



CABINET – 13 SEPTEMBER 2019

**MAINSTREAM AND SPECIAL EDUCATIONAL NEEDS HOME TO
SCHOOL TRANSPORT POLICIES – OUTCOME OF JUDICIAL
REVIEW**

REPORT OF THE DIRECTOR OF ENVIRONMENT AND TRANSPORT

PART A

Purpose of the Report

1. The purpose of this report is to advise the Cabinet of the position with regard to implementation of the Mainstream Home to School Transport Policy and Special Educational Needs (SEN) Transport Policy following the outcome of the Judicial Review.
2. Implementation of part of the Post-16 SEN Home to School Transport Policy, the offer of a Personal Transport Budget for post 16 SEN students, was suspended in July 2019 by the Director of Environment and Transport following consultation with the Cabinet Lead Member as a result of the judgment on the Judicial Review (JR) not being available earlier. This report explains the consequences of this and sets out the intended way forward.

Recommendations

3. It is recommended that:
 - a) The outcome of the Judicial Review, which dismissed the challenge to the Cabinet's decision of 9 March 2018 regarding the Post 16 Special Educational Needs Transport Policy on all grounds, be noted;
 - b) The decision of the Director of Environment and Transport in July 2019 to suspend introduction of a default Personal Transport Budget offer for Post 16 SEN students from the start of the 2019/20 academic year (an element of the new Special Educational Needs Transport Policy) be noted;
 - c) The introduction of two elements of the new Policies from the start of the 2019/20 academic year be noted, namely:
 - (i) for SEN Post-16 and nursery students of low-income families (no low-income exemption) - charging at 50% rate (£330),

- (ii) for Mainstream Post-16 eligible students from low-income or rurally isolated families; traditional transport being replaced by a £150 grant scheme;
- d) The process for the calculation and payment of Personal Transport Budgets set out in the Special Educational Needs Transport Policy be reviewed and clarified ahead of the full implementation of the new Policies from the start of the 2020/21 academic year.

Reason for Recommendations

4. The Director's decision to suspend the implementation of default Personal Transport Budgets (PTBs) for Post-16 SEN pupils was taken as the Council was still awaiting the outcome of the Judicial Review. Had the challenge been upheld there would have been little time before the start of the new term to plan transport, and it was important that students and their families knew what would be available at the start of the 2019/20 academic year.
5. Two elements of the new Policies were completely unaffected by the Judicial Review and are therefore being introduced as originally planned: the charge of £330 for low income SEN Post-16 and nursery students, and a Mainstream Post-16 grant scheme of £150 for qualifying students.
6. Whilst fully upholding the Cabinet's decision, the judge hearing the Judicial Review suggested that the Council's PTBs payment process should be clarified as it was unclear how they would be calculated.

Timetable for Decisions (including Scrutiny)

7. This report notes the decision of the Director of Environment and Transport, in consultation with the Lead Member for Environment and Transport, to take urgent action to pause the implementation of part of the SEN Post 16 home to school transport policy to ensure parents and carers have sufficient certainty around transport arrangements in place from late August/early September 2019.
8. As indicated above, it is intended that PTBs as the default offer for post 16 SEN students will now be implemented with effect from the beginning of the 2020/21 academic year.
9. It is understood that the claimant is making an application to the Court of Appeal regarding the JR decision but at present no further information is available.

Policy Framework and Previous Decisions

10. The Home to School transport policies, for both Mainstream and SEN students were approved by the Cabinet in March 2018. The updated policies as approved were published by the Council in September 2018 and were due to take effect from the start of the 2019/20 academic year.

11. The legal position is still unresolved as an application for leave to appeal against the judgment of the High Court has been submitted and at present the outcome will not be known for some time.

Resource Implications

12. The pause in implementation of part of the new policy means that the planned £420,000 MTFS saving will be largely deferred until the 2020/21 financial year. It is estimated that the implementation of low income charging and £150 grant for Post-16 mainstream pupils will achieve up to £50,000 of savings. The impacts of not realising the expected savings in the 2019/20 Medium Term Financial Strategy (MTFS) will be considered in budget planning for 2020/21 MTFS refresh.
13. The pause of the policy implementation has allowed timely decisions to be made around planning and tendering for services to deliver Post-16 SEN transport for the 2019/20 academic year, which has helped to reduce some of the risk of expensive late-tendered services. Inevitably, however, there will be an increase in some costs due to the short notice of policy reversal.

Circulation under the Local Issues Alert Procedure

14. A copy of this report has been circulated to all members of the County Council.

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PART B

Background

15. Variations to the Mainstream and SEN Home to School Transport Policies were agreed by the Cabinet in March 2018 and an Equality and Human Rights Impact Assessment (EHRIA) was undertaken. The changes agreed were:
 - i. Personal Transport Budgets (PTBs) for Post-16 SEN pupils in most cases with an exceptions policy to be considered on a case by case basis; (instead of providing traditional transport such as minibuses or taxis).
 - ii. Removal of SEN Post-16 and nursery low income exemptions (requiring all those on low income to now pay an annual contribution of £330);
 - iii. Removal of Mainstream Post 16 transport and replacement with an £150 grant for eligible mainstream Post 16 students from low-income or rurally isolated families

16. A claim for a Judicial Review (JR) was submitted in June 2018 on behalf of a 17-year-old SEN pupil who challenged the default PTB offer on the grounds it was a breach of Equality Act and Human Rights, discrimination and would lead to a child suffering severe detriment. The court hearing was held in Birmingham from 3rd to 5th of April 2019. The claim challenged the Council's policy so far as it relates to para 15 (i) above on the grounds that the policy, contrary to the Equality Act 2010 and the Human Rights Act 1998, unlawfully discriminates on the grounds of age, indirectly discriminates on the grounds of disability and fails to comply with the Public Sector Equality Duty.

Suspension of the New PTB Policy

17. At the hearing the judge recognising that the timing of the judgment was key and undertook to use his best endeavors to provide a judgment by the end of May 2019.

18. Unfortunately, as the judgment was not received by the end of June 2019, the Director of Environment and Transport, in consultation with the Lead Member for Environment and Transport, made an operational decision to 'pause' the implementation of the policy to give certainty to families of pupils affected by the policy change about how travel to school/college from the beginning of the new term in late August/September 2019 would be provided.

19. The pause in implementation allowed traditional transport to be planned for the start of the new school year. Effectively five months of planning had to be condensed into the six weeks following the pause. There was a possibility that had planning continued and the judgement was found for the claimant then transport arrangements would have been unlikely to be in place for the start of the new academic year. The Authority was able to tender based on current arrangements for transport contracts, minimising disruption and increased costs.

20. All affected by the suspension of the PTB implementation were contacted by letter at the beginning of July along with affected schools, colleges, and the Parent Carer Forum. Elected members were also advised and a press release explaining the reasons for the pause was issued.

Outcome of Judicial Review

21. The JR judgement was published on 19th July 2019 and dismissed the grounds of the claim in full, upholding the Council's decision to implement all aspects of the new policy.
22. However, the judge was slightly critical of the manner in which the new PTBs had been publicised and explained, noting that although the Council had decided to give the claimant a PTB (when it was still intended to introduce these for the 2019/20 academic year) it had not stated how much this would be and it was unclear how it would have been calculated. Whilst this did not affect his decision on the new policy, the judge considered that the Policy's content on the calculation of PTBs was unsatisfactory.
23. An application to appeal the decision by the claimant has been dismissed but it is understood that they are now applying to the Court of Appeal. At the time of writing it is not known if this has been granted.

Next Steps

24. Subject to the outcome of any Court of Appeal process (if permission is granted) the pause in implementing part of the policy will mean that the majority of the planned £420,000 savings will not be made in the 2019/20 financial year and the impact of this delay will need to be addressed later this year as part of the Medium Term Financial Strategy refresh.
25. As the JR was determined in the Council's favour full implementation of the new policy will now proceed and Post-16 SEN pupils will be given a default offer of a PTB from the start of the 2020/21 academic year. Provision of 'traditional' transport such as fleet minibuses or taxis will, save in exceptional circumstances, no longer be offered.
26. As part of the implementation, further consideration will be given to the need for clarification in the Policy as to how PTBs will be determined in light of the comments made by the judge (including concerning the indicative award calculator and how information provided by the applicants will feed into the Council's calculations).
27. In advance of implementation, further review work will also be undertaken to the impact of revised Department for Education Statutory Post-16 Transport Guidance which was published in January 2019 and the Statutory School Age Guidance that has been issued for consultation in July 2019. Consideration of transport guidance for Post 19 pupils will be specifically reviewed.

Equality and Human Rights Implications

28. A full EHRIA was completed as part of the Cabinet decision making process in March 2018. The EHRIA will be reviewed and updated once the policy has been implemented in September 2020, or as necessary following the various reviews mentioned above.

Background Papers

Report to the Cabinet on 9th March 2018 – Mainstream and Special Educational Needs Home to School Transport Policy

<http://politics.leics.gov.uk/ieListDocuments.aspx?CId=135&MId=5178&Ver=4>

Revised Post-16 transport guidance - <https://www.gov.uk/government/publications/post-16-transport-to-education-and-training>

Judicial Review decision –

<http://www.bailii.org/ew/cases/EWHC/Admin/2019/1934.html>