

Decision maker:	Cabinet member young people and children's wellbeing
Decision date:	Tuesday, 29 May 2018
Title of report:	Termination of the contract in respect of pupil referral services for Herefordshire
Report by:	Assistant director education development and skills

Classification

Open

Decision type

Key

This is a key decision because it is likely to result in the council incurring expenditure which is, or the making of savings which are, significant having regard to the council's budget for the service or function concerned. A threshold of £500,000 is regarded as significant.

This is a key decision because it is likely to be significant having regard to: the strategic nature of the decision; and / or whether the outcome will have an impact, for better or worse, on the amenity of the community or quality of service provided by the authority to a significant number of people living or working in the locality (two or more wards) affected.

NOTICE has been served in accordance with Part 3, Section 9 (Publicity in connection with key decisions) of The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

Wards affected

All wards

Purpose and summary

The purpose of this report is to seek approval to terminate the current contract with HIBOS as the provider of pupil referral services (includes Herefordshire's pupil referral function, behaviour outreach function and home and hospital education function) and to bring these services back under the direct management of the Council.

This will enable the council to deliver PRU provision which is compatible with relevant legislation.

Recommendation(s)

That:

- (a) the contract with HIBOS for the delivery of pupil referral, behaviour outreach and home and hospital education services be terminated in accordance with the provisions of the contract; and**
- (b) the pupil referral, behaviour outreach and home and hospital education services be brought under the direct management of the council at the earliest possible date.**

Note: The term 'alternative provision' refers to all educational provision aimed at pupils who are 'not able to attend school for reasons of illness, exclusion or otherwise'. The term is used in a variety of contexts which can be confusing. For the purposes of clarity in this report, we will refer to:

- (i) Pupil Referral Units (PRU) maintained by the council, registered as a school with a management committee in lieu of a governing body;
- (ii) Non-maintained alternative provision providers (NMAP), not registered as a school and has no management committee; or
- (iii) Alternative Provision Academies/Free Schools (AP Academy) registered as a school with a management committee in lieu of a governing body and part of a multi-academy trust (MAT).

Alternative Options

Alternative Option 1: Continue the contract to the planned date of 31st December 2018.

1. This is not a viable option. The council has recently obtained legal advice which has confirmed that the current contract cannot continue in its present form. This is because the current arrangement is not wholly compatible with the relevant education legislation and it does not enable the council to maintain a Pupil Referral Unit, which was the council's intention when Cabinet approved the contracting out arrangement in 2014.

Alternative Option 2: De-commission the PRU with a view to contracting a provider for alternative provision.

2. The council has a statutory duty to make provision for pupils 'not able to attend school for reasons of illness, exclusion or otherwise'. Contracting with another provider would not result in the council retaining the PRU as a central means of discharging this responsibility. Maintaining the PRU was the intention when Cabinet took the decision to commission the service from HIBOS in 2015.
3. It would be possible to re-commission the services differently, as NMAP. However, the market testing that resulted from the previous tendering exercise did not demonstrate a strong provider market to deliver these services and there is no evidence to demonstrate that the market has grown since then.

Alternative Option 3: Decommission the PRU and transfer the function to an academy.

4. As stated in alternative option 2, the council has a statutory duty to make provision for pupils 'not able to attend school for reasons of illness, exclusion or otherwise'. Transferring the function to an academy would not result in the council retaining the

PRU as a central means of discharging this responsibility. Maintaining the PRU was the intention when Cabinet took the decision to commission the service from HIBOS in 2015.

5. One of the attractions of the present contract was that it could be terminated at short notice if there were concerns over performance. Converting to academy status does not allow for the provision to be brought back to local authority control: an academy conversion is a permanent change in the delivery model for education provision.
6. Converting to academy status would take time and resources as well as focus from leaders taking the provision on. The decision would rest with the Regional Schools Commissioner. Taking the provision back under council control would enable further consideration to take place on the best long term approach to supporting vulnerable children.

Key considerations

7. In 2014 Cabinet took a decision to enter into a contractual arrangement with an external provider to assist in the operation of the council's Pupil Referral Unit, which up until that point had been managed as a fully in-house service. The contract to run pupil referral services on behalf of the council was awarded to the Hereford Integrated Behaviour Outreach Service (HIBOS) in 2015 following a full procurement exercise, and was implemented in January 2016. HIBOS is the academy trust for The Brookfield School. The contract was planned to run for three years to 31st December 2018 with a possible two year extension. The contract entitles the council to terminate at any time on serving 3 months' notice. Around 80 places for vulnerable students are provided by the PRU. In addition, the numbers of students placed in the home and hospital education function have increased from 18 to 46 in 3 years; 80% of these students have severe anxiety and/or emotional well-being needs.
8. The contract covers the management and delivery of three distinct functions:
 - St David's pupil referral unit
 - Hospital and home tuition team (HHTT)
 - The behaviour outreach team.
9. The St David's PRU comprises two sites in Hereford City (St David's Centre KS4 and Aconbury Centre KS3) and maintains places in the PRU for students who have been permanently excluded. It also maintains places for students where there is a strong likelihood that the pupil's outcomes will be significantly improved by accessing a PRU rather than a mainstream school. In the case of the latter, this would be described as a 'managed move' into the PRU.
10. The statutory duty with regard to making provision for children who are 'not able to attend school for reasons of illness' is discharged by the HHTT. This function operates a hospital classroom base for children with physical health needs and the H3 Centre at Hunderton for those with mental health needs who are too unwell to attend school.
11. The Behaviour Outreach Function is a fully traded service offering outreach work to schools. The team receives a small grant (£18k) to cover council requests for non-traded work such as attendance at Child Assessment Framework (CAF) meetings for individual children

12. Since contract implementation in January 2015, Herefordshire's pupil referral service has broadly maintained the performance levels described in the contract and has been judged to be good by Ofsted for the third successive inspection with the most recent inspection in 2017.
13. Towards the end of last year, questions were raised by the Education Skills Funding Agency about the legal basis on which the council's contract with HIBOS was operating. These questions were also of interest to the leadership of HIBOS. Essentially the question raised was whether the relevant education legislation recognised an arrangement where a pupil referral unit was not under the entire control of the council and where an external partner was, for example, responsible for the employment of staff at the PRU. The council's position was always that it expected the contractual arrangements to enhance, not undermine, the status of the service as a pupil referral unit. For example, the council expected to be able to maintain a Management Committee (as had been the case when the service was fully in-house) composed of community stakeholders and other representatives in accordance with relevant DfE regulations and guidance, to have oversight and decisive influence over the strategic direction of the PRU.
14. Discussions with the ESFA continued into this year and the council continued to take expert legal advice. That advice has confirmed that while the decision to seek a contractual partner to support the operation of the PRU was not unlawful, the implementation of that decision was flawed in that it did not take sufficient account of the relevant education legislation and DfE guidance and consequently did not sit well with the legal definition and mode of operation of a PRU as described in that legislation. The legal advice made it clear that if the council wished to retain its PRU provision, it should take steps to bring the service fully back in-house.
15. The council's current commissioning intention is to maintain a PRU. Accordingly this report recommends that the service is brought back in-house at the earliest reasonable date, co-terminus with the end of the current academic year, so that the PRU can be put on the regular legal footing which the legislation recognises.
16. There is then the opportunity to undertake a more comprehensive commissioning review, in consultation with all relevant stakeholders. This review will consider the future funding implications of alternative educational provision as well as the local needs and national direction of these services. Any change to the current PRU provision for vulnerable students in Herefordshire will need to be worked through consultation with the wide range of stakeholders, including primary and secondary headteachers, to ensure that what is in place will best meet the needs of students.
17. 'Creating opportunity for all' (DfE March 2018), is a new publication that sets out the government's roadmap for reforming alternative provision nationally. The roadmap includes a number of key milestones and is due for completion in 2019. The main ambitions from the paper are:
 - a. The right children are placed in alternative provision;
 - b. Every child in alternative provision receives a good education;
 - c. Every child can make a successful transition out of alternative provision;
 - d. Alternative provision becomes, and is recognised as, an integral part of the education system; and
 - e. The system is designed to achieve high quality outcomes for children and value for money for the taxpayer.

18. These objectives are far reaching, and include laying strong foundations for reform by reviewing exclusions practice, bringing key partners together and supporting schools to establish systems to manage poor behaviour and support children with additional needs.
19. Termination of the current contract and bringing services back under the direct management of the council will ensure arrangements are legally compliant. It will also afford the council effective oversight and the necessary flexibility to develop and deliver a clear strategic plan that is in line with the emerging government roadmap, and focussed on:
- optimising behaviour in Herefordshire,
 - working in partnership to maximise opportunities to maintain learners in school,
 - ensuring consistent thresholds for alternative provision,
 - improving outcomes for pupils and
 - developing a more robust approach to reintegration to mainstream schools ensuring alternative provision is delivered efficiently
20. The council is committed to working with all headteachers and the wider education community in developing alternative provision in Herefordshire. Herefordshire faces significant challenges in the growth of the use of the Pupil Referral Unit, Home and Hospital Tuition, a rise in the use of fixed term exclusions and difficulties in children returning to mainstream schooling. These are important issues that the council will be addressing with heads in the months to come.

Community impact

21. All of the pupil referral services serve the whole county. The original procurement exercise was designed to identify a suitable preferred provider that will use the available resource to continue the positive trajectory for Herefordshire's pupil referral services. In line with the overall ambition for the Children's Wellbeing Directorate to keep children safe and give them the best start in life, the aim described in the contract specification was that the pupils covered by the specification will have outcomes in the top quartile of LAs nationally, and in line with Herefordshire's community of schools' Guiding Principles, that we will not 'turn or back on any pupil'. These ambitions remain as a key part of the Council's desire to meet the needs of some of the County's most vulnerable learners which is in accordance with the national emphasis contained within 'Creating opportunity for all' (DfE March 2018). The recommendations will have no significant impact on educational provision for looked after children.
22. All users of the PRU services will be notified of the transfer of the service back in to the council at an appropriate point in the implementation process. It will be necessary to ensure that all official communications and policies applied by the PRU (for example: data protection privacy notices, complaints procedures) are updated to reflect the fact that the council is stepping back in to all day to day service delivery. There are no new health and safety implications which arise as a result of the recommendation.

Equality duty

23. The recommendation to bring services back under the council's direct management will not change the nature of the provision, access to services nor the policies governing these services in Herefordshire. The impact on groups with protected characteristics will therefore be unchanged.
24. The provision offered by the pupil referral services aims to meet the needs of those who cannot attend school because of their medical (including mental health needs), behavioural, social, or emotional difficulties. It meets the requirement to offer an equivalent education to these children and young people compared to those who are in school. Hence it will advance equality of opportunity between persons who share a relevant protected characteristic (long-term health needs fulfil the definition of a disability) and persons who do not share it under Section 149, the "General Duty" on public authorities. As set out below.
25. The 'general duty' on public authorities is set out as follows:
- A public authority must, in the exercise of its functions, have due regard to the need to -
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Resource implications

26. The services concerned are funded from the Dedicated Schools Grant High Needs Block. The current cost of funding these services is approximately £1.5m per annum. It is not intended that bringing the pupil referral services under direct council management would result in any immediate financial saving; it is possible that there will be some financial savings identified by a longer term commissioning review of alternative provision, but it should be noted that financial imperatives are not the reason for the recommendation of this Report.
27. There are a number of employees of HIBOS whose contracts of employment will be likely to transfer to the council under the TUPE Regulations. The majority of those staff were originally transferred out of the council when the contract commenced in 2015. The law requires that consultation and engagement is undertaken, by the outgoing and incoming employers, with all affected staff as to the impact of the TUPE transfer. The TUPE Regulations serve to protect and preserve the contractual terms and conditions of employees who are in scope to transfer; additionally it is not proposed that any changes are made to the work locations or nature of the work to be undertaken by the affected staff and so it is hoped that the impact on this valued group of employees will be minimal. It is for the current employer (HIBOS) to provide all employee liability information for the new employer (Herefordshire Council.)
28. The PRU currently operates out of three sites, as described in paragraphs 9 and 10 of this Report: St David's Centre, Aconbury Centre, and Hunderton. Since 2015 HIBOS has been in occupation of these sites under a "tenancy at will" which is co-terminus with the service contract. HIBOS is currently paying for all utilities at these sites but not rent, and

no leases have been entered into. Once notice under the service contract has been given, no formal notice or process is required to transfer the occupation of the properties back to the council. Officers will work collaboratively with the HIBOS management team to ensure that any property handover issues are as seamless as possible.

29. A loan of £60,000 was made from the council to HIBOS in March 2017 in order to provide some forward funding for the PRU and help keep it in surplus during the financial year 2017/18. A monthly repayment of £2,166.67 is being made from the PRU's account to the council. It is proposed that the outstanding liability to repay this loan, sitting as it does against the PRU's account, is effectively absorbed back into the council when the service transfers back in-house and will therefore become the responsibility of the council.

Legal implications

30. Section 19(1) of the Education Act 1996 places Herefordshire Council under a legal duty to make arrangements for the provision of suitable education for those children who due to exclusion, illness or otherwise would not receive such an education. Section 19(2B) then sets out the power for the council to establish and maintain a PRU to make that provision. In doing so, any PRU must meet the requirements of the Education (PRU)(Management Committee) Regulations 2007 regarding the composition and powers of the management committee and work within the framework established through the Education (PRU) (Application of Enactments) Regulations 2007. The joint impact of both sets of regulations is to provide the PRU with a controlling committee with some of the powers of a governing body of a maintained school, including control over budgets and staffing in the same manner as a community school.

31. It is not necessary for the council to establish and maintain a PRU – it is an option. This is confirmed by the DfE guidance on Alternative Provision which states at paragraph 3 –

“Any school that is established and maintained by a local authority to enable it to discharge the above duty is known as a pupil referral unit. There is no requirement on local authorities to have or to establish a pupil referral unit, and they may discharge their duties by other means. However, only a local authority can establish a pupil referral unit; although they can only do so after exploring the possibility of opening an AP Academy. Others can establish AP Academies or AP Free Schools.”

32. Section 19(1) Education Act 1996 is sufficiently wide to authorise the council to enter into arrangements with another body for the provision of services to support children eligible for support under section 19(1). This was the basis on which the HIBOS arrangement was conceived. However it is noted that there are some concerns about how the contractual arrangements were drawn up and implemented as they were not obviously compatible with the appropriate legal framework. For example, the staff employed in the PRU were transferred into the employment of HIBOS whereas the legislation is written on the basis that the staff of the PRU will be employees of the council. Similarly a PRU must have a Management Committee but it is to be put in place by the council in much the same way as a governing body of a maintained school, having that close but definitely separate role from the council, but not as legally separate as the Board of directors/trustees of a separate provider (HIBOS in this case).

33. As noted earlier in this report, the council's legal advice concluded that for the council to retain the PRU, it must bring the service provision fully back in-house which in turn means terminating the contract with HIBOS.

34. The contract entitles the council to terminate on three months' notice, at any time. This report addresses the legal and practical consequences of this decision and notes the importance of managing this transfer to minimise the impact on service users, working with HIBOS as the outgoing provider. The property transfer implications and the employment implications are specifically addressed elsewhere in this report.

Risk management

35. There is a risk to delivering the change in time for the end of the current academic year. This will be mitigated through a clear transition plan overseen by a project manager and with full involvement of legal and HR services. The council will continue to work positively with HIBOS through the period of change.

36. Although from a pupil and family perspective there should be no visible impact, it is recognised that bringing the services under the direct control of the council will require staff to be TUPE transferred in to the employment of the council. Although there is an element of risk in relation to staff disruption, the council will ensure staff that are fully informed and supported at each stage of the process.

37. If the recommendations are not approved then there is an inherent reputational risk.

Consultees

38. Formal legal consultation is not required on this proposal to bring the service back in-house. However in undertaking a longer term commissioning review of alternative provision, the council fully expects to work with headteachers and other education professionals to develop provision that meets the needs of vulnerable pupils and addresses some of the trends in Herefordshire including the rise in fixed term exclusions, the use of PRU provision and Home and Hospital Tuition. The Hereford Association of Secondary Heads has written expressing a desire to be involved in consultation on the range of options for the future of PRU provision in Herefordshire. Council officers will be meeting with HASH to develop a way forward.

39. Political groups have been consulted and their views are still being received. Once all have responded the details of these responses will be recorded here.

Appendices

None

Background papers

None identified