

Report to:	JOINT MEETING OF OVERVIEW/EXECUTIVE CABINET
Date:	9 February 2022
Executive Member:	Councillor Leanne Feeley – Executive Member (Life-long learning, Equalities, Culture and Heritage)
Reporting Officer:	Tim Bowman Director Education Tameside and Stockport.
Subject:	PFI ACADEMY CONVERSIONS UPDATE
Report Summary:	Update on the conversion to Academy Status of five PFI built schools, three High Schools, Alder, Mossley Hollins and Hyde and two primary schools, Pinfold and Arundale.
Recommendations:	<p>That noting the due diligence work already undertaken, Executive Cabinet are asked to agree that officers will continue to negotiate with schools and the DfE about the paying of our costs and subject to a successful outcome negotiate the variations with the schools and engage with DfE to ascertain that these changes can be made.</p> <p>Thereafter officers will either</p> <ul style="list-style-type: none"> (a) present a further report to members with the outcome of those negotiations in order that a determination can be made as to Council's position if the costs are not indemnified by the DfE and the schools so that the Council is left cost neutral; or (b) Officers will present the final academisation paper work including the updated due diligence in relation to the financial and legal position following those negotiations.
Corporate Plan:	This report supports the starting-well priority of the Corporate Plan, specifically the hope and aspiration objective. It is consistent with the Schools' Strategy agreed by Executive Cabinet in August 2018
Policy Implications:	These are set out in the report.
Financial Implications: (Authorised by the statutory Section 151 Officer & Chief Finance Officer)	<p>The financial and legal arrangements around PFI schools are detailed and complex, requiring specialist legal and financial support. The costs that the Council is expected to incur in dealing with the PFI conversions currently stand at an estimated £140,000. Central Government have agreed to fund £60,000 which leaves a shortfall of £80,000. Elected Members have determined that the Council cannot fund these conversions and are seeking full reimbursement of these costs either from Central Government or from the converting schools, who each receive grants of £25,000 per school.</p> <p>There is no available budget to fund the additional cost of the proposed academy conversions and the responsibility for paying these additional costs has yet to be determined.</p> <p>Responsibility for the PFI contracts remain with the Council post-academisation and there are risks that the Council is financially exposed if the Academy does not pay some or all of its contribution to the PFI contracts.</p> <p>There may be a number of reasons for this, some of which the Council can take actions to mitigate against. For example the</p>

Academy may withhold payment if it feels that there is unsatisfactory contract performance; the Council can help mitigate against this by undertaking robust contract management and the timely and appropriate application of deductions.

There are also a number of proposed changes to the Project Agreement and Schools Agreement that will further indemnify the Council against financial risk. These are set out in Table 3 of the report. Central Government have yet to give their approval for these contract changes.

The technical accounting treatment post academisation will require adjustments to the Council's balance sheet to reflect the transfer of the asset at nil consideration offset by a reversal of accumulated depreciation balances. This technical accounting change has no impact on the overall financial position of the Council.

The PFI contract values against each converting school are set out below. This provides high level context as to the potential financial risk exposure of the Council relating to the proposed PFI Academy Conversions.

The key areas to note in both tables are the School contribution values.

Total Outstanding PFI Contract Values of Converting Schools

	Mossley Hollins	Arundale	Pinfold
Contract End Date	August 2036	August 2032	August 2032
	£'m	£'m	£'m
Remaining Contract Value	58.210	9.700	13.820
Funded by (approx.):			
PFI credits, Investment and Third Party income	43.160	5.410	7.330
Contribution from the Schools	15.050	4.290	6.490

Annual PFI Contribution of Converting Schools

	£'m	£'m	£'m
Annual PFI Contract Value Funded by (approx.) :			
Delegated Schools Budget	0.630	0.170	0.270
Devolved Formula Capital	0.020	0	0
Dedicated Schools Grant Topslice	0.180	0.190	0.270
Annual School Contribution	0.830	0.360	0.540

In total therefore the academising schools make a contribution of approximately £1.73m per annum (2021/22 contribution levels provided as a guide) towards the cost of the PFI contract and this is the element that is potentially at risk once these schools convert to academies.

It is important to note that risks can be mitigated against but not removed. These schemes are complex and the sums of money are very significant. The mitigating actions set out within Table 3 will assist in bringing the risk to an acceptable level but not eliminate it.

Legal Implications :
(Authorised by the Borough

The detailed legal implications in relation to the academisation of these schools are set out in the report considered by Cabinet in July

Solicitor)

2020. Indemnification is only provided by the DfE by law on a mandatory academisation otherwise the DfE's preferred position is to leave the risks with the Local Authority.

These legal implications concentrate on the further work which has been taken and the further action required.

The project officers have been working closely with the external advisors to identify the terms of the standard conversion agreement used by the DfE when PFI schools become academies, which expose the council to risk. These are identified in section 3 of this report.

Unfortunately the pace of this work has been impacted by the negotiations with the DfE in relation to the funding of the of the council's costs in relation to this project. Currently the DfE is only agreeable to contribute 50% of the costs. The Council has a policy of full cost recovery and therefore would expect either the DfE or the Academy Trusts to meet the costs in order that other schools or Council services are not required to subsidise. The legal fees are high but are in line with the usual costs for these projects, which are complex and resource intensive.

It is expected that the schools will be agreeable to fund the remaining costs as the Council has been transparent about its position from the offset as the costs are not insignificant and the schools have indicated at the start of this project they would. However, they dispute the level of costs which whilst high are normal and it would be advisable for this discussion to be had with the schools as soon as possible in order that Members can be updated and be able to make an informed decision especially if the schools are not agreeable to fund the Council's costs as the Council does not have the budget as set out in the financial implications.

It would also be advisable to involve the council's external auditors in reviewing the negotiated position, as it is understood that their predecessors have raised concerns in relation to the Council's exposure to liabilities if the schools were to convert to academies.

It would also be helpful to have a section in the report to provide comfort to Members in relation to how robustly the PFI contract will be managed going forward – with the intention that there will be less performance issues than there have been historically, which will create the risk that the schools do not pay as was the case with Great Academies.

Section 5 sets out some of the policy landscape that we must operate within but this is a changing and complex. Successive Conservative education secretaries have shared a vision of all schools becoming academies, although [research has shown there is little difference](#) in the performance of schools in academy chains and local authorities.

Last year the current education secretary Nadhim Zahawi appeared to shift away from all-out academisation, when he ruled out setting an "arbitrary deadline" to achieve this.

Now there appears to be a shift within the department to allowing councils to set up their own multi-academy trusts (Mats).

The move is likely to be welcomed by councils, as the Local Government Association has been calling for authorities to be given powers to set up their own Mats since 2018.

DfE permanent secretary Susan Acland-Hood told MPs this week that as part of the schools white paper, her department is exploring "whether there are other options we should be looking at for other groups of schools who might want to be taking up this opportunity [to academise] but also holding on to some of the relationships they've already got". "In principle, I think it could be a policy shift that is of the moment," he said. "If the government wants to get more schools into academy trusts, the reality is that many primary schools in particular would look differently at this model to joining an existing trust."

In 2018, the LGA wrote a [paper on improving schools](#) saying that government rules ban councils and council-maintained schools from helping academies and free schools improve, and stating that "given their excellent track record in maintaining high educational standards and in turning around failing schools, councils need to be recognised as effective education improvement partners, ready and able to support schools of all types".

The Commons education select committee also recommended at the time that the government should partner with and use the expertise of local authorities. The LGA paper said the committee, "noting a shortage of academy sponsors - particularly in rural areas", had "joined our call for councils with a good track record in school improvement to be allowed to create [multi academy trusts] to support failing schools". The paper also pointed to councils' "strong track record" in school improvement, with 91% of council maintained schools judged good or outstanding. "Maintained schools outperform academies in every regional schools commissioner region," it said. "By contrast, DfE figures showed that in terms of GCSE results, over half of [multi academy trusts] had progress 8 scores that were below the national average for state-funded mainstream schools and 45% of Mats were performing at significantly below national averages."

Risk Management:

These are set out in the report

Background Information:

The background papers relating to this report can be inspected by contacting Tim Bowman



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1. INTRODUCTION

- 1.1 In July 2020 Executive Cabinet agreed that the Council's no longer has an in-principle objection to the academisation of PFI schools. Members furthermore agreed that the conversion of PFI schools should be considered on a school by school basis following appropriate due diligence.
- 1.2 The report of July 2020 is attached as Appendix A to this paper. This report provides an overview of the financial and legal issues which impact upon on the academisation of PFI built schools. It also outlines the approach to due diligence which was agreed with elected members.
- 1.3 This report provides an update on the progress on the conversion to Academy Status of five PFI built schools, three High Schools, Alder, Mossley Hollins and Hyde and two primary schools, Pinfold and Arundale. Specifically, it provides an update on the due diligence undertaken to date.

2. Update on the progress of these conversions

- 2.1 Subsequent to the decision of Executive Cabinet in July 2020, the Governing Boards of Hyde and Alder High Schools have decided not to academise and join the Tame River Trust. Therefore three PFI built schools are now proposing to academise.
- 2.2 Officers have been engaged in project meetings with the schools and DfE officials since September of 2020. These meetings have also included external legal officers, representing both the schools and the Council. The Council has instructed Addleshaws to act on its behalf in relation to legal due diligence. Whilst these discussion have been positive, progress has been slow. In addition, in September, the Council appointed Grant Thornton to act on its behalf in relation to the financial due diligence.
- 2.3 There are two substantive issues that have hampered progress. The first of these is costs. The Council, as it always does, is seeking to recover its costs in progressing these academisations. As councils receive no funding from central government to complete the substantial work associated with this process, the council recovers its costs directly from converting schools. Typically these costs between £2,500 and £10,000 dependant upon the complexity of the individual schools circumstances. Converting schools receive a grant of £25,000 per school from central government to pay the Council for this and other costs of conversion
- 2.4 The conversion of PFI built schools is a very complicated process, as such it entails a substantial additional cost arising from the PFI contracts needing to be changed. Preparing these three conversions has required the Council to instruct external legal and financial experts.
- 2.5 It is not reasonable to expect that these costs are met by individual schools, Furthermore, Elected Members when they agreed that the Council no longer has an in-principle objection to these conversions instructed officers to ensure that the Council is not subsidising the costs of conversions. In order to resolve this issue and on the advice of DfE officials prepared a "business case" outlining the costs the Council was expecting to incur and asking for this funding to be provided by Central Government. In Tameside, these costs are estimated to be in the region of £140,000 for the 3 remaining schools. The latest offer from Central Government is that they are prepared to contribute £60,000 to the costs, leaving a shortfall of £80,000 for the 3 remaining schools to fund. The Council has been very clear that it should not be in a position that it is subsidising PFI conversions, schools will be expected to pick

up these costs from school budget for the £5,000 that exceeds the grants they have been allocated.

- 2.6 The second substantive issue limiting progress concerns the extent to which the model legal documents which determine the academisation could be amended. A list of the issues which the Council has raised is included in section three of this paper.
- 2.7 On 16 July 2021 the Chief Executive received a letter for Dominic Hetherington, the National Schools Commissioner (NSC). In this letter the NSC offered a contribution to the council's costs and asked that we expedite these academisations. Some further comfort was also provided about the Council's risks. A copy of this letter is included at Appendix B to this paper.
- 2.8 The Chief Executive of the Council responded to the NSC on 30 July 2021 in his response to the National Schools Commissioner the Chief Executive was clear that, *"the Council remains committed to these conversions and that we are conducting due diligence in good faith and wish to progress expediently."*
- 2.9 The Chief Executive's response, included at Appendix C, outlined clearly the issues that the Council was seeking advice from the department on. Furthermore it made clear that, *"the Council is seeking nothing more than reimbursement of the costs it is incurring. Officers have and will continue to work in an "open book" manner with officials on costs This in line with the normal process for charging outlined in the Council procedure note that is used for all conversions in Tameside."*
- 2.10 Officers received a substantial response from DfE officials to these issues on 05 August 2021. This has enabled officers to complete their due diligence.

3. Due Diligence – Update

- 3.1 The Council's legal and financial advisors have performed the required due diligence and articulated the key issues, risks and potential mitigations in relation to the academisation of PFI schools. The issues listed are detailed and complex and have been summarised in Table 1 below.
- 3.2 It is important to state that the proposed mitigations, if agreed with the DfE and the academies will mitigate the risks but not eliminate them, and residual risk will remain. The reduced mitigated risk is predicated upon the agreement of the academies and the DfE amending their standard documentation but it is by no means certain that they will do this. A view is sought as to whether the Council is prepared to accept the risks if the DfE is not prepared to amend the Project Agreement.

Table 1 Key Risks, Issues and Mitigations

#	Key issue and background	Risk issues	Proposed Mitigations
1	<p>Unitary charge risk</p> <p>The Academy is obliged to pay the Authority its "Relevant Proportion" of the Unitary Charge.</p> <p>The Academy's obligations are indemnified by the DfE subject to the qualifications which state that the Academy and the</p>	<p>The key risks for the Council are:</p> <p>Risk 1: the Academy may argue that it should not be liable to pay a Normal Payment because the liability was "caused" by <u>any breach</u> by the Contractor or a Contractor Related Party, and</p>	<p>It is proposed that a new clause is drafted for the Project Agreement, with the purpose of this clause to guard against a technical "no loss" argument in response to a legitimate claim under the Project Agreement.</p> <p>The clause arises from the change in circumstance</p>

#	Key issue and background	Risk issues	Proposed Mitigations
	<p>DfE are not liable under the indemnity where (broadly) the Normal Payment Matter Liabilities have arisen because of the Council's or Contractor's negligence, wilful misconduct or breach.</p>	<p>withhold the money due on this basis; Risk 2: the DfE indemnity would not apply in this circumstance; Risk 3: whether or not such causation applies would not be objectively determined but would be subject to the discretion of the DfE Risk 4: generally, the presence of the Academy in the relationship means that the Authority will have to take into account and respond to the Academy's view on all performance matters – effectively being "piggy in the middle" as between the Academy and the Contractor. For example, the Academy may argue that the insurance premium contribution payable should not be paid because the Contractor breached its obligation to commission the relevant insurance report on time; it may argue that it should not pay its unitary charge contribution because the Council should have imposed deductions for poor performance.</p>	<p>which sees the school becoming (on conversion) independent of the Authority, meaning that losses which pre-conversion would have been incurred by the Authority will post conversion fall on the Academy Trust (thus necessitating back-to-back provisions as the Academy Trust is not a party to the Project Agreement).</p>
2	<p>Council's costs</p> <p>The indemnities referred to do not include Council internal or advisory costs. The definition of Direct Losses for this purpose is: <i>all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), to the extent that the Authority is obliged to pay such amounts to the Contractor under the Project Agreement.</i></p>	<p>Risk 1: where there is a default on a Normal Payment Matter item, the Council would in certain circumstances have to pay and be liable for internal and other advisory costs itself and would not be able to claim the same back from the Academy, the DfE or the Contractor. For example, a situation may arise whereby the Academy wrongly argues that the Relevant Proportion should not be paid. After the expenditure</p>	<p>The Council will be required to underwrite certain costs and it will therefore be necessary to prepare a programme and budget, alongside a standard set of documents which accommodates bespoke drafting for each School. The risk remains that there is under-recovery by the Council.</p>

#	Key issue and background	Risk issues	Proposed Mitigations
	<p>The wording in bold qualifies the amount that the Academy may recover under the indemnity.</p>	<p>of internal management time and external legal advice, the Academy changes its position. There would be no Council right of recovery under the Project Agreement or the Model Documents.</p>	
3	<p>Deductions</p> <p>Clause 13.3 of the School Agreement provides for the benefit of all deductions to be passed to the Academy. The Academy have emphasised the need for the Council to have capacity to make deductions, and have generally made it clear that they would expect deductions for poor performance to be vigorously applied.</p>	<p>Risk 1: the standard forms of the Model Documents do not provide for the Council to be able to retain a proportion to reflect the Council's ability to hire staff to enforce deductions.</p> <p>Risk 2: the Academy may be much more aggressive than the Council has been to date in making deductions, meaning more discussion/ conflict/time to be spent with the Contractor on performance monitoring.</p>	<p>The Council continue to performance manage the Contractor and the funds to do this are provided for within the agreement.</p> <p>Ensuring that there is an appropriate drafting amendment to retain a Council staff member for the purpose of managing Contractor performance is the preferred option.</p>
4	<p>Council's indemnities under the Project Agreement</p> <p>The Council has given certain indemnities to the Project Provider (SPV) for Direct Losses arising from death, PI, property damage etc. Post-academisation, the Council will still have these liabilities despite the Academy being in occupation of and controlling the Site.</p>	<p>Risk 1: the Academy's actions puts the Council in breach of its obligations under the Project Agreement and this consequently crystallises a liability for the Council.</p> <p>Risk 2: relating to risk 1, the Academy cannot (or refuses to) indemnify the Council and the DfE ultimately has discretion as to whether it will indemnify the Council in respect of such liability. Therefore, the Council is at risk of being liable under these indemnities without recourse to either the Academy or the DfE.</p>	<p>This is a potentially difficult risk to mitigate against. The Project Provider will not accept a change of risk profile as they should be "no better no worse" from this change. The residual risks, as outlined in Risk 1 and Risk 2, need to be backed off to the Academy and/or DfE.</p>
5	<p>Accidental damage and vandalism</p> <p>The Council is responsible for certain remedial costs of accidental damage and vandalism under the 2009 Project Agreement. Similarly to item 4, the Council will remain liable for such damage despite the Academy being in</p>	<p>Risk 1: the Academy's actions/omissions (e.g. failure to prevent vandalism for which Project Co is not responsible for) triggers a liability for the Council.</p> <p>Risk 2: relating to risk 1, the Academy cannot (or refuses to) indemnify the Council and the DfE</p>	<p>As above, this is a risk that the Council will have to accept.</p>

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	occupation of and controlling the Site post-academisation.	ultimately has discretion as to whether it will indemnify the Council in respect of such liability. Therefore, the Council has residual risks regarding accidental damage and vandalism without recourse to either the Academy or the DfE.	
6	<p>Termination</p> <p>Entering into the Model Documents means the Council cannot freely exercise its termination rights under the Project Agreement (or exercise its discretion in relation to the same) without involvement from the Academy and the DfE.</p>	<p>Risk 1: the Council could be forced to terminate the Project Agreement or to exercise any of its other rights under the Project Agreement, where the DfE directs it to where the DfE reasonably considers that this would mitigate its own potential liability under the Principal Agreement</p> <p>Risk 2: the Council could be prevented from terminating the Project Agreement.</p>	<p>Legal and financial advice is to accept the standard form drafting around termination that is contained in the model documents, as this is the preferred and likely only option.</p> <p>This is because the Academy cannot buy out the debt as it would not represent Value for Money, therefore the Academy cannot trigger termination unless the Project Co has material breaches and been given opportunity under the project agreement to rectify.</p> <p>All parties would be aware of this escalation process and would need to understand the consequences to terminate and other measures that can be taken in accordance with the contract that may deliver better outcomes.</p>
7	<p>Surveys</p> <p>The Academy may require the Council to request the Project Company to undertake condition surveys but the standard form does not address responsibility for such costs.</p>	<p>Risk 1: the Academy requires surveys to be undertaken which do not subsequently reveal that Project Co has failed in its maintenance obligations, and so the Council is liable for the survey costs.</p> <p>Risk 2: there is a dispute between Project Co and the Academy as to whether the survey shows defects / failures by the Contractor.</p>	<p>Lifecycle risk is with the Project company/ provider therefore there is no need for the Authority/Academy to request additional surveys. There will be a requirement for parties to agree a process for surveys at Handback</p> <p>Generally, the Academy will benefit from a clean handover with low maintenance, therefore it is in their interests to engage and take on board cost liability for third party support to achieve a VfM outcome from Handback.</p>
8	<p>Programmed Maintenance</p> <p>This is similar to item 7 above.</p>	<p>Risk 1: the Academy requires deferment or</p>	<p>Risk to be accepted.</p>

#	Key issue and background	Risk issues	Proposed Mitigations
	<p>The Academy may require the Council to defer or accelerate the Programmed Maintenance but the standard form does not address responsibility for costs of the same.</p>	<p>acceleration (other than as a consequence of Unavailability or a Service Failure a consequence of an Output Specification failure) and this is not agreed by the Contractor, then the Council could be liable for related costs.</p>	
9	<p>Change of Law</p> <p>The Council is liable for certain Change of Law related costs if there is a Qualifying Change of Law or a General Change of Law with associated capex. It would be unreasonable for the Council to be responsible for these liabilities post-academisation – because any Academy running a School should always comply with the Law.</p>	<p>Risk 1: The Change of Law provisions could give rise to Council liabilities if there is a Qualifying Change of Law or a General Change of Law with associated capex (i.e. changes of law which are not Project Co's responsibility under the Project Agreement).</p>	<p>Any cost liability risk is mitigated by the Change in Law account which puts aside funds to be used for this risk.</p> <p>The Academy should be made aware of the Change in Law reserve.</p>
10	<p>Insurance</p> <p>The Academy is to become an insured party under the project insurances pursuant to the Project Agreement Deed of Variation</p>	<p>Risk 1: the Council is liable for increased insurance costs as a result of the Academy becoming a co-insured party (or for another reason in the future). Such costs could be significant.</p>	<p>The term 'Academy Trust' and 'Academy Trust Related Party' will be included as part of the definition of 'Authority Related Party' therefore the Academy will remain with the Council an insured party. The replacement clause is only required to address the concept of an Academy Trust. Financial advice is that they do not see this as a material change that will increase premiums, therefore it is low risk to the Council.</p>
11	<p>Third Party Use</p> <p>The standard form drafting provides that income shared between the Council and Project Co will <u>not</u> be credited to the Academy. This will include income from Third Party Use.</p>	N/A	<p>The treatment of income received in relation to third party use will need to be re-visited with a view to potentially disaggregating current arrangements such that the Council is no longer a party to third party income.</p> <p>This will impact on the Unitary charge, as third party income is currently a key contributor to the PFI Affordability Reserve.</p> <p>There may also be an impact on the availability or affordability of social /</p>

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			community use within the borough, depending upon the view of the Academy, in conjunction with the Project provider, as to continuing this provision. This is a key consideration that Members need to be aware of.
12	<p>Consent etc. from the Academy</p> <p>The standard form drafting gives the Academy the right to prevent the Council from giving certain consents, approvals or authorisations under the Project Agreement.</p> <p>This could apply to any consent which affects the Academy which the Council is required to give the Project Company (e.g. approval of a reinstatement plan, change of control of the Contractor, settling claims, Qualifying Refinancings etc.).</p>	<p>Risk 1: the Academy could block the Council from giving its consent to the Contractor as required under the Project Agreement, thereby causing issues between the Council and the Contractor (and potentially causing the Council to be in breach of its obligations).</p>	<p>The Council should seek to agree new draft wording within the School Agreement.</p> <p>The advice from our financial advisors, based on their commercial experience, is that consent from the Academy should apply only to matters that are material to the Academy.</p> <p>Furthermore, Academies do not have to follow the national curriculum and have the ability to change the length of school terms and the school day. This would constitute a variation which would need to be priced by the contractor and cost liability agreed before implementing. It is therefore recommended that where necessary the Academy are part of the variation process and consent to any cost liability that they have enacted.</p>
13	<p>TUPE</p> <p>The Council has certain contractual obligations that it owes to the Project Company in relation to TUPE and the transfer of employees from the Contractor on expiry or termination of the Project Agreement. TUPE will automatically apply by operation of law and the parties are obliged to co-operate and consult with the relevant employees as required under TUPE (clause 25, School Agreement).</p>	<p>Risk 1: the Academy fails to undertake its TUPE obligations in respect of employees who will transfer to the Academy from Project Co at the expiry or termination of the Project Agreement, which crystallises a liability for the Council.</p>	<p>No further mitigations other than to accept the risk.</p> <p>The schools are joining existing Tameside School Academy Trust who have complied with TUPE regulations in early Academy conversion so the perceived risk is low.</p>

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14	<p>General assistance etc. under the Project Agreement</p> <p>The Council has general assistance, co-operation and mitigation obligations under the Project Agreement, which the Academy may be better placed than the Council in certain circumstances to provide post-academisation.</p>	<p>Risk 1: the Council is not able to perform those obligations and there is no agreement between the Council and the Academy which requires the Academy to provide general assistance, co-operation etc. This could lead to the Council being in breach of the Project Agreement.</p>	<p>No further mitigations other than to accept the risk</p>
15	<p>Refinancing gains</p> <p>Refinancing gains are shared between the Council and the Project Company in accordance with the Project Agreement.</p> <p>Any proposed changes to the Project Agreement which materially affect the Academy (and/or increase the Academy's costs) must be notified by the Council to the Academy and the DfE, and the Council is required to have due regard to the representations of Academy before concluding the changes (which could potentially cause delays to refinancings).</p>	<p>N/A</p>	<p>At this stage, it appears unlikely that there will be further refinancing gains from the schools who are proposing to academies.</p> <p>It is therefore considered to be an acceptable risk and no mitigations are proposed.</p>
16	<p>Utilities</p> <p>Under both the 2002 Project Agreement and 2009 Project Agreement, the Council pays for the cost of utilities as part of the unitary charge.</p> <p>Points to note in relation to utilities are:</p> <p>(a) the cost of telecoms is covered by the unitary charge as a pass through cost under the 2009 Project Agreement (whereas the payment mechanism in the 2002 Project Agreement is silent in relation to telecoms);</p> <p>(b) under the 2002 Project Agreement, the Contractor is fully responsible for any increases in the costs of</p>	<p>Risk 1: the standard form drafting (clause 12.5, School Agreement) is unclear since it refers to "remaining utilities" which <i>probably</i> means those utilities not covered by the unitary charge. The drafting does not expressly refer to those utilities which are not covered by the unitary charge (e.g. telecoms, where relevant under the 2002 Project Agreement). Therefore, this could put the Council in a position of bearing the risk of the cost of some utilities not paid for via the unitary charge.</p>	<p>Both the financial and legal advisors agree that seeking an amendment to the School Agreement to expressly state which other utilities are used by the schools to be academised, that are not paid for under the unitary charge (since reducing ambiguity should reduce the scope for disputes), is the preferable option.</p> <p>Any drafting should flow down any cost liability the Council has under the Project Agreement to the Academy. Referring to the pain/gain mechanism in the contract to incentivise energy efficiency and energy management, the Academy should be back-to-back with the Council's position. This is especially the</p>

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	<p>gas, electricity, water or sewerage services;</p> <p>(c) under the 2002 Project Agreement, if the actual cost of gas, electricity, water and sewerage services combined falls below the agreed anticipated cost, then the saving shall be shared. The Council shall receive 90% of this saving and the Contractor shall receive 10% of this saving (in each case by way of an adjustment to the unitary charge);</p> <p>(d) under the 2009 Project Agreement, if the actual cost of utilities provided by the Contractor is more than 10% of the agreed target, then the Council pays for the amount over the 10% (by way of an adjustment to the unitary charge) with the Contractor taking the risk of the amount up to and including 10%;</p> <p>(e) under the 2009 Project Agreement, if the actual cost of utilities provided by the Contractor is more than 10% lower than the agreed target, the Contractor pays the Council the amount below this level (by way of an adjustment to the unitary charge) with the Contractor retaining the benefit of any saving up to 10% below the target.</p> <p>The Academy should be responsible for costs of all utilities used post-academisation that are not paid for through the Unitary Charge.</p>		<p>case as we anticipate real savings from energy efficiency upgrades which should go back to the entity responsible for the payments.</p>
17	<p>Free school meals / catering</p> <p>The cost of free school meals should be passed to the</p>	N/A	Agreed

#	Key issue and background	Risk issues	Proposed Mitigations
	<p>Academy post-academisation since it receives central government funding for this. Clause 12A.1 of the School Agreement addresses this.</p>		
18	<p>Council's indemnities to the Academy (Academy's Project Document Losses)</p> <p>The standard form School Agreement includes indemnities from the Council to the Academy for acts or omissions of the Contractor. This includes an indemnity for the Academy's Project Document Losses where the Council was entitled to recover those losses but failed to perform its obligations under the School Agreement. "Project Document Losses" broadly means losses, liabilities, costs etc. suffered or incurred by the Academy arising from a breach by the Contractor or Contractor Related Party of the Project Agreement or any other liability attributable to the Contractor or a Contractor Related Party under the Project Agreement or the negligence or wilful misconduct of the Contractor or a Contractor Related Party.</p>	<p>Risk 1: the Council is at risk of being liable for the Academy's Project Document Losses (even where the non-performance of the Council of its obligations under the School Agreement has been caused by the Academy).</p>	<p>It would not be advisable for the council to accept the standard form drafting as this would mean that the council may be liable for the Academy's Project Document Losses, even where this liability arises as a result of the Academy's acts/omissions which would clearly leave the council vulnerable.</p> <p>It would be preferable for the council to seek to agree to amend clause by carving out any non-performance or failure by the Council which was caused by the Academy or a party related to the Academy.</p>
19	<p>Council's indemnities to the Academy (Academy's Direct Losses and Indirect Losses)</p> <p>The standard form School Agreement includes indemnities from the Council to the Academy for acts or omissions of the Council or parties related to the Council.</p>	<p>Risk 1: the Council could be responsible for indemnifying the Academy for Direct Losses and Indirect Losses (and in both cases, liability is uncapped).</p>	<p>The council could accept this standard position which would mean accepting the risk that it be liable for the Academy's Indirect Losses as well as Direct Losses.</p> <p>However it would be advisable to seek an amendment to the agreement to limit the Council's indemnity to Direct Losses only.</p>
20	<p>Academy's indemnities to the Council</p> <p>Under the standard form School Agreement, there is no reciprocal indemnity from the</p>	<p>Risk 1: without an appropriate indemnity, the Council may not have recourse to the Academy</p>	<p>As with the above clause the council could accept the standard wording but it would be advisable to seek to agree an indemnity from the</p>

#	Key issue and background	Risk issues	Proposed Mitigations
	Academy to the Council indemnifying the Council for losses suffered as a result of the Academy's acts or omissions.	for losses it has caused the Council to suffer.	Academy to the Council similar to the indemnity from the Council to the Academy. This should not be contentious as it is mirror the indemnity from the Council to the Academy and it is understood that this has been agreed in other academisation.
21	Business rates – 2002 Project Agreement The Council is required to pay business rates under clause 3.2 of the Manchester City Council Lease. Post-academisation, the Academy should be liable for this.	N/A	This clause is now out of date. There has been a change in arrangements from April 2022/23, whereby DfE will make all payments for NNDR for all schools and Academies directly. Payments will be made to the appropriate Local Authority rather than funding being provided to individual schools or Academies, to make payments themselves.

4. Other Issues

- 4.1 In a speech to the Confederation of School Trusts on 28 April 2021, the Education Secretary outlined the Government's vision for the Education System. He stated:

Today over 50 per cent of pupils in state-funded education study in academies. But we want to go further because strong multi academy trusts are the best structure to enable schools and teachers to deliver consistently good outcomes for all their pupils.

The government's vision is for every school to be part of a family of schools in a strong multi academy trust.

- 4.2 The Conservative Government has a long stated ambition for all schools to be academies. This speech does not therefore mark a change in Government policy rather it makes clear that this objective will once again be the focus of government policy. We should expect a significant increase in the number of academies schools throughout the term of this Parliament. In Tameside this will undoubtedly mean that more PFI built schools will academise. We are not able to prevent the academisation of PFI built schools, however we must mitigate the risk to the Council and ensure academisation brings benefits to all Tameside learners.
- 4.3 Tameside Council has a clear schools' strategy, agreed by Executive Cabinet in August 2018. This strategy asserts that the Council must have a clear voice in determining the future of all Tameside's schools and must be concerned with the long-term sustainability and viability of all its schools.
- 4.4 Our strategy makes clear that partnerships between schools are vital to their success. They increase the sustainability of schools financially and provide a vehicle to share the highest quality practice and maximise the impact of outstanding leaders.

- 4.5 We are well placed to manage the impact of the growth of academy schools through our Schools Strategy.

5. CONCLUSION

- 5.1 As previously outlined in the legal comments to the paper agreed at Executive Cabinet on 29 July 2020, *“A number of residual risks remain with the Council in its liability to pay the PFI provider, its reliance on the continued income in the form of PFI credits, the DSG regulations allowing the top slice and collection of the academy’s contribution. This has not been a problem with those PFI schools that have converted elsewhere, but some residual risk remains. The likelihood of these materialising are low”*.
- 5.2 The due diligence work now undertaken and explained above makes how it is proposed we mitigate these residual risks. However, whilst they are mitigated they are not removed. It is therefore a decision for members about whether the benefits that academisation offers to the delivery of our schools strategy outweighs these residual risks.
- 5.3 Finally, members should note as outlined in section 4.2 above that the direction of Government policy means that we are not able, in the long term, to prevent the academisation of PFI built schools.

6. RECOMMENDATIONS

- 6.1 As set out at the front of the report.