be reviewed. Schools that do not meet the required standards in leadership, governance, and safeguarding will not be named in EHCPs. As non-section 41 schools are not regulated in the same way as Section 41 schools, Torbay Council requires additional assurances that suitable mechanisms are in place to monitor suitability and quality.
- **Efficient instruction and training:** The placement must be compatible with the provision of efficient instruction and training
- **Whether the expenditure on such a placement amounts to unreasonable public expenditure.**

## **5. Procurement and Contract Management**

- a) The Council will ensure all commercial activity undertaken is compliant with the Council’s Contract Procedures and relevant local guidance.
- b) Where a single provider is required the Council may award directly where a direct award justification applies.
- c) Where a single provider is not required, the Council must use an appropriate competitive procurement route.
- d) Upon award, providers will be expected to agree appropriate contractual terms with Torbay Council.
- e) Where agreement cannot be reached, the Council may be unable to proceed with that placement.
- f) Where commercial activity is undertaken the Council will keep a record – separate from the legal decision-making process about what setting is named in an EHC plan.

## **6. Process for Key Stage Transfers and In-Year Placements**

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<sup>2</sup> Note that ‘unreasonable public expenditure’ is different from the ‘efficient use of resources’ noted in Section 38 Children and Families Act 2014. Where the Local Authority notes that the requested placement is significantly more expensive than the LA’s proposed suitable alternative the Local Authority is entitled to prefer a placement which is suitable and represents a responsible use of public funding.

**6.1** There are opportunities during Key Stage transfers and In-Year Placement meetings to consider school placement opportunities, the process is as follows:

- a) Transition Review Meeting: Held in the year preceding the transfer (e.g., Year 5 for secondary school transfer). At this meeting the child, parent, the school and other professionals (if attending) will discuss the EHCP and the type of setting the pupil would like to move to. Parents at this point may request a preferred placement.
  - The meeting will discuss the type of school provision that best suits the child's needs. The outcome of the meeting will be considered at Decision to Issue Panel for the type of provision recommended for Key Stage Transfer. Parents are notified of the decision via their allocated case officer.
- b) Parents have the opportunity to formally give their parental preference by the end of October when their child is in Year 6 via the Torbay online admission portal.
  - Consultation with Schools: If a non-s41 independent school is preferred by the family, Torbay Council does not have a duty to consult with this school, however, there may be instances that we will consult, i.e. if there are no alternative schools to consider. Torbay Council will assess its suitability based on the criteria outlined above in section 4.2 (i.e. Inspection Status, Contractual Agreements, Efficient Use of Resources and Efficient instruction and training).
- c) Final Decision: Parents are notified of the proposed school allocation via their allocated case officer.
- d) If a change of placement from a Mainstream School has been agreed and Families have requested a non-s41 Independent School, as with key stage transfers Torbay Council does not have a duty to consult with this school.
  - Final Decision: Based on the same criteria as key stage transfers. Parents are notified of the decision via their allocated case officer.

## **7. Handling Disputes Over Placements**

- 7.1** Torbay Council will first discuss with the parents to understand the concerns and preferences.
- 7.2** If the dispute involves a Section 41 (s41) school, Torbay Council has a legal duty to consult with the school to ensure it can meet the child's needs.
- 7.3** If the dispute involves a non-s41 independent school, Torbay Council does not have a legal duty to consult with the school.

## **8. Disagreements**

- 8.1** If a parent wishes to name a non-s41 school, and Torbay Council is not in agreement that it meets the requirements as outlined in Section 4, it may be that a discussion with the case officer is required in the first instance. If concerns remain un-resolved, parents can use mediation or the formal complaints process. Torbay Council encourages resolving disputes through mediation. This involves a neutral third party helping both sides reach an agreement.

### Mediation

- Mediation is part of the process followed once a formal decision has been made and a final/amended final EHCP issued.
- If a formal decision is made and a final EHCP is issued or amended and the parent(s) disagree with contents of the plan, mediation can be considered
- Mediation is voluntary and can be a quicker, less formal way to resolve disagreements.

### Complaint

- 8.2** If Mediation does not resolve the dispute Parents can use the Torbay Council complaints process,

- The complaint will be reviewed by a Manager in Children's Services, who will investigate and provide a response.

Complaints from non s41 Schools regarding consults and placements

**8.3** Non-s41 independent schools may question whether the procurement process carried out offers equality of opportunity to them when competing for placements in the current marketplace. [Schedule 5, paragraphs 15 to 17](#) (Direct award justifications) of the Procurement Act 2023 sets out a new direct award justification for ‘user choice contracts’, which, if satisfied, means the contracting authority does not need to carry out a competitive tendering procedure prior to awarding a contract. Broadly, this direct award justification applies where separate legislation or statutory guidance imposes a legal obligation on the contracting authority, when procuring such services, to have regard to the views of the user of the services, or their carer, with regard to which supplier should provide the services. As the Children and Families Act 2014 and section 9 of the Education Act 1996 state that children should be educated in accordance with their parents’ wishes there is no right or recourse to Schools to utilise the Procurement Act 2023 in making a complaint.

## **9. Tribunal**

**9.1** If the dispute remains unresolved, parents can appeal to the Special Educational Needs and Disability Tribunal (SENDIST).

**9.2** The tribunal will review the case and make a legally binding decision on the placement.

**9.3** It should be noted that should parents wish to appeal a non s41 school via tribunal they will need to obtain a formal offer from that setting. A tribunal judge does not have the authority to direct a non s41 setting to admit a pupil if the setting has refused to offer a placement.

## **10. Quality Assurance**

**10.1** Torbay Council conducts independent quality assurance visits to schools causing concern and those who have not been utilised by the Council before. Where a school is causing concern as identified by external inspection we will request action plans to address the issues identified. This ensures that schools meet the

required standards and provide appropriate support for children with SEND.

## **11. Safeguarding**

**11.1** Safeguarding is everyone's business.

**11.2** Providers must take all necessary steps to keep children safe and well and have regard for the statutory guidance, [Working together to safeguard children 2023: statutory guidance](#) and updated in June 2025. If concerns about a child's safety or welfare arise providers must notify children's social care services without delay.

**11.3** Providers must also have regard to the statutory guidance: [Keeping children safe in education 2025](#). This is statutory guidance from DfE issued under Section 175 of the Education Act 2002 (as amended), the Education (Independent School Standards) Regulations 2014, the Non-Maintained Special Schools (England) Regulations 2015 and the Apprenticeships, Skills, Children and Learning Act 2009 (as amended). Schools and colleges in England must have regard to it when carrying out their duties to safeguard and promote the welfare of children. For the purposes of this guidance children includes everyone under the age of 18.

## **12. Further Guidance:**

[Sendiass Torbay | Torbay](#)

[Independent special schools and post-16 institutions - GOV.UK](#)

[Choosing a school/college with an EHC plan | \(IPSEA\)](#)

[Independent Provider of Special Education Advice](#)

[Financial Regulations and Contract Procedures](#)

[Commercial Policy](#)