



City of Westminster

Cabinet Member Report

Meeting or Decision Maker:

Cabinet Member for Young
People, Learning and Leisure

Date:

June 2022

Classification:

General Release

Title:

ALTERNATIVE PROVISION
AND BEHAVIOUR
OUTREACH CONTRACT
EXTENSION

Wards Affected:

All

Cabinet Member:

Cabinet Member for Young
People, Learning and Leisure

Key Decision:

Key Decision, on Forward
Plan

Report of:

Sarah Newman

1. Executive Summary

Local authorities have statutory duty to arrange and fund full-time education provision for children and young people who are permanently excluded from school and to arrange education provision for children and young people who receive a fixed term exclusion (from the sixth day). Alongside these statutory duties, the Bi-Borough School Inclusion Strategy sets out our ambition to reduce the number of children and young people being excluded from mainstream school settings due to their behaviour and improving outcomes for those who are excluded.

Locally, these duties are met through Ormiston Academy Trust (OAT) who run on-site and outreach provision for children who cannot access their mainstream settings or who would benefit from intervention to prevent them being excluded from schools.

In 2021, the Cabinet Member for Young People and Learning approved the award of a 12-month contract to OAT for the top-up funding for alternative provision (AP) placements and for behaviour outreach services with the option to extend the AP element of the contract for a further three years and the behaviour outreach element of the provision for a further 12 months.

This paper seeks permission to exercise these options to extend.

2. Recommendations

To approve the three-year permissible contract extension for the delivery of AP education from Beachcroft AP academy by OAT. The extension period runs from September 2022 through to August 2025.

To approve the one-year permissible contract extension for the delivery of behaviour outreach services by OAT. Behaviour outreach services include the delivery of in-school interventions for Primary Schools, and offsite interventions for Secondary pupils, delivered from the Westminster Education Centre. The extension period runs from September 2022 to August 2023.

As previously explored, the options available to us for the Alternative Provision contract are limited, due to the way that education provision is funded. Alternate options for both areas of provision have been explored and are outlined further below.

Option 1: Do nothing. Allow the contracts to expire and have no formalised commissioning arrangements from September 2022 – not recommended

Prior to the current contract with OAT, our former AP and behaviour outreach service provider had SLA with the local authority. The SLA did not facilitate the level of oversight and scrutiny that the current contract provides. Allowing the contract to expire would create unnecessary risk and any alternate arrangement would be less formal and less favourable than extending the current contracts.

The local authority would still be required by the DfE to provide top-up funding; however, we would have no contractual mechanism to oversee this spend.

Option 2: Undertake a competitive procurement exercise to award new contracts - not recommended

As explored earlier, competitive procurement is not appropriate for the AP contract, given the way schools are funded and precedents set elsewhere.

The timelines for a competitive procurement exercise for the behaviour outreach contract, without utilising the entirety of the extension, do not align with the start of the school year. As such, there would be a risk of change in provider part-way through a school year. This would likely cause disruption to both learners and schools.

We are currently undertaking a comprehensive review of our behaviour outreach offer, to inform our commissioning strategy moving forwards. Extending the contract for another year will allow us to complete this work and develop a robust approach to the delivery of these services from September 2023 onwards.

Option 3: Extend the contract with OAT for three-years for AP top-up funding and a one-year extension for the delivery of behaviour outreach - recommended

This approach is being recommended as it is in line with DfE guidance from a procurement perspective as well as supporting the SEND Green paper recommendations on ensuring sustainability for AP institutions.

This approach will ensure the ongoing delivery of a highly valued local resource, ensuring that vulnerable young people have access to established local provision.

The extension of the behaviour outreach contract for a full year will provide time for officers to complete a thorough review of behaviour outreach models in order to make recommendations on a long-term commissioning strategy.

3. Reasons for Decision

The Alternative Provision top up funding

The local authority has a statutory duty to arrange and fund full-time education provision for children and young people who are permanently excluded from school and to fund education provision for children and young people who receive a fixed term exclusion (from the sixth day). This contract will enable us to fulfil this statutory duty ensuring that sufficient top-up funding is available to meet the needs of young people with complex needs who are unable to attend their mainstream setting.

Given the way in which AP is funded, we have limited discretion on how we allocate funding. Whilst we could theoretically divert top-up funding to a different institution, this would likely be an expensive way of funding statutory places, would require pupils to travel to schools outside their borough and would financially destabilise local provision.

The DfE guidance states that 'the commissioning by local authorities of SEN and AP placements, funded from the high needs block of the DSG, is not regarded as a public service contract for the purposes of the [Public Contracts Regulations 2015](#).' It is therefore their position that we are not required to competitively tender provision of this type.¹

¹ High needs funding: 2022 to 2023 operational guidance [High needs funding: 2022 to 2023 operational guidance - GOV.UK \(www.gov.uk\)](#)

Over the initial 12-month period OAT have demonstrated a commitment to partnership working. During this time, they have improved the timeliness and detail in termly monitoring returns and continued to work with us to explore new funding models with schools to reduce local authority spend on non-statutory provision. Beachcroft Academy is rated as 'good' by Ofsted and both the on-site and outreach offer is highly regarded by schools.

The SEND Green paper (2022) sets out the importance of creating stability within AP settings to ensure providers can develop their AP offer to meet local need. Extending the contract for a three-year period supports this objective, enabling us to work in partnership with OAT and schools on the development of a high quality, sustainable AP offer.

Behaviour outreach

Whilst the majority of the behaviour outreach contract is not statutory, it is an essential component of our local offer, supporting us to fulfil our ambition to improve outcomes for children and young people who are excluded, reduce exclusions further through early intervention and support and improve reintegration rates from alternative provision back into mainstream education. The offer has reached over 400 pupils this school year across Bi-borough, through a combination of individual interventions, group interventions and managed intervention centre placements. All of these interventions are highly valued by schools across the Borough

The behaviour outreach contract does not receive place funding in the same way and therefore we have more freedom to appraise different delivery and funding models. However, we recommend that the current provision is extended for another academic year to allow officers time to complete work that is already underway to explore the most appropriate approach for the delivery of behaviour outreach in the future. This will include recommendations on the best commissioning strategy and will be completed within the next six months.

4. Background

As outlined earlier in the paper, Local authorities have statutory duty to arrange and fund full-time education provision for children and young people who are permanently excluded from school and to arrange education provision for children and young people who receive a fixed term exclusion (from the sixth day). Alongside these statutory duties, the Bi-Borough School Inclusion Strategy sets out our ambition to reduce the number of children and young people being excluded from mainstream school settings due to their behaviour and improving outcomes for those who are excluded.

Prior to 2013, these duties were met through an in-house Pupil-Referral Unit (PRU). In March 2013, the PRU (along with the PRUs in RBKC and in the London Borough of Hammersmith and Fulham) converted to AP Academies governed by a Multi Academy Trust (MAT) under the name Tri-Borough Alternative Provision (TBAP). In August 2018, TBAP received a financial notice to improve from the Education and Skills Funding Agency (ESFA). TBAP were unable to repay advance funding to the value of £950,000 by the August 2020 deadline and unable to demonstrate financial viability to the ESFA. This resulted in a decision taken by the Minister, Baroness Berridge, for the

Trust to be dissolved by mutual consent, and for the academies to transfer to a new academy sponsor. OAT were appointed as the new Academy for Beachcroft AP Academy in WCC, Latimer in RBKC and the Bridge and Courtyard Academies in LBHF.

Through their provision at Beachcroft, the Westminster Education Centre and outreach work, OAT provide:

School places for children who have been permanently excluded from school or placed in the AP setting as part of a managed move. Beachcroft Academy receives place funding for 73 places.

Temporary placements for children who have received a fixed term exclusion from school or for whom it has been agreed there is benefit in a short respite placement, typically five weeks. The Westminster Education Centre has capacity for 15 pupils.

Behaviour outreach provision at a Primary School level. This provision is delivered on an outreach basis, including individual and group work with pupils, parents and teachers.

The funding arrangements for AP settings are complex and include:

Place funding that is paid via the Education Skills Funding Agency and is 'top sliced' from our High Needs Block (HNB). This is paid regardless of who occupies the place (e.g. a place could be used by a child who attends school in Westminster but lives in Brent). The local authority does not therefore have control over the allocation of this funding.

Top-up funding that is paid over and above place funding. This is also paid from our HNB but only for pupils who live in Westminster. This funding is negotiated and agreed with OAT annually on the basis of expected occupancy levels for resident pupils. The local authority has control over the negotiation of the level of this top up funding but must provide sufficient funding to meet evidenced local demand.

Additionally, schools contribute to AP provision at different rates depending on whether it is a Permanent Exclusion (PEX) or Managed Move (MM). The local authority is increasingly moving towards an expectation of greater funding contributions from schools for MM placements where the local authority does not have a statutory duty.

Behaviour outreach is funded through both directly by the local authority through the HNB and through individual arrangements with schools who can opt to buy in to Service Level Agreements (SLAs) or pay for individual placements for managed interventions.

In July 2021, a paper was taken to the Cabinet Member for Young People and Learning requesting permission to award a twelve-month contract to OAT to govern the AP top up place funding for Beachcroft Academy and the further spend on behaviour outreach. Prior to this, our spend on AP had been governed by SLAs which did not provide as robust oversight mechanism for the Local Authority. The establishment of a contract ensured that we could stipulate requirements for

monitoring returns enabling us to have greater control over how money was being used to meet our statutory duties and the ambitions from our inclusion strategy.

This 12-month contract was approved for delivery from September 2021. The paper also included an option to extend the contract for AP top up funding for a further three years and for behaviour outreach for a further 12 months.

The total value of these contracts is included in the table below:

Proposed level of investment into AP Contract & Behaviour Outreach					
	2021/22	2022/23	2023/24	2024/25	Total
AP statutory places	£350,000	£359,100	£359,100	£359,100	
AP managed move places	£253,500	£110,175	£110,175	£110,175	
Total AP	£603,500	£469,275	£469,275	£469,275	£2,011,325
<i>Reduction</i>		£134,225			
Behaviour Outreach	£244,000	£244,000			
Overall total	£847,500	£713,275	£469,275	£469,275	£2,499,325

Following a successful first year of transfer to the new Trust, this paper is seeking approval to invoke the permissible three-year contract extension for Alternative Provision with Ormiston Academies Trust from September 2022 to August 2025 and for the permissible one-year extension for behaviour outreach services from September 2022 to August 2023.

5. Financial Implications

These costs will be charged to the High Needs Block of the Dedicated Schools Grant (DSG) which is allocated annually by the Education and Skills Funding Agency (ESFA). The DSG budget for this provision is agreed annually by the Schools' Forum and the forecast expenditure is reported to each meeting of the Forums. The agreed budget for this provision in 2022/23 is shown in the table below. For 2023/24 and 2024/25 the figures below are the maximum contract value/spend as we will be seeking to negotiate further step downs in DSG funding in line with other Local Authorities who charge the non statutory provision to schools.

Potential level of investment into AP Contract- WCC					
	2021/22 Academic Year	2022/23 Academic Year	2023/24 Academic Year	2024/25 Academic Year	Total Investment
AP statutory places (Pex, FAP)	£350,000	£359,100	£359,100	£359,100	
AP managed move places	£253,500	£110,175	£110,175	£110,175	
Total AP	£603,500	£469,275	£469,275	£469,275	£2,011,325
Reduction		£134,225			
Behaviour Outreach	£244,000	£244,000			£488,000
Total	£847,500	£713,275	£469,275	£469,275	£2,499,325

There is no impact on the Council's General Fund.

The demand for high needs funding is outstripping the budgets available to Local Authorities across the country, resulting in significant deficits in the High Needs Block of the DSG in many Authorities

The Westminster Council DSG has a cumulative deficit of £1.167m at the end of 2021/22. A deficit management plan is being finalised and will be submitted to the DfE with details of how the cumulative deficit will be eliminated. This deficit also limits what can be charged to the DSG for non statutory functions.

The Local authority has a statutory duty to ensure all children of compulsory school age are receiving suitable education and alternative provision can be the appropriate approach in some cases.

If the ESFA change the future funding methodology for alternative provision or the high needs block, the funding received may change. Should this result in a reduction, this would impact all Local Authorities

Financial Implications prepared by Anita Stokes, Lead Strategic Finance Manager

6. Legal Implications

The Council is seeking to exercise the extension provisions under the relevant contracts detailed in section 2 above.

As stated at section 3 of this report, it is the Education & Skills Funding Agency's (ESFA) position that the commissioning by local authorities of SEN and AP placements, funded from the high needs block of the DSG, is not regarded as a public service contract for the purposes of the Public Contracts Regulations 2015 and they

have cited their reasons for this position in their High Needs Funding: 2022 to 2023 operational guidance. As such the Council can seek to rely on this position in support of its commissioning strategy for these education provisions that are funded by High Needs Funding issued by ESFA. In light of this new guidance and the funding arrangements clarified in the same, the Council has the option of liaising with the supplier to agree a mutual termination of the current contracts and enter into funding agreements with the Supplier (with service level agreements embedded into the same).

In any event under the AP contract, the Council is able to extend the contract by issuing written notice to the supplier no later than 20th June 2022. If the Council is not able to meet this timescale the notice period may be varied by extension between the Parties.

Under the behavioural outreach contract, the Council is able to extend the contract by serving written notice no later than the last day of the summer term of 2022

Approval to extend the AP contract can be granted by the appropriate Cabinet Member following endorsement by CGRB.

Approval to extend the of the Behavioural outreach contract may be granted by the appropriate Executive Director following endorsement by CGRB

The Council's expenditure from the dedicated schools grant (DSG) in respect of these commissioned services is subject to conditions of grant set by the ESFA and Early Years Finance (England) Regulations 2022 and the service should work with Legal to make sure express provision if necessary is inserted into the contracts as part of the extension to cover these requirements.

The Council must also consider whether the funding issued to the Supplier under the current agreements fall within the scope of a Subsidy under current legislation. Under the current Subsidy Control Act 2022. Under the Act, a Subsidy is defined as:

financial assistance which—

- (a) is given, directly or indirectly, from public resources by a public authority,*
- (b) confers an economic advantage on one or more enterprises,*
- (c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and*
- (d) has, or is capable of having, an effect on—*
 - (i) competition or investment within the United Kingdom,*
 - (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or*
 - (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom*

Under the Act an 'enterprise' is defined as:

"Enterprise"

- (1) In this Act, "enterprise" means (subject to subsections (2) and (3))—*

(a) a person who is engaged in an economic activity that entails offering goods or services on a market, to the extent that the person is engaged in such an activity, or

(b) a group of persons under common ownership or common control which is engaged in an economic activity that entails offering goods or services on a market, to the extent that the group is engaged in such an activity.

(2) For the purposes of this section, an activity is not to be regarded as an economic activity if or to the extent that it is carried out for a purpose that is not economic

Based on the above provisions, it is legal's view that the current funding issued the supplier does not meet the provisions of a 'Subsidy' as the Supplier is not an enterprise engaged in economic activity, because the delivery of publicly funded and supervised education organised within a national education system does not constitute economic activity. The ESFA also makes the same point in their guidance referred to above.

Legal Implications prepared by Christina Worrell, Solicitor, Bi-Borough Legal Services

7. Carbon Impact

There is no change to current service delivery proposed via these contract extensions, therefore the carbon impact of this decision is neutral.

8. Consultation

The proposed contract extensions will not involve alterations to the service received by children and young people and their families.

We have consulted schools through the WSSIC meetings and The Schools' Forum who value the services provided by OAT and who are supportive of the intentions to extend the contract arrangements.

9. Equalities implications

The work to develop the Bi-Borough School Inclusion Strategy highlighted the reality that boys, children and young people at secondary age, those with SEN support or with SEMH identified as a primary need, eligible for free school meals or living in areas of greater deprivation and young people from Black Caribbean, mixed or Bangladeshi backgrounds are all disproportionately affected by school exclusion.

Without approval to extend the contracts with OAT there is a risk that the children and young people currently accessing provision at Beachcroft AP Academy or through the behaviour intervention services would be disproportionately affected by the potential disruption to delivery of services via these settings.

An equalities impact screening document was completed for the original KDR approved in July 2021 which continues to be relevant.

**If you have any queries about this Report or wish to inspect any
of the Background Papers, please contact:**

Insert report author contact details here

NB: For individual Cabinet Member reports only

For completion by the **Cabinet Member** for Young People, Learning and Leisure

Declaration of Interest

I have <no interest to declare / to declare an interest> in respect of this report

Signed: _____ Date: _____

NAME: **[add Cabinet Member's name]** _____

State nature of interest if any:

(N.B: If you have an interest, you should seek advice as to whether it is appropriate to make a decision in relation to this matter)

For the reasons set out above, I agree the recommendation(s) in the report entitled

ALTERNATIVE PROVISION AND BEHAVIOUR OUTREACH CONTRACT EXTENSION and reject any alternative options which are referred to but not recommended.

Signed: _____

Cabinet Member for Young People, Learning and Leisure

Date: _____

If you have any additional comment which you would want actioned in connection with your decision you should discuss this with the report author and then set out your comment below before the report and this pro-forma is returned to the Secretariat for processing.

Additional comment:

If you do not wish to approve the recommendations, or wish to make an alternative decision, it is important that you consult the report author, the Director of Law, City Treasurer and, if there are resources implications, the Director of People Services

(or their representatives) so that (1) you can be made aware of any further relevant considerations that you should take into account before making the decision and (2) your reasons for the decision can be properly identified and recorded, as required by law.

Note to Cabinet Member: Your decision will now be published and copied to the Members of the relevant Policy & Scrutiny Committee. If the decision falls within the criteria for call-in, it will not be implemented until five working days have elapsed from publication to allow the Policy and Scrutiny Committee to decide whether it wishes to call the matter in.