



Education  
Funding  
Agency

# **Approval of independent special schools and special post-16 institutions**

**A guide for independent special  
institutions on applying for inclusion on  
the Section 41 Secretary of State  
approved list**

**January 2015** (Spring Term)

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## Introduction

1. Independent special schools<sup>1</sup> and special post-16 institutions do not have a distinctive definition in law. Unlike maintained schools and academies, Further Education (FE) colleges and non-maintained special schools, such institutions cannot be subject to statutory duties as a distinct group.
2. Section 41 of the Children and Families Act 2014<sup>2</sup> allows the Secretary of State, by order, to publish a list of approved independent educational institutions, independent schools and special post-16 institutions. Institutions can only be included on the list with their consent. The Education (Special Educational Needs and Disability) Regulations (2014)<sup>3</sup> set out the criteria for inclusion and removal of institutions. The list is published [on GOV.UK](#).<sup>4</sup>
3. Those independent institutions applying to join the approved list make themselves voluntarily subject to certain duties in Children and Families Act:
  - local authorities' published local offer of support available to children and young people with SEN must refer to the institutions on the approved list;
  - institutions on the approved list have a reciprocal duty to co-operate with the local authority on arrangements for children and young people with SEN, and to have regard to the statutory guidance in the Special educational needs and disability code of practice: 0-25 years<sup>5</sup> (Code of Practice).
4. In addition, the Children and Families Act 2014 gives parents and young people the right to express a preference for independent specialist provision when their Education, Health and Care (EHC) plan is being agreed and completed. Under section 38 of the Act, if an EHC plan names a maintained school or academy, FE college, non-maintained special school or approved Section 41 independent special institution, the local authority must secure a place at that institution and the institution must admit the pupil or student. The local authority must comply with the request 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

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<sup>1</sup> This includes independent educational institutions in England and independent special schools in Wales, as set out below.

<sup>2</sup> [http://www.legislation.gov.uk/ukpga/2014/6/pdfs/ukpga\\_20140006\\_en.pdf](http://www.legislation.gov.uk/ukpga/2014/6/pdfs/ukpga_20140006_en.pdf)

<sup>3</sup> <http://www.legislation.gov.uk/uksi/2014/1530/part/5/made>

<sup>4</sup> <https://www.gov.uk/government/publications/section-41-secretary-of-state-approved-list>

<sup>5</sup> <https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>

with the efficient education of others, or the efficient use of resources.<sup>6</sup> This requirement places approved independent special schools and special post-16 institutions on the same legal footing as maintained schools, academies, non-maintained special schools and FE colleges, which can be named as a preferred institution.<sup>7</sup>

5. Parents and young people may request that an independent special school or special post-16 institution not on the approved list be named in an EHC plan. The local authority will consider this request, but is not under any specific duty to secure a place, and there is no duty on the institution to admit the pupil or student.
6. The Education Funding Agency (EFA) is acting as the Secretary of State's agent in determining which independent special schools and special post-16 institutions should be approved to join the list.
7. This document provides guidance for the approval of independent special schools (England and Wales) and special post-16 institutions applying for inclusion on the list of approved independent special institutions. Institutions must be able to provide evidence and demonstrate that they meet the criteria listed within this guidance.

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<sup>6</sup> See section 9.79 of the Code of Practice for further information.

<sup>7</sup> See section 9.79 of the Code of Practice for further information.

## Who is this guide for?

8. This guide provides information for those institutions that wish to be considered for inclusion on the approved list. For the purpose of this guide these are defined as:
- **Independent educational institutions** (also referred to as independent special schools) in England, which are entered on the register of independent educational institutions under the Education and Skills Act 2008 and which are specially organised to make special educational provision for students with special educational needs.
  - **Independent special schools** in Wales, which are entered on the register of independent schools under the Education Act 2002 and which are specially organised to make SEN provision.
  - **Special post-16 institutions** which are legally established to provide education and are not maintained schools or Further Education colleges, which provide specialist post-16 education and support to young people with some of the most severe learning difficulties and / or disabilities or low-incidence needs. In many cases they offer specialist residential provision which would not be economical for a local authority to replicate.

For the purposes of this guide the above categories will be referred to as **independent special institutions**.

## Special education institutions not in scope

9. There are two other types of special institution who offer services to a similar cohort. Both have their own legal status and are already subject to the statutory duties set out in the Act. They are therefore not in scope of the approved list under section 41 of the Act. They are:
- **Non-maintained special schools**, which cater for pupils up to age 18. They are funded on the same basis as and subject to similar inspection and accountability requirements as maintained special schools.
  - **Special free schools**, which have a statutory footing as academies and are subject to a separate approval process. They are subject to the same funding, accountability and inspection regime as other academies.

In addition:

**Other LA-maintained provision** (e.g. Pupil Referral Units or specialist units), is legally considered part of the local authority and is inspected as part of the

local authority. Since such institutions are not a distinct legal entity, they cannot be subject to statutory duties.

## When to make an application to the list of approved Independent Special Institutions

10. We are conducting a termly application process from summer 2014 to the summer of 2015 to encourage institutions to join the Section 41 approved list. After the summer 2015 application window the list will be updated annually, i.e. the next application process will take place in summer 2016, in accordance with the published timeframe available via Gov.uk. Applications received after the closing date will be considered as part of the next review.
  
11. Once the application process becomes annual, special post-16 institutions and independent special schools which are newly established or newly registered with the Department for Education (DfE) (within the last year) will be able to submit an exceptional application to join the Section 41 list, outside the normal process timeframe. Enquiries should be made to [HNSSoS.EFA@education.gsi.gov.uk](mailto:HNSSoS.EFA@education.gsi.gov.uk) and include the institutions name, DfE registration number (independent special schools only) and Companies House and/or Charity Commission number. Subject to demonstrating that the institution meets the exceptions criteria (established within the last year and are legally/DfE registered), the institution will be asked to complete an application form for consideration. Applications submitted via the exceptions process will need to meet the eligibility requirements set out within this document.

## Applying to be included on the list of approved independent special institutions

12. The application process to be added to the list of approved independent special institutions consists of the following criteria, as set out in part 5 of the Education (Special Educational Needs and Disability) Regulations (2014).<sup>8</sup>
13. Independent special institutions will need to complete a three stage process of application outlined below. Each criterion must be met and all three stages of the application process must be successfully completed before the EFA will consider entering an independent special institution onto the list.
14. The process follows 3 stages prior to reaching a decision:
  - Stage 1 – specialism and background information
  - Stage 2 – quality of provision
  - Stage 3 – financial health assessment
  - Decision is made
15. Independent special schools must be registered with the Department for Education before the application closing date. Pre-registered schools cannot be considered. Special Post-16 institutions must be legally established and registered for the delivery of education with Companies House and/or Charity Commission.
16. Failure to fully respond to any of the questions posed during the application process may result in the EFA not being able to progress the application, a delay in the completion of the application process or failure to successfully complete the application process.

### Stage 1 – Specialism and Background Information

17. This criterion is intended to confirm that the majority of the provision offered by the institution is specialist educational provision to pupils and students aged between 0 and 25 with special educational needs:
  - Information relating to your pupil / student cohort and provision available. Please provide the total number of students along with the number of those students with an Education, Health and Care Plan (EHCP), Learning Difficulties Assessment (LDA) or Statement of Special Educational Needs (statement) for the current academic year.

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<sup>8</sup> <http://www.legislation.gov.uk/uksi/2014/1530/contents/made>



18. We expect that the majority of the pupil / student intake in an approved special institution will be in possession of an ECHP, LDA or Statement.
19. Special Post-16 institutions which do not hold an EFA contract (from which we can validate student information) will be required to provide details of current or planned student places which will include the students name, date of birth and commissioning local authorities. This information will be validated with other parties. If other parties do not support planned or commissioned places, the application cannot be considered and will fail.

## Stage 2 – Quality of Provision

20. In assessing this area we will consider evidence for the quality of education provision and residential provision that is being offered (where it is in place or intended to be offered). We will ask for and consider the most recent full inspection reports, including those from Ofsted, the Independent School Inspectorate, Estyn and (where applicable) the Care Quality Commission and Care and Social Services Inspectorate Wales. This will include providing a link(s) to inspection reports.
21. Where an institution is assessed during an education or social care inspection as being inadequate overall and/or is judged not to be meeting essential standards that result in a major impact, the institution will fail the application process.
22. We will expect to consider the most recent published full inspection report and recent emergency, monitoring or interim inspections. We may also contact the institution, home local authority and/or commissioning authority/ies, along with other parties to discuss other evidence that could be provided to demonstrate the quality of provision, which may include an education adviser visit.
23. Where an institution has not to date been subject to inspection, agreement will be required before approval onto the list that the teaching, learning and care provision can be inspected within 18 months.

## Stage 3 – Financial Health Assessment

24. The financial health of institutions will be assessed using the EFA's financial health assessment methodology. The formulaic based assessment will categorise institutions financial health as: *outstanding, good, satisfactory, or inadequate*. These categories are based on a scoring of three ratios: solvency (current ratio); sustainability (surplus divided by income); and status (debt as a percentage of reserves. It will also take into the account the nature of the institution, i.e. charity, business etc.

25. An institution that has not yet prepared its first set of annual accounts, should submit a costed business plan including, as a minimum:
- Forecast income and expenditure;
  - Cash flow forecast;
  - Projected balance sheet;
  - Full explanation of assumptions behind figures provided.
26. The EFA reserves the right to carry out further financial checks throughout the application process and if more up to date information comes to light.
27. Any institution whose financial health is assessed as being inadequate or has omitted to provide the financial information required will fail the application process.

## Decision

28. Where an institution has successfully passed stages 1 to 3 of the application process, the decision on whether to place the institution on the Secretary of State's approved list will be made by a panel comprising representatives from across the EFA, operating on behalf of the Secretary of State. The evidence provided in support of all the qualifying criteria will be considered. Some applicants may not proceed to the panel review where they do not meet the application criteria.
29. The institution will be informed of the decision in writing via the email address provided on their application and the approved independent special institutions list will be updated, in accordance with the process timeframe.<sup>9</sup>
30. This process relates only to the consideration to be entered onto the list of approved independent special institutions and will not automatically entitle the institution to receive funds or a contract from the EFA. An EFA contract will be subject to local authorities' commissioning decisions and a high needs student [market entry](#) process which is undertaken separately outside of any process set out in this document.

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<sup>9</sup> <https://www.gov.uk/government/publications/section-41-secretary-of-state-approved-list>

## **Right of Appeal should you not be entered onto the list**

31. All EFA decisions are final and not subject to appeal. However, applicants that fail to meet some or all of the criteria may apply again once they feel they have addressed the issues raised in the feedback from the EFA.
  
32. Institutions can be added or removed from the list on an exceptional basis should any additional information come to light. This will include, but not be limited to, updated financial health assessments or outcomes from emergency inspections or safeguarding concerns.

## What information do I need to provide?

33. Please refer to the [application form and supporting guidance](#) for information on the evidence required in support of your application.
34. The EFA may also seek information from the local authority in which the institution is located or from other commissioning local authorities.

## Review of the list of independent special institutions

35. The list of approved independent special institutions will be reviewed termly, with institutions expected to continue to meet the three qualifying criteria. Any new information such as recent inspection reports or the institution's financial viability will be taken into account during this review. If serious concerns relating to an institution have been raised with the Secretary of State by any individual (for example relating to safeguarding), the EFA will consider the implications of these concerns.
36. The EFA will contact an institution if there is a risk that it may be removed from the list. The decision to remove an institution from the list will take effect 28 days after notification has been given (condition 61.3 - SEND Regulations 2014). All local authorities in England will be notified of the institutions removal (condition 61.2 – SEND Regulations 2014).
37. The list of approved independent special institutions will be updated on 30 April 2015 and 31 August 2015 to incorporate institutions approved during the spring and summer applications windows, and the removal of institutions which have not continued to meet the eligibility criteria.
38. Once the application process in the summer term 2015 has been completed, the next opportunity to join the section 41 list will be in summer 2016, as set out in paragraphs 10 -11 The termly reviews of the list are intended to confirm that the institutions continue to meet the three qualifying criteria, as set out above.

## EFA contact details

39. If you have any questions about any part of the application process please email:

[HNSSoS.EFA@education.gsi.gov.uk](mailto:HNSSoS.EFA@education.gsi.gov.uk)

## Further sources of information

Children and Families Act 2014

[http://www.legislation.gov.uk/ukpga/2014/6/pdfs/ukpga\\_20140006\\_en.pdf](http://www.legislation.gov.uk/ukpga/2014/6/pdfs/ukpga_20140006_en.pdf)

The Special Educational Needs and Disability Regulations 2014

<http://www.legislation.gov.uk/uksi/2014/1530/part/5/made>

The published list of approved independent special institutions

<https://www.gov.uk/government/publications/section-41-secretary-of-state-approved-list>

EFA application form and guidance

<https://www.gov.uk/government/publications/applying-to-be-on-the-approved-list-of-independent-special-institutions>

SEND Code of Practice 2014

<https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>

## Other advice and guidance you may be interested in

16 to 19 education: high needs funding

<https://www.gov.uk/government/publications/high-needs-students-market-entry>



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