

REPORT TO CABINET

9 October 2019

Subject:	Exemption from Procurement and Contract Procedure Rules for Post-16 High Needs Education Provision
Presenting Cabinet Member:	Cabinet Member for Best Start in Life: Councillor Joyce Underhill
Director:	Director – Education, Skills and Employment – Chris Ward
Contribution towards Vision 2030:	
Key Decision:	Yes
Cabinet Member Approval and Date:	Cabinet Member for Best Start in Life - Councillor Joyce Underhill:
Director Approval:	Director – Education, Skills and Employment – Chris Ward:
Reason for Urgency:	Urgency provisions do not apply
Exempt Information Ref:	Exemption provisions do not apply to the content of this report
Ward Councillor (s) Consulted (if applicable):	Ward councillors have not been consulted
Scrutiny Consultation Considered?	Scrutiny have not been consulted
Contact Officer(s):	Erroll Blackwood – Erroll_blackwood@sandwell.gov.uk

DECISION RECOMMENDATIONS

That Cabinet:

- 1.1 Approve an exemption to the council's Procurement and Contract Procedure Rules, to enable the Council to enter into individual contracts with Education and Skills Funding Agency (ESFA) approved institutions and independent specialist institutions named in the approved list under Section 41 of the Act, for a three year period.

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| <p>1.2 Authorise any necessary exemptions be made to the Council's Procurement & Contract Procedure Rules to enable the course of action referred to in 1.1 above to proceed.</p> |
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1. PURPOSE OF THE REPORT

- 1.1 On 30 August 2017 (Minute No. 146/17 refers) Cabinet approved that, for the purposes of satisfying Section 38 (Preparation of an Education, Health and Care Plan by local authorities) of the Children and Families Act 2014, any necessary exemptions to the Council's Procurement and Contract Procedure Rules be approved to enable the Council to enter into individual contracts with Education and Skills Funding Agency approved institutions and independent specialist institutions named in the approved list under Section 41 of the Act, up to a maximum of the level of grant awarded to the Council in any particular academic year. A three year exemption is now required.

2 IMPLICATION FOR THE VISION 2030

- 2.1 The proposals in this report directly support the Vision 2030 relating to Ambitions 1 and 3.

Ambition 1 – By 2030, Sandwell will be a borough where families' aspirations are raised and that prides itself on equality of opportunity and resilience to change.

Ambition 3 – By 2030, Sandwell's young people will have better skills and working people will have developed new skills, giving Sandwell a workforce geared up to respond to changes in business needs and the economy.

- 2.2 This will allow the Council to make special educational provision to meet the special educational needs (SEN) of the young person; so as to secure the best possible outcomes for them across education, health and social care, and to prepare them for adulthood, as they grow older.

3 BACKGROUND AND MAIN CONSIDERATIONS

- 3.1 From 1 September 2014 major changes to services for young people with special educational needs and disabilities (SEND) were introduced. The reforms are part of a national programme of support for young people with additional needs set out in the Children and Families Act 2014. They extend the special educational needs system from birth to 25 years and place new legal duties on councils, schools, health services and other agencies to ensure that young people with SEND, and their families, get the support they need.

- 3.2 To address any public procurement issues arising from the commissioning of these services, we will issue an Official Journal of the European Union (OJEU) contract notice stating that we procure provision through the Education, Health and Care Plan (EHCP); which providers we use; how providers are selected in relation to individual learners and how providers can apply to become an EFSA provider and apply to be included on the section 41 list.
- 3.3 Independent special institutions wishing to apply to be included on the Secretary of State's approved list will find the application form, guidance and supporting information available at GOV.UK. There is also the 'high needs students' market entry process for those institutions wishing to apply to receive an EFSA education and training contract for services to deliver education and training for high needs students. Institutions need to email a completed application to HNSMarketEntry.EFSA@education.gsi.gov.uk
- 3.4 Sandwell Council will contract with Education and Skills Funding Agency funded institutions which include Further Education Colleges, Sixth Form Colleges, School/Academy Sixth Forms (includes free schools) and approved independent specialist institutions named on the Section 41 (Children and Families Act 2014) list. Section 41 allows the Secretary of State, by order, to publish a list of approved independent special institutions (independent special schools – England and Wales and special post-16 institutions) for the purposes of satisfying Section 38 (Preparation of an Education, Health and Care plan by local authorities) of the Act.
- 3.5 In this context at the end of compulsory school age, commissioning and procurement of high quality post 16 education provision for young people in Sandwell with high needs is underpinned by the statutory obligations of the SEN Code of Practice (Section 19 of the Children and Families Act 2014).

The Code makes clear that local authorities, in carrying out their functions under the Act in relation to disabled young people and those with special educational needs, must have regard to:

- the views, wishes and feelings of the young person and their parents/guardians
- the importance of the young person and parents/guardians, in participating as fully as possible in decisions, and being provided with the information and support necessary to enable participation in those decisions

- the need to support the young person and parents/guardians, in order to facilitate the development of the young person and to help them achieve the best possible educational and other outcomes, preparing them effectively for adulthood.

These principles are designed to support:

- the participation of young people and parents/guardians in decision-making
- the early identification of young people's needs and early intervention to support them
- greater choice and control for young people and parents/guardians over support
- collaboration between education, health and social care services to provide support
- high quality provision to meet the needs of young people with SEN
- a focus on inclusive practice and removing barriers to learning
- successful preparation for adulthood, including independent living and employment.

3.6 Local authorities must ensure that young people and parents/guardians are involved in discussions and decisions about their individual support and about local provision.

3.7 Specifically, local authorities must ensure the young person or parents/guardians are fully included in the EHC needs assessment process from the start, are fully aware of their opportunities to offer views/information and are consulted about the content of the plan.

4 THE CURRENT POSITION

4.1 It is recognised that there is a tension between the legal framework regarding learner choice and the public procurement rules regarding competition for the award of contracts following public advertisement.

For example, from the age of 16, the law recognises young people have rights to take some decisions for themselves (provided they are capable of doing so).

- 4.2 In the academic year 2019/20 the Council still has a statutory duty (Children and Families Act 2014, section 42) to secure special educational provision and health care provision in accordance with the EHC Plan with Schools and other institutions named in the EHC plan: duty to admit.
- 4.3 Institutions that have successfully completed the Education and Skills Funding Agency due diligence process are required to approach the individual student's home Local Authority (LA) and request that the placement is funded by that LA from their "top up" funding for the academic year.
- 4.4 ***The local picture***
- 4.5 In the academic year 2018/19 the Council was required to contract with 14 providers for Post-16 High Needs provision for 183 individual learners. The total value of these individual learner contracts was £1.470m with the average cost per learner being £8,032.39.
- 4.5 Of the 183 learners there is already a potential number of 150 learners who are likely to continue their education with their provider of choice in September 2019. The value of the individual contracts for these continuing learner's total's approximately £1.379m*. The average cost per continuing learner being £9,193.00.
- *These figures may vary if individual students decide not to continue with their chosen education provision.
- 4.6 In academic year 2019/20, the Council's SEN team will also be working with 140 new learners (Current Year 11) taking the total number of Post 16 learners up to 290. These numbers are indicative only as the number of learners reflects the number of students who are currently working with the SEN team.
- 4.7 In academic year 2019/20 the Element 3 (top-up) funding is likely to cost the Council in the region of £2.5m* for these 290 learners, with the average cost per learner being £8,621.00**
- *Moving forward into the academic year 2020/2021 and future years beyond this, the total cost to the council for post 16 funding will only increase year on year as more learners move into post 16 education than leave.

**The approximate value for each learner may change in the academic year 2019/20 and for future years beyond this as costs for each learner are dependent upon their individual need and negotiated accordingly between the SEN Department and each individual provider.

- 4.8 Student numbers will change during each and every academic year as Education Health and Care Plans are issued every month (increasing the number of higher needs learners). Students also leave courses to pursue other opportunities.
- 4.9 Contracts with each provider are for individual learners. Each provider educates multiple learners and the numbers educated by each separate provider changes year on year depending on individual preferences. Individual learner contracts are added together in order that a total sum can be paid to each of the providers contracted with.
- 4.10 Variations to the individual learner contract arranged with each separate provider will need to be flexible. Individual contracts will vary dependent upon the needs of each individual learner and the number of learners on roll at any one point in time during the course of each and every academic year. Additionally, a student's individual needs may also change once they have begun their education. It will therefore be necessary for the Director of Education, Skills and Employment to vary individual contracts within year.
- 4.11 The Education and Skills Funding Agency issued guidance that stated, *'Where a local authority has agreed a placement, it is not appropriate that a pupil or student should be placed there without a contract'*. If there are problems issuing contracts or receiving timely payments, the Education and Skills Funding Agency will examine cases and consider remedial action where there is clear evidence that a local authority is not meeting the required conditions as detailed above. An exemption to the council's Procurement and Contract Procedure Rules is therefore required for each and every academic year to enable contracts to be signed to a maximum value of the provision in any academic year.
- 4.12 Young people who have EHCPs can potentially stay in education up to 25 years of age. The SEN code of practice gives clear and specific guidance on when an EHCP must remain active and when a plan can be closed.

4.13 Neighbouring and national comparison

- 4.14 All local authorities are seeing the number of new EHCP requests increase year on year; comparatively 2019 figures show Sandwell has seen the number of EHCP requests increase month by month based on comparative 2018 statistics.

- 4.15 Sandwell has a similar percentage of the whole school cohort with EHCPs (within 0.6%) as neighbouring boroughs such as Dudley, Walsall and Wolverhampton.

Percentage of whole school cohort with Education Health and Care Plans

	2017	2018	2019
Birmingham-Secondary Statements/EHC	1.40%	1.30%	1.20%
Dudley-Secondary Statements/EHC	1.00%	1.10%	1.20%
Sandwell-Secondary Statements/EHC	1.80%	1.80%	1.70%
Walsall-Secondary Statements/EHC	1.20%	1.30%	1.40%
Wolverhampton-Secondary Statements/EHC	1.10%	1.00%	1.10%
West Midlands-Secondary Statements/EHC	1.50%	1.40%	1.40%
England-Secondary Statements/EHC	1.70%	1.60%	1.70%

(source DfE – LAIT – Sept 2019)

However, authorities such as Birmingham have a higher number of young people who have an EHCP when compared to Sandwell – see table below.

Birmingham	2,176
Dudley	316
Sandwell	409
Walsall	465
Wolverhampton	350

(source DfE data: January 2019)

- 4.16 Although Sandwell has also seen the number of EHCP requests increase month by month based on comparative 2018 statistics, in 2018/19, Sandwell had the highest of proportion of EHCPs completed within 20 weeks compared to neighbouring Local Authorities.

Percentage of Education Health and Care Plans approved within 20 weeks

	2018
Sandwell-EHC - 20 weeks	97.60
Dudley-EHC - 20 weeks	46.70
Walsall-EHC - 20 weeks	34.60
Wolverhampton-EHC	59.00

(source DfE – LAIT – Sept 2019)

5 CONSULTATION (CUSTOMERS AND OTHER STAKEHOLDERS)

- 5.1 The proposals in this report are regarding internal procedures and therefore consultation with external customers and stakeholders was not required.

6 ALTERNATIVE OPTIONS

- 6.1 There are specific provisions laid down for the purposes of satisfying Section 38 (Preparation of an Education, Health and Care plan by local authorities) and there are therefore no other options as the proposal in this report follows council procedure for exemption to contract procedure rules.

7. STRATEGIC RESOURCE IMPLICATIONS

- 7.1 High needs funding is provided to local authorities through the high needs block of the dedicated schools grant (DSG). Local authorities must spend that funding in line with the associated conditions of grant, and School and Early Years Finance (England) (No. 2) Regulations 2018. High needs funding is also provided directly to some institutions by the Education and Skills Funding Agency (ESFA).
- 7.2 Element 3 top up funding is paid from local authorities' high needs budget to meet the individual needs of young people with high needs, over and above the funding provided to institutions through place led funding (element 1 and 2).
- 7.3 The educational costs of the support package should be met through Elements 2 and 3. Other costs are met from contributions from health and social services where appropriate.
- 7.4 The total cost of funding element 3 will increase from the academic year 2020/2021 onwards as more learners move into post 16 education than leave.
- 7.5 It is difficult to estimate the costs for future years as costs for each learner are dependent upon their individual need and negotiated accordingly between the SEN Department and each individual provider.
- 7.6 On 30 August 2019 the Department for Education announced additional funding of £700m at a national level for children with Special Educational Needs and Disabilities in 2020/21. It is understood this will be allocated via the high needs block, but the authority awaits further guidance on the detail.

8 LEGAL AND GOVERNANCE CONSIDERATIONS

- 8.1 The Department for Education takes the view that an agreement between a local authority and institution to pay top-up funding to meet the costs of support for young people with an education, health and care plan (EHCP) should not be treated as a public service contract for the purposes of the Public Contracts Regulations 2015, and therefore that such an agreement does not have to follow the procurement rules prescribed in those regulations.
- 8.2 The Public Contracts Regulations 2015 are not intended to cover all expenditure of public funding, reflecting the intention of the EU Directive on public procurement. The public procurement rules only apply to contracts for the provision of public works, services or goods made for “pecuniary interest” between an “economic operator” and a contracting authority. Other forms of public funding, such as funding provided through grants, usually fall out of scope. (source High needs funding operational guide 2019 to 2020).
- 8.3 Case-law from the European Court of Justice has established that public education organised within a national education system does not constitute economic activity, even in cases where tuition fees may be required to support placements. (source High needs funding operational guide 2019 to 2020).
- 8.4 When a local authority fulfils its statutory duties to make provision specified in an EHC plan funded from their high needs budget, it will be delivering public education organised within a national education system. (source High needs funding operational guide 2019 to 2020).
- 8.5 Under section 38 of the Children and Families Act 2014, where a local authority is required to secure that an EHC plan is prepared for a young person, it must consult the young person or parents/guardians and give the young person or parents/guardians notice of their right to request the authority to secure a placement at a particular school or other institution, which will include those institutions approved by the Secretary of State under section 41 of that Act.
- 8.6 Section 41 of the Act allows the Secretary of State to publish an approved list of independent educational institutions, independent special schools and special post-16 institutions and widen the scope of institutions that can be specified on an Education Health and Care plan (EHCP).

- 8.7 This process by which an institution applies to be on the Secretary of State's approved list relates only to consideration to be listed and will not automatically entitle the institution to receive funds or a contract from the Education and Skills Funding Agency (EFSA).

An EFSA contract will be subject to local authorities' commissioning decisions and a separate high needs student market entry process. But, the Council will only contract with EFSA approved institutions and approved Independent specialist institutions named on the section 41 list.

- 8.8 Under Schedule 3 of the Public Contracts Regulations 2015, contracts for educational services should be let by competitive tender in accordance with these Regulations when the life time value of the contract is, or exceeds, EUR 750,000 (approximately £589,000). In addition, where the contracting authority has a requirement for a series of contracts of the same type, the figure should be based on total annual aggregate spend. Whilst it is considered that the rules on aggregation of spend do not apply to contracts in respect of individual learners, a procurement process as outlined in this report would help ensure compliance where the threshold is reached.
- 8.9 Furthermore, procurement of high quality provision for young people with high needs is underpinned by the statutory obligations of the SEN Code of Practice (section 19 of the Children and Families Act 2014) which makes clear that local authorities, in carrying out their functions under the Act in relation to disabled young people and those with special educational needs, must have regard to the views, wishes and feelings of the young person and their parents/guardians and it is important for the young person and the parents/guardians to participate as fully as possible in decisions and be provided with the information and support necessary to enable participation in those decisions.
- 8.10 The institution is named in the student's Education and Health Care Plan (EHCP) which is put together/agreed by the SEN Team in full consultation and agreement with the student and the student's parents/guardians. This process covering the EHCP is set out in legislation, and if an institution is named in an EHCP the Council is bound to agree it.

9 EQUALITY IMPACT ASSESSMENT

- 9.1 An Equality Impact Assessment screening has been completed. It shows that the recommendations, if implemented, will have a significant positive effect on the lives of young people with high level learning difficulties or disabilities.

- 9.2 By ensuring that there are clear robust contracting arrangements in place, contracted provision will meet the required education, health and care needs of those learners, and should enable them to make the best possible progress at all stages of their education and into adult life.

10 DATA PROTECTION IMPACT ASSESSMENT

- 10.1 There are no data protection implications for content in this report as this report continues a well-established practice for the awarding of contracts to organisations.

11 CRIME AND DISORDER AND RISK ASSESSMENT

- 11.1 There are no crime and disorder issues relevant to this proposal.
- 11.2 The Corporate Risk Management Strategy (CRMS) has been complied with - to identify and assess any significant risks associated with this decision/project. This includes (but is not limited to) political, legislation, financial, environmental and reputation risks.
- 11.3 This assessment has identified there are no current “red” risks that need to be reported.
- 11.4 Based on the information provided, it is the officers’ opinion that no significant risk has been identified. If the report is not approved, this may bring the Council into disrepute because it has a statutory responsibility to provide this funding and young people will not be able to start their learning.

12 SUSTAINABILITY OF PROPOSALS

- 12.1 The proposals in this report ensure that the council’s exemption from contract procedure rules are adhered to and the council’s statutory responsibilities are met.

13 HEALTH AND WELLBEING IMPLICATIONS (INCLUDING SOCIAL VALUE)

- 13.1 These proposals, if agreed, contribute towards individuals’ wellbeing as they offer them greater opportunities to access education and employment.

14 IMPACT ON ANY COUNCIL MANAGED PROPERTY OR LAND

- 14.1 There is no impact on any council managed property or land.

15 CONCLUSIONS AND SUMMARY OF REASONS FOR THE RECOMMENDATIONS

- 15.1 The recommendations will ensure the council meets its statutory duty for young people with SEND by entering it to appropriate contracts for their ongoing educational provision.

16 BACKGROUND PAPERS

- 16.1 SEN Code of Practice.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND_Code_of_Practice_January_2015.pdf

- 16.2 EFSA High Needs Funding 2017/18 Operational Guide

<https://www.gov.uk/government/publications/high-needs-funding-arrangements-2019-to-2020>

17 APPENDICES:

None.

Chris Ward

Director – Education, Skills and Employment