

## IN THE MATTER OF SCHOOLS FUNDING ARRANGEMENTS

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### INITIAL ADVICE

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#### INTRODUCTION

1. I am instructed by Torbay Council to advise as to the lawfulness of its arrangements whereby schools' budgets are 'recharged' in respect of pupils who are withdrawn from the school roll in that academic year and home-educated. These were previously approved by the local Schools Forum in 2018 and again in 2020.
2. I understand that the local Schools' Forum ('SF') has raised concerns about this on behalf of affected schools [REDACTED]  
[REDACTED] It has been suggested that the use of the funding is *ultra vires* because the students concerned are not 'receiving education funded by a local authority other than at a school which is maintained by that authority'. It is also contended that the Schools Forum had no power to approve this arrangement which is said to entail 'fines...levied against a school as a sanction'.
3. The context is that the Council faces pressures on its education budget. The current arrangements were justified on the basis that where children are no longer being educated in a school, it would be anomalous for that school to receive funding in respect of those pupils, because funding designed to follow pupils should follow the child to secure that they receive an appropriate education and because there could otherwise be perverse incentives created to 'off-roll' children. Conversely there may be objections on grounds that unplanned changes in funding harm the effective budgeting/planning and staffing of schools at the level of each institution, to the detriment of pupils educated there. In particular, [REDACTED] has pointed out that where the vacant place is subsequently filled by another child, or a home-educated child joins the school midway through the year, the school does not then receive an additional payment. I would emphasise that this Advice is not about the policy merits of the current arrangements, but is confined to their lawfulness.
4. This Initial Advice is necessarily preliminary and at a high level because I have not been provided with sufficiently specific details to reach a concluded opinion on all aspects. It also deals only with the current financial year at this stage. I do not believe that there was any material difference in the 2020 funding regulations, but have not consulted all previous relevant statutory instruments and grant conditions.

## **FACTS**

### **Background**

5. This is an area bedevilled by acronyms and jargon.
6. I am told that the funds in question derive ultimately from general taxation from H.M. Treasury in the form of the 'dedicated schools grant' ('DSG') under s.14 of the Education Act 2002, which is paid to each local authority according to a formula. Whilst this 'national funding formula' ('NFF') is currently used to calculate the DSG paid to the authority based on a notional funding level for each school, it is then up to the authority to determine how to then allocate its education funding within its own area.<sup>1</sup>
7. Local authority expenditures include spending on to schools and for education otherwise than at school ('EOTAS'), including elective home education ('EHE').
8. The NFF comprises various factors, which are each tweaked from one year to the next.<sup>2</sup> In 2021-22, the various elements in the formula comprise:
  - (a) 'schools block' funding
  - (b) Central school services block ('CSSB')
  - (c) 'High needs block' ('HNB')
  - (d) Early years block'.
9. The 'schools block' funding comprises:
  - (a) 'school-led funding' /premises funding including a fixed lump sum, an allocation based on 'sparsity' (based on catchment area), and funding related to historical factors such as public finance initiative contracts;
  - (b) 'basic per pupil funding' calculated using the numbers of pupils in particular age cohorts recorded in the schools' census for the previous school year ('age-weighted pupil unit' or 'AWPU') with a minimum per-pupil level;
  - (c) Additional needs funding based upon deprivation as reflected in an 'Income Deprivation Affecting Children Index or 'IDACI', low prior attainment, English as an additional language and pupil mobility;
  - (d) An 'area cost adjustment' ('ACA') to take account of geographical variation in labour market pay rates for teaching and non-teaching staff; and
  - (e) transitional protection for local authorities in the form of funding floors/capping of reductions based on previous years' DSG.

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<sup>1</sup> Central government policy is to apply a single national formula in future and remove local authorities' discretion over allocations.

<sup>2</sup> I have had regard to Department for Education, *The national funding formula for schools and high needs 2021-2022* (July 2020).

There is a detailed Technical Note (July 2021) on how the various factors are quantified and calculated.<sup>3</sup>

10. The 'high needs block' NFF is based on the following:
- (a) A basic entitlement set at £4,660 per pupil, then weighted by ACA;
  - (b) A historic spend factor;
  - (c) An ACA-weighted element computed using proxy factors for additional needs (population, disability living allowance, children in bad health, low attainment, free school meals and IDACI),
  - (d) a funding floor factor,
  - (e) an adjustment for import/export of pupils,
  - (f) a hospital education funding element, and
  - (g) various other supplements (e.g. for teacher pensions).
- This is again supported by a Technical Note (dated 2019) with a detailed methodology.

### Conditions of the DSG funding

11. The terms and conditions of the DSG funding are set out on the central government website.<sup>4</sup> Those for 2021-22 state inter alia:

#### **'2. Terms on which the grant is paid**

The formal terms of grant given by the Secretary of State under section 16 of the Education Act 2002 state that:

1. We will pay the grant as a ring-fenced specific grant and it must be used in support of the schools budget as defined in the School and Early Years Finance (England) Regulations 2021. It can be used for no other purpose.

2. At the end of the 2021 to 2022 financial year the Chief Finance Officer (CFO) of the local authority is required to append an additional note to the statement of accounts confirming the deployment of the DSG in support of the schools budget as required by the Accounts and Audit (England) Regulations 2015. The CFO is also required to confirm the final deployment of the DSG in support of the schools budget.

3. The Secretary of State reserves the right to recover the grant where there is evidence that a local authority has used it for any purpose other than to support the schools budget or has failed to comply with any other condition of grant.

[...]

#### **3.1 Purpose of the grant**

The grant is paid in support of the local authority's schools budget. It is the main source of income for the schools budget.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1003310/2022-23\\_NFF\\_schools\\_block\\_technical\\_note.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003310/2022-23_NFF_schools_block_technical_note.pdf)

<sup>4</sup> <https://www.gov.uk/government/publications/dedicated-schools-grant-dsg-2021-to-2022/dsg-conditions-of-grant-2021-to-2022>

Local authorities are responsible for determining the split of the grant between central expenditure and the individual schools budget (ISB) in conjunction with local schools forums. Local authorities are responsible for allocating the ISB to individual schools in accordance with the local schools' funding formula.

Local authorities can add to the schools budget from local sources of income, subject to the provisions below.

[...]

### **3.4 Allocation of grant to schools by local authorities**

Local authorities retain responsibility for setting the overall level of their ISB [individuals schools budget] and for determining schools' budget shares, subject to the School and Early Years Finance (England) Regulations 2021.

[...]

### **3.5 Transfer of funds between DSG funding blocks**

The following conditions apply to the transfer of funds between the four DSG funding blocks:

1. Subject to the paragraphs below, local authorities must not allocate money designated in the DSG settlement tables as schools block to items of spend other than budget shares for mainstream primary and secondary schools (excluding funding for nursery classes and for places reserved for pupils with special educational needs), or money retained centrally for growth in schools, as defined in Schedule 2 to the School and Early Years Finance (England) Regulations 2021.

2. Local authorities may allocate up to 0.5% of money designated as school block, excluding the amount transferred into the schools block from the Teachers Pay Grant (TPG) and the Teachers' Pensions Employer Contribution Grant (TPECG), to other items with the consent of the schools forum.

3. Local authorities must consult with all local maintained schools and academies if they propose to allocate schools block money to other items. The schools forum must take into account the outcome of that consultation before deciding whether to give their consent.

4. The local authority can apply to the Secretary of State for permission to allocate schools block money to other items if they do not secure the consent of the schools forum as above, or if they wish to allocate more of the schools block money to other items than would be permitted under paragraph 11.2. In the case of the Secretary of State giving such permission, this may be for all or part of the sum requested by the local authority and may be given subject to conditions.'

### The Council's local arrangements

12. I was not provided with full details of the Council's overall local schools funding formula by my instructing solicitors.

13. The Council's Schools Funding website contains a document entitled 'Scheme for Financing Primary, Secondary and Special Schools Effective From 1<sup>st</sup> April 2021' ('the Scheme'). Within this, the main relevant chapter is Section 2A ('Primary & Secondary Schools') and the sub-heading 'The Funding Formula – How the Formula Works'. Paragraphs 2.3–2.4 state that 'the funding is determined by the allowable factors set nationally by the DfE' and refer to these. Paragraph 2.19 then reads:  
'In-year budget adjustments to school funding are not permitted, apart from the areas listed below: \*Permanently Excluded pupils \*Education, Health & Care Plans above £6k... \*Nursery Funding \*Enhanced provision... \*Pupil Premium...'
14. Paragraph 2.25 ('Charging policy for provision other than mainstream schools') then reads as follows:

### **'2.25 Charging policy for provision other than mainstream schools**

**Behaviour Assessment Places** – If places are available at Burton Academy or the Mayfield (Chestnut) Centre, they may be applied for via the Pupil Referral Panel. Each referral will be a 12 week place which will be charged at £6,500 for each 12 week block. Places will be charged termly in arrears.

**Medical Tuition Service** – Provision arranged by the Local Authority is charged at the same rate under section 19 regardless of the provision. The charge is £6,000 / 38 weeks a year = £157.89 a week. The service will be charged for termly in arrears. It is charged pro rata to allow schools to maintain places and in the expectation that schools will continue to provide SEN and safeguarding support for the student and plan for reintegration as soon as possible.

**Elective Home Education** - The local authority will use the Elective Home Education register to calculate the number of weeks to be charged. This register is maintained using EHE visit records and the 'Additions and Deletions from School Roll' submissions provided by schools.

The register will be deemed an accurate record.

As such it is incumbent on schools to inform the Student Services team as soon as they add or delete a child from roll or become aware that a child has left the local area.

An example of the charge is listed below, schools will only be charged for the elements of funding which apply to the pupil...

...E.g. If Primary pupil was eligible for FSM / Ever 6 and Pupil Premium, but not EAL & Low Attainment, the charge would be MPPF £4,180, FSM £455.83, Ever 6 £569.78 & PP £1,345 = £6,550.61 divided by 38 weeks = £172.38 per week. Therefore the charge for the Summer Term would be 12 weeks x £172.38 per week = £2,068.56

This service will be charged for termly in arrears.

Students moving to Elective Home Education who have an agreed offer of a place at another school (that the Local Authority have been notified of at the time of removal from roll) will not be charged.'

15. I am told that 'recoupment and recharging' of 'high needs block' and 'schools block' funding is applied where children are withdrawn for *inter alia* EHE and permanent exclusion. This policy was agreed to by the Torbay Schools Forum on 1<sup>st</sup> October 2018. The recoupment is of the per-pupil elements of the school's funding, i.e. the basic and additional needs elements (if any) of the 'schools block' funding for that pupil, and the per-pupil element of HNB funding.
16. The 'recharge' is made termly in arrears on a week-by-week basis using the Council's EHE Register. I am told that '[t]he charges go back into the high needs block to partially cover incurred costs due to EHE'.
17. The funds obtained from the 'recharging' have been used to fund:
  - an additional EHE Officer,
  - the Torbay Mediation Service,
  - Educational Psychology provision,
  - 'Year 11 provision – 9 places' (not further specified);
  - an 'EHE Day for Families', and
  - specific support for individuals.No further detail has been provided, although I requested details.
18. Recoupment was made at 50% of the sum otherwise due in the year 2020/21 because of Covid19 (as approved by the Schools Forum at a meeting on 8 October 2020), and was then reapplied at the previous full level.

#### Secretary of State's guidance

19. The Secretary of State publishes statutory guidance on 'Schemes for financing local authority maintained schools' (last updated April 2021).<sup>5</sup> This states:

'This guidance lists the provisions which a local authority's scheme must, should or may include. Schemes need not follow the format used in this guidance, except for the text of directed revisions.'
20. Section 8 of the guidance provides guidance on '[t]he charging of schools budget shares'. This says:

'The scheme should contain a provision which allows the budget share of a school to be charged by the local authority without the consent of the governing body only in circumstances expressly permitted by the scheme, and requires local authorities to consult schools as to the intention to so charge, and notify schools when it has been done.'

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<sup>5</sup> <https://www.gov.uk/government/publications/schemes-for-financing-schools/schemes-for-financing-local-authority-maintained-schools>

Schemes may provide for a disputes procedure for such charges.

Although the right of local authorities to protect their financial position from liabilities caused by the action or inaction of governing bodies by charging budget shares is well established, the government is anxious to ensure that schools are clearly aware of the circumstances in which this may happen.

Schemes must therefore list the circumstances in which such charging is permitted. The main ones are given below, and local authorities may add others or omit some if they consider them unnecessary.

It may be useful to remind schools that the local authority cannot act unreasonably in the exercise of any power given by the scheme, or it may be the subject of a direction under section 496 of the Education Act 1996.

For each of these circumstances the local authority would have to be able to demonstrate that they had necessarily incurred the expenditure now charged to the budget share. This means that where the local authority cannot incur a liability because the statutory responsibility rests elsewhere, no charging is possible. Therefore, the position on charging will vary between categories of school....'

A list of circumstances is given where action or inaction by schools may lead to local authorities incurring expenditure, such as premature retirement costs, works in repairs or remediation of school property, legal costs or services provided by the authority to the school.

## **RELEVANT LAW**

### **Grants by the Secretary of State**

21. Sections 14–16 of the Education Act 2002 provide as follows (my underlining):

#### **14. Power of Secretary of State and National Assembly for Wales to give financial assistance for purposes related to education or children etc**

(1) The Secretary of State (in relation to England) or the National Assembly for Wales (in relation to Wales) may give, or make arrangements for the giving of, financial assistance to any person for or in connection with any of the purposes mentioned in subsection (2).

(2) Those purposes are—

(a) the provision, or proposed provision, in the United Kingdom or elsewhere, of education or of educational services;

(b) the provision, or proposed provision, in the United Kingdom or elsewhere, of childcare or of services related to childcare;

(c) enabling any person to undertake any course of education, or any course of higher education provided by an institution within the further education sector;

(ca) enabling any person to receive any training for teachers or for non-teaching staff;

(d) providing for a person's maintenance while he undertakes such a course;

(e) the promotion of learning or research;

(f) the promotion of the use of educational buildings or facilities for purposes other than those of education;

(g) the provision of any form of training for teachers or for non-teaching staff;

(h) the promotion of the recruitment or retention of teachers or non-teaching staff;

(i) the remuneration of, or provision of other benefits to, teachers or non-teaching staff.

(j) the promotion of the welfare of children and their parents;

(k) the provision of support for parenting (including support for prospective parents).

(2ZA) In subsection (2), "training for teachers or for non-teaching staff" includes—

(a) any training or education (whether or not constituting higher education) with the object of fitting persons to be teachers or non-teaching staff, or better teachers or non-teaching staff, and

(b) any assessment related to the award of a qualification or status to teachers or non-teaching staff, or prospective teachers or non-teaching staff.

(2A) In subsection (2)(j), "children" means persons under the age of twenty.

(3) In this section—



“education” includes—

(a)vocational training (including the preparation of young people for employment in general), and

(b)social and physical training (including the promotion of the development of young children),

but , except in subsection (2ZA)(a), does not include higher education, and “educational” shall be construed accordingly;

“educational services” includes administrative, advisory, organisational, training or information services related to education;

“non-teaching staff” means persons who are not teachers but who—

(a)are employed at, or otherwise engaged to work at, a school or an institution within the further education sector,

(b)are employed by, or engaged to provide services for, a local authority for purposes connected with the authority’s education function], or

(c)are employed by any person in connection with the provision of education or childcare;

“teacher” does not include a teacher at an institution within the wider higher education sector, unless, in relation to a registered higher education provider within the meaning given by section 3(10) of the Higher Education and Research Act 2017, the institution is also an institution within the further education sector.’

## **15. Forms of assistance under section 14**

(1) Financial assistance under section 14 may be given in any form.

(2) Assistance may, in particular, be given by way of—

(a) grants,

(b) loans,

(c) guarantees,

(d) incurring expenditure on the provision of equipment for the benefit of the person assisted, or

(e) incurring other expenditure for the benefit of the person assisted.

(3) Assistance given under section 14 to a local authority may not be given by way of loan or guarantee.

[...]

## **16 Terms on which assistance under section 14 is given**

(1) Financial assistance under section 14 may be given on such terms as the Secretary of State (or, as the case may be, the National Assembly for Wales) considers appropriate, subject to —

(a) subsection (2B) (which relates to institutions within the higher education sector), and

(b) section 175(3B) (which relates to institutions in England that provide further education).

(2) The terms may, in particular, include provisions as to—

(a) circumstances in which the assistance is to be repaid, or otherwise made good, to the Secretary of State (or the National Assembly for Wales), and the manner in which that is to be done;

(b) the giving by the person receiving assistance of financial assistance to other persons on such terms as that person or the Secretary of State (or the Assembly) considers appropriate, subject to subsection (2B);

(c) circumstances in which any payments made by virtue of terms included by virtue of paragraph (b) are to be repaid, or otherwise made good, to the person receiving assistance from the Secretary of State (or the Assembly), and the manner in which that is to be done;

(d) the keeping, and making available for inspection, of accounts and other records.

[...]

(3) The person receiving assistance must comply with the terms on which it is given, and compliance may be enforced by the Secretary of State (or, as the case may be, the National Assembly for Wales).

(4) Section 15(2) applies to financial assistance required by virtue of subsection (2)(b) as it applies to financial assistance given under section 14.'

### **Powers of the Secretary of State**

22. Section 496 of the Education Act 1996 provides for the Secretary of State to give directions to a local authority as to the performance of duties or the exercise of discretions under that Act, to prevent them acting unreasonably. Section 497 of the 1996 Act provides for him to give directions to local authorities where he considers them to be in default in respect of a duty under that Act. Section confers powers on the Secretary of State to give directions to local authorities where he is satisfied that they are failing to perform any education function either at all or to an adequate standard. The term 'education functions' is defined by Schedule 36A to include functions conferred on them under the Education Acts (defined by s.578 to include the EA 2002 and the SSFA 1998)

### **Schools forums and schools budgets**

23. The School Standards and Framework Act 1998 ('SSFA 1998') governs the setting of maintained school budgets.
24. Section 45(1) of the SSFA 1998 provides that every maintained school shall have a budget share which is allocated by the authority which maintains it. The term 'maintained school' includes, for this purpose, a foundation school such as The Spires College (subsection (1A)).
25. Section 45A SSFA 1998 provides in material part (my underlining):  
**'45A Determination of specified budgets of local authority**  
(1) For the purposes of this Part, a local authority's "non-schools education budget" for a relevant period is the amount appropriated by the authority for meeting all education expenditure by the authority in that period of a class or description prescribed for the purposes of this subsection.  
  
(1A) In subsection (1) "*relevant period*" means a financial year or such other period as may be prescribed.  
  
(2) For the purposes of this Part, a local authority's "schools budget" for a funding period is the amount appropriated by the authority for meeting all education expenditure by the authority in that period of a class or description prescribed for the purposes of this subsection (which may include expenditure incurred otherwise than in respect of schools).  
  
(2A) The amount referred to in subsection (2) includes the amount of any grant which is appropriated, for meeting the expenditure mentioned in that subsection, in accordance with a condition which—  
(a) is imposed under section 16 of the Education Act 2002 (terms on which assistance under section 14 of that Act is given) or any other enactment, and  
(b) requires that the grant be applied as part of the authority's schools budget for the funding period.  
  
(3) For the purposes of this Part, a local authority's "individual schools budget" for a funding period is the amount remaining after deducting from the authority's schools budget for that period such planned education expenditure by the authority in respect of that period as they may determine should be so deducted in accordance with regulations.  
  
(4) Regulations under subsection (3) may—  
(a) prescribe classes or descriptions of expenditure which are authorised or required to be deducted from an authority's schools budget;  
(b) provide, in relation to any prescribed class or description of expenditure specified in the regulations, that such expenditure may only be deducted subject to either or both of the following, namely—  
(i) such limit or limits (however framed) as may be specified by or determined in accordance with the regulations, and  
(ii) such other conditions as may be so specified or determined.

(4A) Regulations under subsection (3) may also make provision–  
 (a) enabling any expenditure falling outside any classes or descriptions of expenditure prescribed by virtue of subsection (4)(a) to be deducted from the authority's schools budget if the deduction of such expenditure is authorised, on the application of the authority, by the authority's schools forum or the Secretary of State, and  
 (b) enabling any limit or condition that would otherwise apply by virtue of subsection (4)(b)(i) or (ii) to be varied or excluded, on the application of the authority, by the authority's schools forum or the Secretary of State.  
 [...]  
 (7) In this section "*education expenditure*" means expenditure incurred by a local authority in connection with the performance of their education functions.

26. Under s.47(1) of the SSFA 1998,  
     'For the purposes of this Part a maintained school's budget share for a funding period is such amount as the local authority may determine, in accordance with regulations, to allocate to the school out of the authority's individual schools budget for that period'
27. Under s.47A of the SSFA 1998, every local authority must establish a schools forum in accordance with regulations, which is to advise the authority on the setting of schools budgets and have such functions as may be imposed by or under the Act.
28. Section 48(1) of the SSFA 1998 provides that each local authority shall maintain a financial scheme dealing with such matters connected with the financing of the schools maintained by it as are required to be dealt with in the scheme by or by virtue of any provision in Part II of the Act or regulations made by the Secretary of State. Subsection 48(3) provides that where there is any inconsistency between the statutory financial scheme and any other rules or regulations made by the authority which relate to the funding or financial management of schools which they maintain, the terms of the scheme prevail.
29. Subsection 48(4) SSFA 1998 enacts Schedule 14, which provides for revisions to the authority's financing scheme to be prepared having regard to guidance of the Secretary of State, following consultation with headteachers and governing bodies of its maintained schools, and submitted to its schools forum for the forum's approval in accordance with regulations (esp. paras 2A(3) and 2B(1)).
30. Section 24(4) of the Education Act 2002 provides for regulations to make provision as to federations of maintained schools.

#### Finance Regulations

31. There have been a number of different sets of regulations made under Part II of the SSFA 1998, which generally each applied to a particular financial year only. The

current set are the Schools and Early Years Finance (England) Regulations 2021 ('the 2021 Regs') which apply in the financial year beginning 1<sup>st</sup> April 2021 (reg.1(2)).

32. Section 142(8) and (9) of the SSFA 1998 provide that the SSFA 1998 is to be construed as one with the Education Act 1996 unless a particular definition is given for the purposes of the SSFA 1998. Expressions in subordinate legislation made under the SSFA bear the same meanings as in the parent Act (s.11, Interpretation Act 1978). This means that some expressions in the 2021 Regs fall to be interpreted by reference to the Education Act 1996.

### *Schools Budget*

33. Regulation 6 of the 2021 Regs provides (my underlining):

**'6.— The schools budget**

(1) The classes or descriptions of local authority expenditure specified in paragraph (2) and Schedule 2 are prescribed for the purposes of section 45A(2) of the 1998 Act and the determination of a local authority's schools budget, subject to the exceptions in regulation 7.

(2) The classes or descriptions of local authority expenditure are—

(a) expenditure on the provision and maintenance of maintained schools and on the education of pupils at maintained schools;

(b) expenditure on the education of children at independent schools, non-maintained special schools, pupil referral units, at home or in hospital, and on any other arrangements for the provision of primary and secondary education for children otherwise than at schools maintained by a local authority;

(c) all other expenditure incurred in connection with the authority's functions in relation to the provision of primary and secondary education, in so far as that expenditure does not fall within sub-paragraphs (a) or (b);

(d) expenditure on the education of—

(i) persons provided with further education who are aged under 19 and have special educational needs; and

(ii) persons provided with further education who are aged 19 or over but under 25 and are subject to an EHC plan, in so far as that expenditure does not fall within sub-paragraphs (a) to (c); and

(e) expenditure on early years provision, in so far as that expenditure does not fall within sub-paragraphs (a) to (d).'

34. Schedule 2 includes:

' 31.

Expenditure on support services for children who have attained compulsory school age and for young people who are subject to an EHC plan or have a statement of special educational needs, and for such children and young people with special educational needs who do not have such a plan or statement.

[...]

34.

Expenditure incurred in relation to education otherwise than at school under section 19 of the 1996 Act or in relation to a pupil referral unit, where the expenditure cannot be met from the sum referred to in regulation 14(3) and, in the case of an alternative provision academy, where it would be unreasonable to expect such expenditure to be met from the general annual grant paid to such an academy by the Secretary of State.

40.

Expenditure on the provision of special medical support for individual children and young people in so far as such expenditure is not met by an NHS Trust, NHS foundation trust, Clinical Commissioning Group or Local Health Board

[...]

41.

Expenditure (other than expenditure referred to in Schedule 1 or any other paragraph of this Schedule) incurred on services relating to the education of children with behavioural difficulties, and on other activities for the purpose of avoiding the exclusion of pupils from schools.

[...]

56.

Expenditure on the provision of tuition in music, or on other activities which provide opportunities for pupils to enhance their experience of music.

[...]

57.

Expenditure incurred in enabling pupils to enhance their experience of the visual, creative and performing arts other than music.

58.

Expenditure on outdoor education centres, but not including centres wholly or mainly for the provision of organised games, swimming or athletics.'

### *Non-schools budget*

35. Regulation 4(1) provides that the 'non-schools education budget' comprises classes or descriptions of expenditure specified in Schedule 1, items treated as part of the non-schools budget under regulation 8(13) which grants local authorities some discretion in relation to particular categories of the schools budget, and 'any expenditure which falls outside the classes or descriptions of expenditure specified in regulation 6 and Schedule 2 (the schools budget)'. Regulation 4(2) provides that 'expenditure referred to in paragraph (1) includes expenditure on associated administrative costs and overheads'.

36. Schedule 1 includes the following:

- (a) 'Expenditure on services provided by educational psychologists' (para 1);
- (b) 'Expenditure in connection with—(a) the provision of parent partnership services (that is, services provided under section 32 of the 2014 Act to give advice and information to parents of children with special educational needs), or other guidance and information to such parents which, in relation to pupils at a school maintained by the authority, are in addition to the information usually provided by the governing bodies of such schools; and (b) arrangements made by the authority with a view to avoiding or resolving disagreements with the parents of children with special educational needs.' (para 5).

*Budget shares formula*

37. Regulations 10 and 11 provide for the local authority to set its own local formulae to determine maintained schools' budget shares, providing in material part:

**10. — Formulae for determination of budget shares etc. for certain maintained schools and early years providers**

(1) A local authority must, before the beginning of the funding period and after carrying out any consultation required by regulation 9(2), decide on the formula which it will use to determine the budget shares for schools which it maintains (other than special schools, pupil referral units and nursery schools, and in relation to nursery classes in schools maintained by it).

(2) A local authority must use the formula determined under paragraph (1) in all determinations of school budget shares in respect of the funding period.

[...]

(7) A local authority may not change its formulae after the funding period has begun.

(8) The formulae must be determined in accordance with Part 3 of these Regulations.

[...]

**11. — Determination of allocation of budget shares etc. for the funding period**

(1) Except as provided for in paragraphs (2), (4) and (9), not later than 28th February 2021, a local authority must determine the budget share for each school which it maintains, using the formula referred to in regulation 10(1) in accordance with Part 3 of these Regulations.

[...]

(11) Save as provided in this regulation and in regulations 16 (special arrangements for pupils in maintained nursery schools and nursery classes and children receiving relevant early years provision), 19 (Risk Protection Arrangement), 20 (differential funding), 26 (sixth form funding), 27 (new

schools, merged schools and closing schools), 28 (federated schools), 29 (excluded pupils), 30 (correction of errors and non-domestic rates) and 31 (alternative arrangements), the authority must not redetermine a school's budget share or the amount allocated to a relevant early years provider.'

38. Regulations 13–20 within Part 3 of the 2021 regs include mandatory requirements, criteria and factors which must be included in the local funding formula for setting budget shares. I shall not set these out in full, but they are highly prescriptive. Regulation 21 then provides as follows (my underlining):

**'21. Additional requirements, factors or criteria**

(1) In order to determine the budget shares for schools maintained by it (other than special schools, pupil referral units and nursery schools), a local authority—

- (a) must comply with the requirement for minimum per pupil funding set out in regulation 22, and
- (b) may take into account in its formula any or all of the requirements, factors or criteria mentioned in Part 1 of Schedule 3.

(2) For the purposes of—

- (a) complying with the requirement mentioned in paragraph (1)(a), or
- (b) taking into account the matters mentioned in paragraph (1)(b),

the date for ascertaining pupil numbers or proportions is 1st October 2020,  
unless these Regulations provide otherwise.

[...]

(4) The requirements, factors and criteria set out in Schedule 3 may not be taken into account by a local authority on the basis of actual or estimated cost unless otherwise stated in that Schedule.'

39. Part 1 of Schedule 3 includes at paras 3–15 distinct 'single per pupil amounts' for pupils of different ages related to various factors (e.g. attainment, English as an additional language or being in care; sparsity) calculated as specified in the various paragraphs. Regulation 1(5)(e) provides that for the purpose of the Regs, 'a reference to the number of pupils at a particular key stage is a reference to the number on 1st October 2020, unless otherwise stated'.

*Provision for redetermination of budget shares*

40. Regulation 29 of the 2021 Regs makes mandatory provision (at paras (1) and (2)) for the redetermination of an excluding school's budget where it permanently excludes a pupil. This is the amount that would be attributable to the pupil multiplied by the number of complete weeks left in the funding period, divided by 52, plus any financial adjustment order. Paragraph (7) of regulation 29 applies paragraphs (1) and (2) 'where a pupil leaves a maintained school (other than a special school, a pupil referral



unit, or a place which the authority has reserved for children with special educational needs) for reasons other than permanent exclusion and is receiving education funded by a local authority other than at a school which is maintained by that authority.’

41. Regulation 30(1) provides:

‘(1) A local authority may at any time during the funding period redetermine a maintained school's budget share, or the amount allocated to a relevant early years provider, for the funding period or any previous funding period in order to correct an error in a determination or redetermination made under these Regulations or any previous regulations made under sections 47 or 47ZA of the 1998 Act, whether arising from a mistake as to the number of pupils at the school or otherwise, and any such redetermination will take effect in the next financial year following the funding period.’

42. Regulation 31 allows for the local authority to request the Secretary of State to authorise deviation from the terms of the Regulations.

*Provision as to contents of financial schemes and their approval*

43. Regulation 32 of the 2021 Regs and Schedule 5 thereto make provision relating to financial schemes. A scheme prepared by a local authority under section 48(1) of the 1998 Act must deal with the matters connected with the financing of schools maintained by the authority set out in Schedule 5. These matters include (per para 2) ‘amounts which may be charged against schools’ budget shares’.
44. Under regulation 33, the scheme may not come into effect unless approved by the schools forum (with or without modifications), but any dispute may be referred to the Secretary of State for resolution by him. Regulation 34 provides that the Council must publish its scheme on a website accessible to the general public.

**ADVICE**

45. I have not been presented with a document containing the Council’s financing scheme under s.48 of the SSFA 1998. Charges to schools’ budget shares must be dealt with in that scheme. Given that the recharging policy has been approved by the Schools Forum, in what follows I assume that it was comprised in the statutory finance scheme.
46. In broad terms there are 2 key questions: (1) whether the Council can ‘recharge’ schools’ budgets where pupils cease to attend and are taken off the school roll as part of its local funding formula, and (2) whether the expenditures that the money was spent on were lawful. If the answer to either question is ‘no’, the question arises (3) as to how the consequences should be addressed.

**(1) Is an in-year deduction/charge to take account of actual pupil numbers on a week-by-week basis lawful?**

47. Whilst there is no case law on this point, in my view the Council is entitled to make charges as spelled out in its Scheme as a matter of principle.
48. Section 47(1) of the SSFA requires that the local schools budget share allocations must be determined in accordance with regulations.
49. Regulation 10(8) requires the budget share formulae to be determined in accordance with Part 3. Regulation 21 (1)(b) states that the authority 'may take into account in its formula any or all of the requirements, factors or criteria mentioned in Part 1 of Schedule 3'. In my opinion, paragraph (1) of this regulation cannot have been intended to be non-exclusive so as to allow the authority to come up with its own alternative criteria instead. If that had been intended, it would not have spelled out in such fine detail how the various factors in Part 1 of Schedule 3 were to be determined, including the deeming date of 1 October 2020 (reg.21(2)) and the prohibition against using actual or estimated costs for the purpose of determining the Part 1 Schedule 3 factors (reg.21(4)). Instead, Part 3 of the Regulations must be read as forming a self-contained comprehensive code, allowing for deviations only in accordance with the procedure in regulation 31 which allows for ministerial approval of alternative arrangements.
50. Regulation 10(2) and (8) then make clear that the statutory formulae must be used in all determinations of budget shares for the relevant period, and the formulae must not be changed mid-year.
51. Regulation 30(1) also makes clear that any redetermination for correction of errors (which must mean miscalculating pupil numbers as at the date of 1st October 2020, rather than the actual numbers) only takes effect from the next funding period.
52. The foregoing points mean that the Council cannot devise school budget shares by reference to actual numbers of pupils who have been withdrawn in any given week. However, this does not answer the question posed.
53. The 'recoupment' policy for EHE pupils has been incorporated into the Scheme under s.48(1) SSFA 1998. The 2021 Regs provide by reg.32 and Schedule 5 para 2 that the s.48(1) SSFA statutory finance scheme must deal with the amounts which may be charged against schools budget shares. Implicitly, this allows local authorities to take funding away from budget shares that would otherwise be kept by the schools in question, where such has been agreed in a scheme approved by the schools forum or Secretary of State. The statutory requirement for approval of the local schools forum or Secretary of State provides a safeguard for the protection of the schools.

54. The term 'amounts which may be charged' is not defined, and it is an ordinary English phrase which is sufficiently broad to encompass any pecuniary charges which have been agreed to by the Schools Forum and are reasonably set for a proper purpose in public law terms having regard to the statutory framework.
55. In this case, a proper purpose must mean one that is sufficiently related to the authority's own liabilities/expenditure, reflects costs actually incurred by the Council; is sufficiently related to its lawful functions or responsibilities and reasonably charged to the school education budget. A charge that had nothing whatsoever to do with the school (e.g. raiding the schools budget to pay for town planning enforcement or domestic bin collections), or was totally unrelated in amount, would be unlawful.
56. In my view, as long as the charges are aimed in aggregate at costs recovery of amounts actually spent (or reasonably projected to be spent) on sufficiently related activities or services, it is reasonable to set charges at a fixed tariff. By analogy, a local authority is entitled to charge for provision of a leisure centre and to charge a flat rate subscription or entrance fee notwithstanding that some customers use the facilities more than others.
57. In this case, the charges are made to reduce the school budget share where a pupil has been withdrawn from that school for EHE. Whilst the decision whether to withdraw the child is the responsibility of the parents rather than the school's governing body, the charge is directly related to schools' per-pupil funding levels and (in principle) should be related to the Council's duty to make exceptional provision for suitable education for children who may not otherwise receive this (s.19 of the Education Act 1996), provided the money is used to fund a Council service where there is a reasonable link between the withdrawal of the children and the demand for the service that is funded.
58. Although such charges are not part of the policy of the Secretary of State, being contemplated neither in the NFF for setting budgets nor in the statutory guidance, nevertheless they are not irrational or wholly unreasonable in public law terms. In my opinion, the High Court would not interfere in what is fundamentally a policy decision whether to make such charges.

**(2) Are the expenditures financed by the monies concerned lawful?**

59. The terms of the DSG require the funds to be spent in support of the 'schools budget'. This cannot include support provision of advice and information about SEN provision, nor provision of educational psychologists or other categories of expenditure in Schedule 1 to the 2021 Regs. The funding of educational psychologists from the DSG Grant is therefore unlawful without ratification by the Secretary of State.
60. However, the 'schools budget' may include any money spent on education of children otherwise than at school, including at home; on 'support services for children of compulsory school age' with SEN; on 'services relating to the education of children with behavioural difficulties'; on music, arts and outdoor sports activities or tuition;

and expenditure incurred 'in connection with' the provision of primary and secondary education (see regulation 6 and Schedule 2 to the 2021 Regs).

61. I do not have sufficient details to definitively advise whether the other items of expenditure are lawful because I have not been provided with details as to the precise role of the 'EHE Officer', precisely what the funded Torbay Mediation Service activities are, or what the 'EHE Day' comprises. However, funding of educational places or support services for children is likely to be lawful.

### **Summary and Next Steps**

62. In my opinion it is lawful in principle to charge schools' budget shares with an amount equivalent to per-pupil funding where that pupil is withdrawn to EHE, so long as the money is then spent on a sufficiently related purpose, and within the terms of any grant by the Secretary of State. This is subject to the agreement of the schools forum, and any individual school governing body which is unhappy may also petition the Secretary of State to intervene and give a statutory direction to the Council to revise its Scheme.
63. It is lawful in principle to spend the DSG on education of children who are being educated at home; services related to the education of children with behavioural difficulties; support services for children with SEN; or functions reasonably relating to the provision of primary or secondary education otherwise than in schools (but not themselves constituting such education) (reg.6 of the 2021 Regs and Schedule 2 thereof).
64. It is not lawful to spend the DSG on services provided by educational psychologists without a special authorisation from the Secretary of State, because these services are expressly part of the non-schools education budget (para. 1, of sched.1 to the 2021 Regs), and the general terms of the DSG make clear that it must be spent on the schools budget. Such expenditure is therefore contrary to s.16(3) of the Education Act 2002.
65. I am not able to advise definitively on whether all the items of expenditure to which the 'recoupment' has been redirected fell within the schools budget so as to be within s.16(3) of the Education Act 2002, because full details have not been supplied to me.

### **Next steps**

66. The Council should check whether all items funded by the charges for EHE pupils have been properly spent on items qualifying as part of the 'schools budget', and sufficiently relate to the withdrawal of children from schools for EHE.
67. The Council will be answerable to the Secretary of State for the remainder, and may need to write to him to request retrospective authorisation, or be liable to repay the monies to the DfE from other revenue sources.

68. Expenditure on educational psychology services cannot be funded from the DSG because it falls outside the 'schools budget'. The Council's Chief Finance Officer will have been required to sign an assurance statement confirming deployment of the DSG towards the schools budget in previous years pursuant to the terms of the DSG, and they may need to issue a corrected statement to the Department for Education.
69. To keep my costs within bounds, this Advice is confined to the current financial year. I have not checked the terms of all previous sets of regulations and DSG grants. If so instructed, I would be pleased to check those, or to advise further on particular items of expenditure.

DAVID GRAHAM  
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Francis Taylor Building,  
Temple,  
London EC4Y 7BY