

Public Report

Birmingham City Council

Report to Cabinet

Date: 11th December 2018



Subject: COUNCIL RUN DAY NURSERIES

Report of: Acting Corporate Director for Children and Young People

Relevant Cabinet Member: Cllr Kate Booth - Children's Wellbeing
Cllr Jayne Francis - Education, Skills and Culture

Relevant O &S Chair(s): Cllr Mohammed Aikhlaq - Children's Social Care
Cllr Mariam Khan - Learning, Culture and Physical Activity
Cllr Sir Albert Bore - Resources

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Are specific wards affected?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s): Bordesley Green, Birchfield, Lozells, Glebe Farm & Tile Cross, Ladywood, South Yardley, Sparkhill, Stirchley, Soho & Jewellery Quarter, Small Heath, North Edgbaston and Alum Rock		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference: 005447/2018		
Is the decision eligible for call-in?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential :		

1 Executive Summary

- 1.1 To report to Cabinet the outcome of the public consultation and subsequent future options appraisal of the Council run day nurseries services (hereafter referred to as nurseries).
- 1.2 To seek approval for the Council to commence the withdrawal as the current provider of the nurseries and commence a due diligence process for each nursery by inviting expressions of interest for delivery of childcare services from other public bodies and the Private, Voluntary and Independent (PVI) sector, including social enterprises.
- 1.3 The accompanying private report contains commercially confidential information and exempt information relating to employment matters.

2 Recommendations

- 2.1 Approves the Council's proposal to withdraw from the operation of the fourteen day nurseries and commence a due diligence process by inviting expressions of interest for delivery of childcare services from other public bodies and the Private, Voluntary and Independent (PVI) sector, including social enterprises, with the TUPE transfer of staff and lease agreements of the current premises.
- 2.2 That if no viable provider can be sourced then the services will be decommissioned and the asset(s) will be subject to the Council's asset disposal process.
- 2.3 The use of delegated authority for approval and execution on the outcome of the due diligence (invite for proposals) process and any asset disposal process to the Corporate Director.

3 Background

- 3.1 Formal consultation on the proposed options for the day nurseries commenced on 23rd January 2018. Fourteen sessions were initially held with a further three sessions as a result of specific demand prior to the end of the consultation period.
- 3.2 There were 159 people attending the fourteen consultation meetings, from 18th January – 13th February 2018. Overall, their feedback at the meetings suggests that there is little or no support for the current proposed ideas. Some people commented that nurseries are going to close no matter which idea is chosen. Other specific key themes from the feedback or questions asked were around **(Appendix A – Sub Appendix 4)**:

- Funding/budget;
- The decision process;
- Negative comments about private, voluntary and independent (PVI) providers;
- There were also suggestions on how to change the options.

3.3 An information event was held inviting interested parties to consult on the proposed options on the 15th March 2018, with a view to gauging whether there would be any market provider interest to run the childcare provision in the future.

3.4 A market sounding exercise was carried out from the 11th June to 25th June 2018. A questionnaire was published on the Council's Intend and Find it in Birmingham systems, which was designed to develop the Council's understanding of the market interest in taking on the running of the day nurseries. During this period an initial questionnaire was sent out to all interested parties and current childcare providers. Interested providers signed a confidentiality agreement prior to receiving all information and entering into more detailed discussions with the Council.

A summary of the market sounding exercise (**Appendix A – Sub Appendix 5**) is below:

- 26 providers registered an interest in the exercise;
- 16 providers returned a completed questionnaire;
- 13 providers were invited to attend a meeting with the project team to discuss their responses to explore whether they were potentially viable options.

3.5 An options appraisal was undertaken to establish the recommendations in this report. The appraisal looked at the consultation findings, the market sounding exercise summary, financial information (sustainability) and the sufficiency requirements for the ward in making a recommendation for each nursery on a case by case basis against these criteria. The results can be seen below and at (**Appendix A – Sub Appendix 5**).

Day Nursery	Recommended Option
Bertram Road Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset subject to the usual asset disposal process, which needs to take in to account the HWB lease arrangements for the next 5 years.
Birchfield Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset subject to the usual asset disposal process.
Cherry Tree Nursery	Service has been temporarily closed due to low demand for places. Staff have been relocated to alternative sites where there are currently vacancies. Permanent closure of service. Asset currently identified for educational use and will be retained until a final decision is made.
Golden Start Nursery	Staff and the building are employed/owned by South & City College and leased to early years. The service will be offered to South & City College in the first instance. Service offered to the market if no interest from South & City College.
Kitts Green Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider close service. Asset subject to the usual asset disposal process.
Ladywood Nursery	Service has been temporarily closed due to low demand for places. Staff have been relocated to alternative sites where there is currently agency staff or vacancies. Permanent closure of service. Asset subject to the usual asset disposal process, which needs to take in to account the HWB lease arrangements for the next 5 years.
Lime Tree Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset subject to the usual asset disposal process, which needs to take in to account the HWB lease arrangements for the next 5 years.
Oaklands Park Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset subject to the usual asset disposal process.
Park Road Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset currently partially

	occupied by CYP services on the first floor. The remainder will be marketed on the open market as appropriate.
Reameadow Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset subject to the usual asset disposal process.
Soho Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset subject to the usual asset disposal process, which needs to take in to account the HWB lease arrangements for the next 5 years.
St Benedicts Nursery	The building is owned by the council and staff are in the BCC early years structure. The service will be offered to school in the first instance with staff transferred internally. If no interest from the school the service will be offered to the market.
Summerfield Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. Asset subject to the usual asset disposal process.
Sunshine Nursery	Opportunity to TUPE staff to PVI provider. If no viable provider, close service. This is not an education Asset and therefore will be returned to the owning portfolio (Place) This will only apply to the Day Nursery and not the HWB lease arrangements for the next 5 years.

3.6 The sufficiency requirements for each nursery can be seen in detail in (**Appendix A – Sub Appendix 8**). This looks at sufficiency not only for the ward in which the nursery is located, but also the immediate surrounding area to determine the overall sufficiency assessment.

3.7 Part of the work undertaken was to present alternative delivery models that showed ways to reduce costs, increase income and occupancy levels; with the intention of showing a position of improved sustainability or breakeven point. The model identified was shared with the trade unions at a workshop session on 26th April 2018 with each nursery looked at in some detail. The outcome of this modelling is summarised in **Appendix C**. All sides noted the challenges and reached agreement on the assumptions and projections. The unions confirmed that they did not have any alternative proposals that would move the nurseries to a sustainable position, at that point.

3.8 On 30th September 2018 a proposal was submitted jointly by GMB and Unison (Unions) which proposed the development of a social enterprise model with nine of the fourteen nurseries. The proposal was shared with all current nursery staff at an event on the 30th September 2018. It was agreed that this proposal would be reviewed by officers, involving a detailed assessment of the costs associated. Following some considerable work it was identified and agreed by all parties that this proposal was not a viable alternative and a formal withdrawal email was sent by the Unions on the 18th October 2018.

3.9 There will need to be a separate Cabinet process connected to the disposal of affected buildings in the future once a decision as to the future of the nurseries has been determined. However the risk of TUPE applying will need to be considered if an invitation to the PVI market is made to submit proposals to take on the running of the nurseries from the existing buildings.

4 Options considered and Recommended Proposal

4.1 Do nothing – There will continue to be an ongoing financial dependency as has been evidenced historically (**Appendix B**). Funding will need to be identified outside of the current Early Years budget.

- 4.2 Implement the alternative operational delivery model for the day Nurseries. The financial commitment for this, based on the Grade 2 salary option would be £1.266m in 2019/20 and £1.117 in 2020/21 totalling £2.384m for the first two years. This financial commitment of at least £1.1m will be required annually as it is not possible to reach a break-even position. A summary of the financial commitment which would be required for each nursery can be found in **(Appendix C)**.
- 4.3 Withdraw as the provider of fourteen buildings as quickly as possible and make the staff redundant. There will need to be a minimum of 45 days consultation where a redundancy process is likely to apply. In order to allow sufficient time to conduct a process to invite and assess proposals for the delivery of childcare services by other public sector bodies/Social Enterprises and the PVI sector, and to begin the asset disposal process, it is not anticipated that withdrawal would occur until 1st June 2019 and therefore an additional deficit is projected in 19/20 of £160k. Please see additional detail contained in the private report.
- 4.4 The recommended proposal is to seek approval for the Council to commence the withdrawal as the current provider of the nurseries and commence a due diligence process for each nursery by inviting expressions of interest for delivery of childcare services by the Private, Voluntary and Independent (PVI) sector, including social enterprises, that would prioritise the public sector ethos.

5 Consultation

5.1 Internal

- 5.1.1 A recommendation to carry out a public consultation of the nurseries was first presented to the Cabinet on the 12th December 2017.
- 5.1.2 Senior managers from each of the fourteen nurseries have been regularly involved throughout the public consultation.
- 5.1.3 The consultation questionnaire was shared with the Trade Unions and a group of parents and staff
- 5.1.4 Ongoing sessions have been held with the unions to support the consultation and the Cabinet report formation.
- 5.1.5 Consultation has been conducted with Unions to look at sustainable models for delivery for each of the existing Council run day nurseries on a case by case basis to ensure we looked at each and every individual aspect of their current and future operation. Trade Unions have had an opportunity to convey their preferred position. They have been unable to provide any formal detail or any economic information to demonstrate a cost-neutral financial position.
- 5.1.6 Following the submission of a further proposal submitted jointly by GMB and Unison there has been considerable work undertaken to review this involving a detailed assessment of the costs associated with the proposal.

Following this work it was identified and agreed that this proposal was not a viable alternative.

5.1.7 Officers from City Finance and Legal and Governance and Commissioning have been involved with the preparation of this report.

5.2 External

5.2.1 A full public consultation has taken place with MPs and Councillors, parents, staff and a range of private, voluntary and independent childcare providers.

5.2.2 Discussion is ongoing with the Birmingham Community Healthcare NHS Trust (BCHCT) with regard to the Health and Wellbeing (H&WB) service as some of the sites they use currently house nurseries. Withdrawal from any of the nurseries will impact on the cost of the premises at some of the sites. Further discussions are taking place with BCHCT to identify any cost implications such as the increased costs at sites where this happens.

5.2.3 Discussions are taking place with Sandwell & West Birmingham CCG and Birmingham and Solihull Clinical Commissioning Group around the current use of six of the nurseries for their maternity services, as currently they do not contribute to the building costs for the use of this space.

5.2.4 A market sounding exercise began on the 11th June 2018. This sought expressions of interest from prospective providers of childcare provision and was used to support the options appraisal process. Each nursery was looked at on a case by case basis.

6 **Risk Management**

6.1 A detailed Risk Register for the whole day nursery service is being maintained through the project management arrangements.

7 **Compliance Issues:**

7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?

7.1.1 Within the Birmingham City Council Plan 2018-2022 outcome 1, priority 2 sets out how the Council will strive to maximise the investment in the city and engage local employers to create quality jobs and opportunities for citizens. By developing these relationships the provision of day care services will be effectively managed in the Private, Voluntary and Independent sector (PVI) and continue to support the wide ranging needs of our existing and any new customers.

7.1.2 With the Childcare Act 2006 clearly stating that the Local Authority will be the provider of last resort, this is a strong factor in working more closely with the PVI sector (see section 7.2.4).

7.1.3 The Birmingham City Council Plan: 2018-2022 Birmingham – a city of growth where every child, citizen and place matters is committed to ensure Birmingham is an aspirational city to grow up in. Underpinning the plan are the following outcomes:

Outcome 1: Birmingham is an entrepreneurial city to learn, work and invest in;

Outcome 2: Birmingham is an aspirational city to grow up in;

Outcome 3: Birmingham is a fulfilling city to age well in;

Outcome 4: Birmingham is a great city to live in;

Outcome 5: Birmingham residents gain the maximum benefit from hosting the Commonwealth Games.

7.2 Legal Implications

7.2.1 Section 8 of the Childcare Act 2006 describes the 'Powers of local authority in relation to the provision of childcare' as (3) An English local authority may not provide childcare for a particular child or group of children unless the local authority are satisfied that (a) that no other person is willing to provide the childcare (whether in pursuance of arrangements made with the authority or otherwise), or (b) if another person is willing to do so, that in the circumstances it is appropriate for the local authority to provide the childcare. This does not affect the provision of childcare by the governing body of a maintained school, or the provision of day care for children in need in accordance with section 18 of the Children Act 1989.

7.2.2 Early Education and Childcare Statutory guidance for local authorities refers to the Sufficiency Duty. This guidance refers to the Childcare Act 2006, specifically:

- Section 6, which places a duty on English local authorities to secure sufficient childcare for working parents;
- Section 7 (as substituted by section 1 of the Education Act 2011), which places a duty on English local authorities to secure early years provision free of charge. Regulations made under section 7 set out the type and amount of free provision and the children who benefit from the free provision;
- Section 7A (as inserted by the Children and Families Act 2014). Regulations made under section 7A make provision about how local authorities should discharge their duty under section 7;
- Section 9A (as inserted by the Children and Families Act 2014). Regulations made under section 9A limit the requirements local authorities can impose when they make arrangements to deliver early education places for two-, three- and four-year-olds;

- Section 12 which places a duty on English local authorities to provide information, advice and assistance to parents and prospective parents.
- 7.2.3 In relation to staff, the TUPE regulations will apply if there are new providers of the nursery services. This also needs to be addressed concurrently with whether the new Provider would wish to take up the existing leases in order to minimise the impact on staff and service users.
- 7.2.4 The Statutory Duty within the Childcare Act (2006) is quite explicit that Local Authorities should be the provider of last resort. If the council were to withdraw as the provider this would enable quality buildings to be available to the local childcare market and still enable the statutory duty of Sufficient Childcare places to be provided. Consultation to establish the childcare sectors interest in the existing services and buildings has been undertaken.
- 7.2.5 Whilst the Council is not seeking to enter into contracts or provide any funding for the running of the nurseries, a robust due diligence process will be required to ensure that the best providers are in place to deliver these services to Birmingham's citizens, whilst considering the impact on the Service and staff. The Council will not contract manage providers once a TUPE process has been completed, other than to ensure that they are operating in line with agreements to operate childcare provision from the premises in line with the Council's requirements relating to potential funding claw back with DfE. Providers will be regulated through Ofsted inspections.

7.3 Financial Implications

- 7.3.1 The council run day nurseries are budgeted to break even. The current sustainability issues affecting the nurseries have been a significant issue for several years and although some improvement has been made during the last two financial years, this has not led to a financially sustainable position. The end of year position in 2017-18 was £713k deficit (**Appendix B**). Compensatory in-year savings were used to mitigate this pressure of £659k from the Early Years, Childcare and Children's Centre service.
- 7.3.2 Three options have been considered as set out in section 4 of the report. The table below summarises the revenue implications of each of the options over the period 2018/19 to 2020/21. Further financial implications are set out in the report on the private agenda.

Options	18/19 Budget £	18/19 Forecast deficit £	19/20 Forecast Deficit £	20/21 Forecast deficit £	Total Net deficit 18/19 to 20/21 £
1 - Do Nothing	500,000	965,000	984,300	1,003,986	2,453,286
2 - Remodel	500,000	965,000	1,266,245	1,117,949	2,849,194
3 - Withdraw (2/12 of full year cost in 19/20)	500,000	965,000	160,000	-	625,000
*Redundancy Cost		624,518			624,518

*Assumes redundancy will be met from corporate budgets and includes pension strain.

** Potential capital grant claw back costs will be treated as set out in paragraph 7.3.8.

Option 1 – Do nothing

7.3.3 For 2018/19 the day nurseries continue to be financially unsustainable. If the council opts for 'do nothing', the forecast deficit is currently projected at £965k in 2018/19, which is partly mitigated by a one off budget allocation of £500k from within the Early Years budget leaving a residual deficit of £465k. **(Appendix B)**. This budget is not available in future years and therefore the forecast deficit will continue to grow annually. The net expenditure pressure over the period 2018/19 to 2020/21 is forecast to be £2.453m.

Option 2 – Remodel

7.3.4 The estimated net cost of the service after remodelling as set out in section 4, is £1.266m in 2019/20 and £1.117 in 2020/21 but it is not considered possible to break even beyond this period. The forecast deficit in 2018/19 cannot be mitigated and so the estimated net pressure over the period to 2021 is £2.849m.

Option 3 – Withdraw

7.3.5 Withdrawing from the Service as quickly as possible and making staff redundant is forecast to cost £160k in 2019/20 assuming that the withdrawal takes place by 1st June 2019. The service will identify actions to mitigate this cost within the overall Early Years budget, so this does not add to cost pressures in 2019-20. For 2020/21 there would be a nil deficit on this basis.

7.3.6 The total cost of redundancy is £479,355 plus an additional £145,163 for the pension strain for the Council employees; therefore the total costs for 2018/19 will be £624,518. This cost will be met from corporate budgets in line with current policy. If TUPE which stands for the Transfer of Undertakings (Protection of Employment) Regulations 2006 is applicable the Council will be required to act as a guarantor for the purposes of the transfer of the pension liability under Admitted Body Status.

7.3.7 The Park Road Day Nursery also houses a Family Support & Safeguarding team in the building, who contribute to the overall running costs for the proportion of the building they occupy.

7.3.8 Some of these nurseries are located on sites which are children's centres or had children's centre capital investment, therefore there is a potential capital claw back of £3.21m **(Appendix A – Sub Appendix 3)**, unless the buildings continue to be utilised for under-fives provision. This will be explored further with the Department for Education (DfE) to ascertain future building use following the outcome of the recommendations. If clawback is incurred it is anticipated that this will be funded from capital receipt from disposal of the assets or through prudential borrowing which will fall as a

cost to the service. Further discussions are taking place with BCHCT to identify any ongoing cost implications if there are increased costs at sites should the council withdraw as the provider of the nursery, but these cannot be quantified at present.

7.4 Procurement Implications

7.4.1 Advice from our legal team states that the process to establish any future arrangements with potential providers for the running of day nurseries does not constitute procurement, therefore we are not required to complete a procurement process, and there is no contract to be established between the Council and any new provider(s). This is on the grounds that:

- No money will be exchanging hands for the service between the Council and the provider(s);
- BCC will not be seeking to performance manage the providers of the day nurseries;

7.4.2 We will need a clear and managed process in the form of due diligence to satisfy that any potential providers are financially and operationally competent to take on our staff and run a day nursery.

7.4.3 We will establish a formal process for this due diligence by mirroring Public Contract Regulations 2015 requirements and this will seek to attract responses from other public bodies and the Private, Voluntary and Independent (PVI) sector, including social enterprises.

7.4.4 We will establish a lease agreement and a TUPE agreement with the providers in either case outlined in 7.2.3.

7.5 Human Resources Implications

7.5.1 Any new provider will need to be working towards Admitted Body Status (ABS) prior to TUPE, and this will need to be evidenced as part of the due diligence process.

7.6 Public Sector Equality Duty

7.6.1 The initial assessment was undertaken in October 2017 (Reference number EA002393). A full assessment of the impact has been undertaken alongside the public consultation (Reference number EA002394) see **(Appendix D)**.

7.6.2 The nursery provision is not a specialist provision and provides open access to all of its services to all children and their families.

7.6.3 The assessment has highlighted that there may be an impact in the following areas. Detail of how this impact will be mitigated is outlined below:

- 1) Age – There are over four hundred children attending the fourteen nurseries each week. This will not significantly impact on those children and their families as there is currently an oversupply of nursery provision across the city

and therefore sufficient provision to provide alternative services and mitigate this.

- 2) Disability - 8% of children attending the fourteen day nurseries have a disability with a further 1% waiting for assessment or referral. Additional support is being considered to work with parents and carers to ensure that they are fully aware of Birmingham's 'local offer'. This has been fully considered and the affected children/families will be supported to access suitable alternative provision within other local provision as there is a requirement within the Early Years Foundation Stage to provide Inclusive provision.
- 3) Gender – 98% of the nurseries employees are female. All employees would be supported to access priority movers and/or work with any new nursery provider to mitigate this impact.
- 4) Race – Over 63% of the services users are reported as Asian/British Asian and reflective of the local communities. Access to nursery provision will continue to be provided and any possible loss of provision will not impact on these service users as there is currently an oversupply of nursery provision across the city.
- 5) Religion – 67% of the service users are Muslim and reflective of the local communities. Access to nursery provision will continue to be provided and any possible loss of provision will not impact on these service users as there is currently an oversupply of nursery provision across the city.

8 Background Documents

8.1 Childcare Act 2006.

8.2 DfE: EYFS – Early Years Foundation Stage 2014

8.3 Early Education and Childcare – Statutory Guidance for Local Authorities, 2017

8.4 List of Appendices accompanying this Report (if any):

- A. Full Business Case (including sub-appendices 1-8)
- B. Current Financial Position 2018-19
- C. Financial Models for Break-Even
- D. Equalities Impact Assessment