

Report to Cabinet

20 July 2022

Subject:	Exemption from Procurement and Contract Procedure Rules for Post-16 High Needs Education Provision
Cabinet Member:	Cabinet Member for Children and Education Councillor Simon Hackett
Director:	Michael Jarrett - Director of Children's Services and Education
Key Decision:	Yes
Contact Officer:	Erroll Blackwood, Post 16 Manager erroll_blackwood@sandwell.gov.uk

1 Recommendations

- 1.1 That approval be given for 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.
- 1.2 Authorise this exemption under Contract Procedure Rule 15.8 to enable the course of action referred to in 1.1 above to proceed where 'genuine sole suppliers' for certain goods, service or works where it can be evidenced that there is no benefit in undertaking a procurement exercise', an automatic exemption is given to the following types of contract or activity - Patient or Pupil choice and Sole Suppliers/Providers
- 1.3 That the Director of Children's Services and Education be authorised to procure and award contracts to approved Education and Skills Funding Agency institutions.



2 Reasons for Recommendations

- 2.1 On 9 October 2019 (Minute No. 118/19 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.
- 2.2 The current arrangement ends on 8 October 2022, so an exemption is now required from 9 October 2022. This will enable a smooth transition between academic years and consistency of service.
- 2.3 This will allow the Council to make special educational provision to meet the special educational needs (SEN) of the young person; 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 How does this deliver objectives of the Corporate Plan?

	<p>Best start in life for children and young people</p> <p>The proposals in this report directly support the council's Vision 2030 relating to:</p> <p>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.</p> <p>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.</p> <p>Ambition 4 – Our children benefit from the best start in life and a high-quality education throughout their school careers with outstanding support from their teachers and families. By giving children the best start in life through a good quality, well-rounded education which is vital to increasing their life opportunities and social mobility'.</p>
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Post 16 children with Education Health Care (EHC) Plans may need specialist education or training provision to achieve their outcomes and make an effective transition into adulthood. Their EHC plan will allow them to access Post 16 provision, which supports them to build on their achievements at school and which helps them progress towards adulthood.

and contributes to:

- B11 of the Corporate Plan where *we will work with partners to make sure that vulnerable children in our community receive the right support to enable them to thrive and have successful adult lives.*
- B16 of the Corporate Plan where *we will ensure that children and young people with SEND can access high quality local services when they need them, by working with partners to ensure there is a comprehensive local offer available to children and families*
- E19 of the Corporate Plan - *We will work to ensure our young people have access to good jobs and we will work with all education institutions to guide young people to the pathways that enable them to meet their aspirations. We will do this through the provision of independent advice and guidance*

4 Context and Key Issues

- 4.1 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.



- 4.2 To address any public procurement issues arising from the commissioning of these services, we will issue contract notice an UK e-notification on the Government's Find a Tender service (FTS). It will state that we procure provision through the Education, Health and Care Plan (EHCP). It will also state which providers we use, how providers are selected in relation to individual learners and how providers can apply to become an ESFA provider and apply to be included on the section 41 list.
- 4.3 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 ESFA education and training contract for services to deliver education and training for high needs students.
- 4.4 Sandwell Council will contract with Education and Skills Funding Agency funded institutions which include Further Education Colleges, Sixth Form Colleges, School/Academy Sixth Forms (including 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.
- 4.5 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, 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.

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

4.7 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.

4.8 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).

- 4.9 In the academic year 2022/23 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.
- 4.10 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.
- 4.11 In the academic year 2021/22 the Council was required to contract with 15 providers for Post-16 High Needs provision for 241 individual learners. The total value of these individual learner contracts was £2.14m with the average cost per learner being £8,900.00.
- 4.12 Of the 241 learners there is already a potential number of 180 learners who are likely to continue their education with their provider of choice in September 2022. The value of the individual contracts for these continuing learner's totals approximately £1.6m*. The average cost per continuing learner being £9,000. *These figures may vary if individual students decide not to continue with their chosen education provision.
- 4.13 In academic year 2022/23, the Council's SEN team will also be working with 117 new learners (Current Year 11) taking the total number of Post 16 learners up to 297. These numbers are indicative only as the number of learners reflects the number of students who are currently working with the SEN team.



4.14 In academic year 2022/23 the Element 3 (top-up) funding is likely to cost the Council in the region of £2.673m* for these 297 learners, with the average cost per learner being £9,000.**

*Moving forward into the academic year 2022/2023 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 2022/23 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.

4.15 Student numbers will change during each 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.

4.16 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.

4.17 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 each 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 Children's Services and Education to vary individual contracts within year.

4.18 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.

- 4.19 Each Education & Health care plan is monitored at student level rather than at provider level to ensure that the young person is making progress and is receiving everything they are entitled to. Individual payments can be stopped if they are not.
- 4.20 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.
- 4.21 Since 2018 all local authorities are seeing the number of new EHCP requests increase year on year.
- 4.22 In 2021/22 Sandwell has a slightly lower percentage of the whole school cohort with EHCPs when compared to neighbouring boroughs such as Dudley, Walsall and Wolverhampton.

Percentage of whole school cohort with Education Health and Care Plans	2019	2020	2021
	%	%	%
Birmingham-Secondary Statements/EHC	3.20	3.30	3.40
Dudley-Secondary Statements/EHC	3.10	3.60	4.20
Sandwell-Secondary Statements/EHC	2.80	2.90	3.10
Walsall-Secondary Statements/EHC	2.80	2.90	3.30
Wolverhampton-Secondary Statements/EHC	3.00	3.10	3.50
West Midlands-Secondary Statements/EHC	3.10	3.30	3.60
England-Secondary Statements/EHC	3.10	3.30	3.70

(source DfE – LAIT – April 2022)

However, in 2021 authorities such as Birmingham have a higher number of young people who have an EHCP when compared to Sandwell – see table below.



Local Authority	Student Numbers
Birmingham	6,821
Dudley	1,889
Sandwell	1,866
Walsall	1,774
Wolverhampton	1,698

(source DfE data: April 2022)

4.23 Although Sandwell has also seen the number of EHCP requests increase month by month based on comparative 2018 statistics, in 2020/21, 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	2020/21
	%
Sandwell-EHC - 20 weeks	69.30
Dudley-EHC - 20 weeks	24.50
Walsall-EHC - 20 weeks	19.60
Wolverhampton- EHC - 20 weeks	24.40
Birmingham – EHC - 20 weeks	48.40

(source DfE – LAIT – April 2022)

5 Alternative Options

5.1 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.

6 Implications

Resources:	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
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	<p>some institutions by the Education and Skills Funding Agency (ESFA).</p> <p>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).</p> <p>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.</p> <p>The total cost of funding element 3 will increase from the academic year 2022/2023 onwards as more learners move into post 16 education than leave.</p> <p>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.</p> <p>The commissioning local authority (the local authority in which the student is ordinarily resident) agrees top-up funding with the institution directly. (source DfE High Need Operational Guide 2021 – 22)</p>
<p>Legal and Governance:</p>	<p>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.</p> <p>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</p>



“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 2021 to 2022).

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 2021 to 2022).

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 2021 to 2022).

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.

Under Sections 33 and 39 of the Children and Families Act 2014, The child’s parent or the young person has the right to request a particular school, college or other institution to be named in their EHC plan where they have been approved for this purpose by the Secretary of State.

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).



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 (ESFA).

An ESFA 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 ESFA approved institutions and approved Independent specialist institutions named on the section 41 list.

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.

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.

The institution is named in the student's Education and Health Care Plan (EHCP) which is put together/agreed by



	<p>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.</p>
Risk:	<p>The Corporate Risk Management Strategy (CRMS) has been complied with – to identify and assess the significant risks associated with this decision / project. This includes (but is not limited to) political, legislation, financial, environmental and reputation risks. Based on the information provided, it is the officers’ opinion that no significant risks have been identified.</p> <p>For example, a local authority may cease to maintain an EHC plan only if it determines that it is no longer necessary for the plan to be maintained, or if it is no longer responsible for the child or young person. To mitigate that risk, funding will be only be provided on an annual basis and regularly monitored by the SEN team.</p>
Equality:	<p>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.</p> <p>There will be no adverse impact on people or groups with protected characteristics. The proposal will seek to maintain the current arrangements for Post 16 EHC plans.</p> <p>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.</p> <p>A full EIA is not therefore required.</p>
Health and Wellbeing:	<p>These proposals, if agreed, contribute towards individuals’ wellbeing as they offer them greater opportunities to access education and employment.</p>



	It also ensures that children can attend a Post 16 institution from September 2022 that meets their needs as planned.
Social Value	<p>This proposal is intended to enable young people to progress fairly to further education, training and employment.</p> <p>Community – Improving life's by creating aspirational and resilient communities.</p> <p>Wellbeing – Improving the lived experience of children and young people within the communities that they live.</p> <p>Inequalities – Challenging inequalities.</p> <p>Opportunities – Ensuring that Young people have opportunities to develop and maintain friendships and relationships. They can access their community and feel safe and confident.</p> <p>Employment – Developing opportunities for work experience and employment</p>

7. Appendices

Appendix A – EIA.

8. Background Papers

8.1 [SEN Code of Practice.](#)

8.2 [ESFA High Needs Funding 2021/22 Operational Guide](#)

8.3 Supporting SEND - Supporting SEND - GOV.UK

(<https://www.gov.uk/government/publications/supporting-send/supporting-send>)

8.4 SEND Strategy – 2021-24

<https://fis.sandwell.gov.uk/kb5/sandwell/directory/site.page;jsessionid=80B78AA67AF85AAA07BB39E80421CAD0?id=FpFgX9xMeS8>

