
Report to: Cabinet **Date of Meeting:** 24 May 2012

Subject: Hawthornes Free School / Closure of St George of England High School Update

Report of: Director of Young People & Families **Wards Affected:** Netherton & Orrell, Derby, Litherland, Ford, St Oswald's

Is this a Key Decision? Yes

Is it included in the Forward Plan?
Yes

Exempt/Confidential No

Purpose/Summary

At their meeting on 29 March Cabinet agreed to the request of the Governing Body of St George of England High School and the proposers of the Hawthorne's Free School to bring forward the closure date for St George of England High School by 12 months to 31 August 2012 to facilitate the proposed Free School. This was dependent on the Free School being approved by the Secretary of State for Education by 25 May 2012, when the decommissioning of the school would need to commence.

The resolution included a requirement to update Cabinet at the May meeting.

Recommendation(s)

Cabinet is recommended to:

- i. Note the contents of the report and consider the latest information provided by the DfE.
- ii. Note that the request from the Free School Trust and the Governing Body to bring the closure date for the St. George of England High School forward from 31 August 2013 to 31 August 2012 was, for practical reasons and to ensure continuity of education for pupils affected, dependent on the decision to open the Free School being approved by the Secretary of State for Education by 25 May 2012 when the decommissioning of the school would need to commence.
- iii. Note that the Free School will not be approved by the Secretary of State by 25 May 2012.
- iv. Note the risks to the Council outlined in the report if St Georges High School is decommissioned before the Free School is approved.
- v. Reaffirm the Council's position of being facilitative towards the proposed Free School, request Officers continue dialogue with the Free School Trustees and report to a future Cabinet meeting if the Secretary of State approves the Free School.

How does the decision contribute to the Council's Corporate Objectives?

	<u>Corporate Objective</u>	<u>Positive Impact</u>	<u>Neutral Impact</u>	<u>Negative Impact</u>
1	Creating a Learning Community		✓	
2	Jobs and Prosperity		✓	
3	Environmental Sustainability		✓	
4	Health and Well-Being		✓	
5	Children and Young People		✓	
6	Creating Safe Communities		✓	
7	Creating Inclusive Communities		✓	
8	Improving the Quality of Council Services and Strengthening Local Democracy		✓	

Reasons for the Recommendation:

Cabinet at their meeting in March requested that an update on this matter come to this meeting.

What will it cost and how will it be financed?

(A) Revenue Costs: where these costs are known they are covered in the body of the report.

(B) Capital Costs: at the moment there are no known capital costs, however, there may be some impact in future years if the Free School affects other established schools.

Implications:

The following implications of this proposal have been considered and where there are specific implications, these are set out below:

Legal - the process for school closure is contained within DfE guidance and has been followed by officers. Legislation relating to Free Schools is included in the Academies Act 2010.

Human Resources – these are set out in the body of the report
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Equality

1.	No Equality Implication	<input checked="" type="checkbox"/>
2.	Equality Implications identified and mitigated	<input type="checkbox"/>
3.	Equality Implication identified and risk remains	<input type="checkbox"/>

Impact on Service Delivery:

N/A

What consultations have taken place on the proposals and when?

The Head of Corporate Finance (FD 1531/12) has been consulted and her comments are included in the body of the report.

Head of Corporate Legal Services (LD 860) has been consulted and her comments are contained within the body of the report:

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Are there any other options available for consideration?

Available Options are discussed in the body of the report.

Implementation Date for the Decision

Following the call-in period for the minutes of this meeting

Contact Officer: Mike McSorley, Head of Learning Support
Tel: 0151 934 3428
Email: mike.mcsorley@sefton.gov.uk

Background Papers:

None

1. Introduction/Background

- 1.1 At its meeting on 29 March 2012 Cabinet considered the report of the Director of Young People and Families on the request from the Governing Body of St. George of England High School and the proposers of the Hawthorne's Free School to bring forward the date of closure for St. George of England High School by 12 months to 31 August 2012 in order to facilitate the proposed Free School which is planned to open in September 2012. The request to bring forward the closure had been subject to consultation and the details of the outcome of the consultation and the various implications of the proposals were set out in the report.

Cabinet resolved that:

- (1) the options and information outlined in the report and the request by the local community, Free School Trust and the St. George of England High School Governing Body to facilitate the opening of the Free School, be noted;
- (2) approval be given to the request from the Free School Trust and the Governing Body to bring the closure date for the St. George of England High School forward from 31 August 2013 to 31 August 2012, this being contingent upon an alternative school opening in the area in September 2012;
- (3) for practical reasons and to ensure continuity of education for pupils affected, the decision in resolution (2) above, is also dependent on the decision to open the Free School being approved by the Secretary of State for Education by 25 May 2012 when the decommissioning of the school would need to commence;
- (4) subject to (1), (2) and (3) above, Officers be authorised to conduct relevant negotiations with regard to the land, assets, fixtures and fittings at the St. George of England High School with the Free School Trust; and to progress and make decisions on issues regarding employees from St. George's and St. Wilfrid's Schools as outlined in the report;
- (5) the change for pupils wishing to move to the Free School and the required admission arrangements be noted and Officers be requested to work with the Free School to ensure the transition is as smooth as possible;
- (6) it be noted that the proposal was a Key Decision but, unfortunately, had not been included in the Council's Forward Plan of Key Decisions. Consequently, the Chair of the Overview and Scrutiny Committee (Children's Services) had been consulted under Rule 15 of the Access to Information Procedure Rules of the Constitution, to the decision being made by the Cabinet as a matter of urgency on the basis that it was impracticable to defer the decision until the commencement of the next

Forward Plan because of the need to progress the decommissioning of the school, lease agreements and pupil admissions; and

- (7) Officers be requested to submit a progress report on this issue to the Cabinet meeting to be held on 24 May 2012.

2 Update Position

- 2.1 The report to Cabinet in March highlighted the main issues with regard to the closure of St Georges and the development of the Hawthorne's Free School proposal on the St Georges site. An update on these issues is given below:

Free School Consultation

- 2.2 Lord Hill wrote to the Council in October informing us that this application had been approved to the 'pre-opening' stage of the Free School process and that the Secretary of State has a duty under Section 9 of the Academies Act 2010 to consider the impact that any new school will have on existing schools in the area. Lord Hill gave an undertaking that the Secretary of State would not enter into a Funding Agreement until the Council's views and any contextual information we provide has been carefully considered.
- 2.3 Officers responded to the consultation on 30 March setting out the pupil forecast and current surplus places in the secondary sector in South Sefton, and explaining that 600 additional school places were not needed. The response pointed out that if the Free School was approved and was successful there would be an adverse impact on existing schools.
- 2.4 The response asked for an ongoing dialogue with the Department for Education about ways of mitigating the impact on existing schools and protecting them during a transition period due to the speed of the Free School process and the lack of time established schools have had to plan for any impact on them,
- 2.5 At the time of writing the Council have not received a response to this letter.

Site Issues

- 2.6 Discussions around the use of the St Georges site by the Free School are progressing well. Officers are in regular dialogue with Partnership for Schools (PfS) who are leading on this on behalf of the DfE and the Free School Trust.
- 2.7 PfS are in the process of drawing up plans for improvements to the building, once the funding agreement is completed, and they propose that the work is completed over the summer period in time for the Free School opening in September. All funding will come directly from the DfE.
- 2.8 A benefit of the Free School setting up on the St Georges site is the continued availability of Fernhill Sports Centre, which is part of St George of England school, for community use. This requirement will be included within the lease agreement.

Human Resource Issues

- 2.9 Independent legal advice has been taken by the Council on TUPE and the views of trade unions canvassed. The issue is still not entirely clear given the uncertainty of some of the Free School plans, and the application of the law.
- 2.10 Based on the usual tests applied to TUPE, the advice the Council has received suggests that TUPE is more likely than not to apply to employees from St George's and St Wilfrid's, although the position (as with many TUPE situations) is ultimately one for interpretation by Court or Employment Tribunal. There are different factors which affect the employee groups from the two schools and given that the Trust maintain a strong view that TUPE does not apply the outcome of any TUPE challenge is difficult to predict at this stage. The TUPE situation is, however, a real concern given the likelihood of legal challenge by employees and trade unions. Of the trade unions who have asserted a view, the view is that TUPE applies.
- 2.11 The Trust responded to requests to provide their view on TUPE on 23 February stating that: *"On TUPE, we are now clear that Free Schools are completely new and additional provision and as such TUPE does not apply. However, we expect a good number of posts in the new Free School to be available for staff at both St Wilfrid's and St George's....."* In further discussions the Trust has maintained its view which is apparently on advice of the DfE.
- 2.12 Officers have requested more detail on the legal basis of this view; however the Trust declined to share their detailed legal advice.
- 2.13 The DfE view on TUPE echoes that of the Trust in that Free Schools are new and additional provision and therefore TUPE does not apply. The DfE have also declined to share their legal advice on this issue.
- 2.14 Further discussions will take place with the DfE and the Trust over TUPE, however, in order to progress the closure of St George's staffing awareness meetings have been held with the staff from the school and the position has been explained to them. Staff will be kept informed of the on-going discussion over TUPE.
- 2.15 A similar discussion is to be had with staff from St Wilfrids.
- 2.16 The Free School have started recruiting staff via open advert and these positions are available to staff from St Wilfrids and St Georges to apply for.
- 2.17 At this stage plans have been requested from the DfE and Trust as to how this TUPE situation and challenge may be managed and any clarification as to how they will deal with the situation of a TUPE challenge. This is particularly relevant given the real risk to employees and the Local Authority.
- 2.18 Practically the issues have been dealt with by the Local Authority covering both TUPE and potentially redundancy. At this stage employees have been told no entitlements are payable pursuant to redundancy as it is more likely than not TUPE applies.

- 2.19 The situation, it is recognised, gives rise to a stressful and difficult period for employees. If factors do not change, there is a real risk of litigation.

Programme Issues

- 2.20 Cabinet's decision to bring forward the closure of St Georges was dependent on the decision to open the Free School being approved by the Secretary of State for Education by the 25 May 2012 when the decommissioning of the school will need to commence. This was for practical reasons and to ensure continuity of education for pupils affected.
- 2.21 The DfE have confirmed via e-mail that the Free School is unlikely to be approved for a further 5 to 6 weeks ie early July.

3 Risk associated with closing St Georges before the Free School has been approved

- 3.1 The Council have a statutory duty to ensure that all children and young people of school age have a place in school and failure to meet a statutory duty is per se actionable via the Ombudsman's office and through the Courts.
- 3.2 Staff in St Georges who are on teacher's terms and conditions of employment are required to receive notice by 31 May. In order to be equitable the Council would usually work to the same timescales for non-teaching staff. Once notice has been issued it can not be withdrawn without the agreement of the individual. This is the start of decommissioning St Georges.
- 3.2 The risk to the Council is that if the current provision (St Georges) is decommissioned before the new provision (Free School) is approved and the Free School does not open then it is the Council who will have the responsibility for providing school places for pupils who had intended to go to the Free School.
- 3.3 The worst case scenario could, therefore, be that having closed St Georges the Council would then have to recommission sufficient provision to provide for pupils who would have gone to the Free School had it opened. It is unlikely that this will be possible within the time available if the Free School does not then open. The Council would then be failing in its statutory duty and/or face potential additional cost in having to recommission school places.

4.0 Meeting with the DfE and Hawthorne's Trust

- 4.1 In order to be able to update Cabinet more fully Senior Officers from the Council met with the Chair of the Hawthorne's Trust (who is also the Chair of Governors from St Georges) and a senior official from the DfE on 16 May. The purpose of the meeting was to discuss any outstanding issues which could be a barrier to approval of the Free School and the Council's governance process and legal/statutory responsibilities.
- 4.2 Council officers clearly set out the risk as outlined above in the context of the

Council's facilitative approach to the Free School. The Council's position regarding risk, statutory duty and moral role in terms of the education of the children and young people from St Georges and St Wilfrids was clearly spelt out.

- 4.3 The Chair of the Free School Trust and the DfE acknowledged that the Council had worked hard to deliver on the various site issues in a timely manner and these had all progressed well.
- 4.4 There was a brief discussion regarding TUPE, however, in the event that a common position can not be arrived at the DfE have confirmed that this will not delay approval for the Free School. The Council made it clear that the discussions over TUPE are causing uncertainty and anxiety for the workforce and urged discussions to continue as soon as possible.
- 4.5 Council Officers made it clear that Cabinet would expect to have strong assurances that there are no barriers to the approval of the free School in order to mitigate the risks set out in the report.
- 4.6 Understandably, the DfE can not pre-empt the decision of the Minister, however, they confirmed that they could not see any barriers to signing the funding agreement and that delay in the approval from the initial programme was due to the bureaucratic process they needed to follow rather than fundamental issues.
- 4.7 The DfE agreed to put their verbal assurances that there are no foreseen barriers to the approval of the Free School and that it is still intended to open in September 2012 in writing to the Strategic Director – People. At the time of writing the letter had not been received from the DfE.

5 Conclusion

- 5.1 In the absence of written confirmation that the Funding Agreement will be signed by the Secretary of State and the Free School opened in September 2012 there are significant risks to the Council, at the current time, in proceeding with the closure of St Georges in August 2012. These are summarised above and formed part of the report in March when Cabinet agreed to the request from the Governing Body of St Georges to bring forward the closure, provided the Free School was approved before the decommissioning of St Georges needed to start.
- 5.2 The Free School may be approved by the Secretary of State over the summer, in which case Members may wish to request a further report on whether the closure of St George of England should be brought forward from August 2013 if this would facilitate the Free School proposal.