

## EXECUTIVE DECISION NOTICE

<b>SERVICE AREA:</b>	CHILDREN'S SERVICES
<b>SUBJECT MATTER:</b>	<b>REASONABLE ENDEAVOURS TO SECURE PROVISION FOR CHILDREN WITH EHCPS</b>
<b>DECISION:</b>	<p>To consider a report received by the Council's Covid-19 Executive Board and the executive decision made by the Executive Member and Chair of the Education Attainment Board. That the current local position as a result of the impact of the Covid-19 necessitates the Council using its reasonable endeavours to secure special education provision specified in Education Health and Care Plans in accordance with the Notice issued by the Secretary of State for Education on 28 April 2020 on the following basis:</p> <ol style="list-style-type: none"> <li>1. The Council will continue to work with educational settings, the children and young people and parents or carers to determine whether children and young people would be able to have their needs met at home, and be safer there than attending an educational setting.</li> <li>2. As part of the on-going assessment of the best way to deliver provision outlined in Education Health and Care Plans the attached document (<b>Appendix 1</b>) will be used.</li> <li>3. It is noted that monitoring of the local position and individual plans will be an on-going process.</li> <li>4. In addition the local position and delivery of plans will be subject to a further review in 3 months' time or whenever the Secretary of State for Education's Notice expires, whichever is the sooner.</li> </ol>
<b>DECISION TAKER(S):</b>	Councillor Leanne Feeley
<b>DESIGNATION OF DECISION TAKER (S):</b>	Executive Member – Lifelong Learning, Equalities, Culture and Heritage
<b>DATE OF DECISION:</b>	3 June 2020
<b>REASON FOR DECISION:</b>	A decision is required, in order to establish the Tameside process to ensure that provision set out in Education Health and Care plans continue to be delivered during covid-19 lockdown and throughout the phased school re-opening in accordance with the council's statutory duties and accordance with the provisions in the Coronavirus Act 2020 and related government notices and guidance.
<b>ALTERNATIVE OPTIONS REJECTED (if any):</b>	<p>Option One - No process is put in place</p> <p>Option Two - Every Plan (1600+) is formally reassessed and a new plan issued.</p> <p>Neither is considered in the circumstances to be expedient, proportionate and reasonable.</p>

<p><b>CONSULTEES:</b></p>	<p>Various colleagues from the Children's Services and Education Management Teams, Dr Lawson - Consultant Paediatrician, Community Child Health &amp; Designated Medical Officer for SEND, Kristy Nuttall - CYP Individual Commissioning Manager</p> <p>NHS Tameside and Glossop CCG, Maggie Kirkup - Service Unit Manager, Child Protection and Children in Need,</p> <p>Children's Services, Karen Kromilikie - Pathway Lead, Children's Partnership Services</p>
<p><b>FINANCIAL IMPLICATIONS:</b> <b>(Authorised by Section 151 Officer)</b></p>	<p>The DfE Covid-19 guidance on funding pupils with high needs, states that local authorities will continue to receive their high needs budgets, and they should continue to pay top-up and other high needs funding, so that the employment and payment of staff supporting children and young people with special educational needs and disabilities (SEND), and those requiring alternative provision, can continue.</p> <p>If the assessment identifies an alternative, than the provision currently commissioned, this may result in additional costs to the authority. This cannot be quantified at this stage. If any alternative provision needs to be made every effort should be made to keep costs to a minimum, the only budget to pay for these costs are the DSG High Needs Budget or Covid-19 Government funding. The DSG budget is anticipated to overspend in the region of £5m dependant on the growth in demand, and Covid-19 funding of £13.9m from Government which is currently anticipated to be £28.6m too little to cover the expected loss of income and increased demand for services costing £42.5m.</p>
<p><b>LEGAL IMPLICATIONS:</b> <b>(Authorised by Borough Solicitor)</b></p>	<p>On the 28 April 2020 the Secretary of State for Education issued a Notice under the powers of the Coronavirus Act 2020 to modify Section 42 of the Children's and Families Act 2014 so that Local Authorities will be deemed to have discharged their duty to secure special educational provisions as specified in an Education, Health and Care Plan if it has used its 'reasonable endeavours'. The Notice is currently due to expire on 30 May 2020 but the expectation is that it will be extended.</p> <p>'Reasonable endeavours' remain a challenging duty, albeit a less stringent duty to comply with. In addition the Notice does not actually define what 'reasonable endeavours' and so could be open for interpretation especially if the Council's approach is challenged. One often used definition is what a prudent person would do balancing all of the relevant factors which would be a suitable test to use (Wednesbury Principle).</p> <p>The Notice explained that the reasons for the modification to reasonable endeavours is proportionate as the Council will be assessing the situation in terms of the delivery of services and also the needs of the children and young people and that the use of reasonable alternatives for delivery have been considered, i.e. what a prudent man would do.</p> <p>Therefore in order to be content that the Council is fulfilling its statutory duties and minimising the risk of complaints and</p>

potentially litigation it needs to be content that the local situation is such that the Council can only reach the standard of using its reasonable endeavours based on the evidence provided in this report. Whilst not required to be a treatise they must clearly state what was taken into account and the justification of any decision being basic principles of public law.

That evidence should follow the reasoning in the Notice, which stated that the following are relevant factors:



- Reduced staff resources due to the coronavirus outbreak or staff having been diverted to emergency planning.
- Whether children and young people with EHC plans although classed as 'vulnerable' are now isolating at home rather than attending the schools, which have remained open for vulnerable children and young people.
- The impact of social distancing on delivery.
- Consideration of any alternative provisions for example, whether all the provision specified in EHC plans could be delivered remotely.

Once the Council is content that it is only able to operate at a reasonable endeavours level it must consider the needs of all children and young people with an EHC plan and to carry out a risk assessment. Even though this report suggests that the educational settings are to lead on the risk assessment the Council needs to be cognisant that the statutory duty and therefore any liability lies with it.

The government is asking Councils to work with educational settings and parents or carers to determine whether children and young people would be able to have their needs met at home, and be safer there than attending an educational setting.

This is especially important from 1 June as educational settings and local authorities are expected to continue to offer places to all children and young people with EHC plans whose risk assessment determined that was the right course of action.

Therefore in order to ensure the best provisions for Tameside's children and young people, and to limit the likelihood of complaints and ultimately litigation the Council must ensure that risk assessments in relation to all with a EHC plan are undertaken and kept up to date up-to-date to reflect any changes in circumstances, including changes to coronavirus alert levels and other relevant factors. The use of the risk assessment appended to this report will assist in this process. Contemporaneous records of any decisions are paramount as the courts will consider the circumstances at the time of the decision and not with hindsight vision unless there are no such records to advise them what was in the decision makers mind.

<b>CONFLICT OF INTEREST:</b>	None known.
<b>DISPENSATION GRANTED BY STANDARDS COMMITTEE ATTACHED:</b>	n/a
<b>ACCESS TO INFORMATION:</b>	<p>Background papers relating to this report can be inspected by contacting:</p> <p>Charlotte Finch, Head of Service, SEND</p> <p> Telephone: 07854679971</p> <p> E-mail: <a href="mailto:charlotte.finch@tameside.gov.uk">charlotte.finch@tameside.gov.uk</a></p>

## EXECUTIVE DECISION REPORT

<b>SERVICE AREA:</b>	CHILDREN'S SERVICES
<b>SUBJECT MATTER:</b>	<b>REASONABLE ENDEAVOURS TO SECURE PROVISION FOR CHILDREN WITH EHCPS</b>
<b>DATE OF DECISION:</b>	3 June 2020
<b>DECISION TAKER(S):</b>	Councillor Leanne Feeley
<b>DESIGNATION OF DECISION TAKER (S):</b>	Councillor Leanne Feeley, Executive Member Lifelong Learning and Skills
<b>REPORTING OFFICER:</b>	Tim Bowman, Assistant Director Education
<b>REPORT SUMMARY:</b>	<p>This report sets out the proposed process for Tameside to ensure that provision set out in Education Health and Care Plan is being delivered during the Covid-19 lockdown and throughout the phased school re-opening. That a school-led process to determine what provision is to be delivered for each child with an EHC Plan is agreed subject to the Local Authority providing:</p> <p>(a) a template to facilitate this as set out at <b>Appendix 1</b>;  (b) guidance for completion; and  (c) individual officer support to all settings for the duration of the task.</p>
<b>RECOMMENDATION:</b>	<p>It is agreed that the current local position as a result of the impact of Covid-19 necessitates the Council using its reasonable endeavours to secure special education provision specified in Education Health and Care Plans in accordance with the Notice issued by the Secretary of State for Education on 28 April 2020 on the following basis:</p> <ol style="list-style-type: none"> <li>1. The Council will continue to work with educational settings, the children and young people and parents or carers to determine whether children and young people would be able to have their needs met at home, and be safer there than attending an educational setting.</li> <li>2. As part of the on-going assessment of the best way to deliver provision outlined in Education Health and Care Plans the attached document (<b>Appendix 1</b>) will be used.</li> <li>3. It is noted that monitoring of the local position and individual plans will be an on-going process.</li> <li>4. In addition the local position and delivery of plans will be subject to a further review in 3 months' time or whenever the Secretary of State for Education's Notice expires, whichever is the sooner.</li> </ol>
<b>JUSTIFICATION FOR THE DECISION:</b>	<p>The primary reason is to ensure each plan is reviewed and that young people and families are engaged in this process.</p> <p>TMBC and its statutory partners do not have capacity to reassess all plans and the administrative burden of this would</p>

	<p>impact on support for children. In addition, it is widely acknowledged that parents would not welcome a wholesale reassessment exercise. An EHCP outlines a long term plan to meet a child's individual needs and follows a comprehensive multi-agency assessment.</p> <p>Every young person's plan should be individually considered and this approach ensures that this can be done.</p>
<p><b>ALTERNATIVE OPTIONS REJECTED (if any):</b></p>	<p>Option One No process is put in place</p> <p>Option Two Every Plan (1600+) is formally reassessed and a new plan issued.</p>
<p><b>CONSULTEES:</b></p>	<p>Various colleagues from the Children's Services and Education Management Teams, Dr Lawson - Consultant Paediatrician, Community Child Health &amp; Designated Medical Officer for SEND, Kristy Nuttall - CYP Individual Commissioning Manager</p> <p>NHS Tameside and Glossop CCG, Maggie Kirkup - Service Unit Manager, Child Protection and Children in Need,</p> <p>Children's Services, Karen Kromilikie - Pathway Lead, Children's Partnership Services</p>
<p><b>FINANCIAL IMPLICATIONS:</b> <b>(Authorised by Section 151 Officer)</b></p>	<p>The DfE Covid-19 guidance on funding pupils with high needs, states that local authorities will continue to receive their high needs budgets, and they should continue to pay top-up and other high needs funding, so that the employment and payment of staff supporting children and young people with special educational needs and disabilities (SEND), and those requiring alternative provision, can continue.</p> <p>If the assessment identifies an alternative, than the provision currently commissioned, this may result in additional costs to the authority. This cannot be quantified at this stage. If any alternative provision needs to be made every effort should be made to keep costs to a minimum, the only budget to pay for these costs are the DSG High Needs Budget or Covid-19 Government funding. The DSG budget is anticipated to overspend in the region of £5m dependant on the growth in demand, and Covid19 funding of £13.9m from Government which is currently anticipated to be £28.6m too little to cover the expected loss of income and increased demand for services costing £42.5m.</p>

**LEGAL IMPLICATIONS:  
(Authorised by Borough  
Solicitor)**

On the 28 April 2020 the Secretary of State for Education issued a Notice under the powers of the Coronavirus Act 2020 to modify Section 42 of the Children's and Families Act 2014 so that Local Authorities will be deemed to have discharged their duty to secure special educational provisions as specified in an Education, Health and Care Plan if it has used its 'reasonable endeavours'. The Notice is currently due to expire on 30 May 2020 but the expectation is that it will be extended.

'Reasonable endeavours' remain a challenging duty, albeit a less stringent duty to comply with. In addition the Notice does not actually define what 'reasonable endeavours' and so could be open for interpretation especially if the Council's approach is challenged. One often used definition is what a prudent person would do balancing all of the relevant factors which would be a suitable test to use (Wednesbury Principle).

The Notice explained that the reasons for the modification to reasonable endeavours is proportionate as the Council will be assessing the situation in terms of the delivery of services and also the needs of the children and young people and that the use of reasonable alternatives for delivery have been considered, i.e. what a prudent man would do.



Therefore in order to be content that the Council is fulfilling its statutory duties and minimising the risk of complaints and potentially litigation it needs to be content that the local situation is such that the Council can only reach the standard of using its reasonable endeavours based on the evidence provided in this report.

That evidence should follow the reasoning in the Notice, which stated that the following are relevant factors:

- Reduced staff resources due to the coronavirus outbreak or staff having been diverted to emergency planning.
- Whether children and young people with EHC plans although classed as 'vulnerable' are now isolating at home rather than attending the schools, which have remained open for vulnerable children and young people.
- The impact of social distancing on delivery.
- Consideration of any alternative provisions for example, whether all the provision specified in EHC plans could be delivered remotely.

Once the Council is content that it is only able to operate at a reasonable endeavours level it must consider the needs of all children and young people with an EHC plan and to carry out a risk assessment. Even though this report suggests that the educational settings are to lead on the risk assessment the Council needs to be cognisant that the statutory duty and therefore any liability lies with it.

The Government is asking Councils to work with educational settings and parents or carers to determine whether children and young people would be able to have their needs met at

	<p>home, and be safer there than attending an educational setting.</p> <p>This is especially important from 1 June as educational settings and local authorities are expected to continue to offer places to all children and young people with EHC plans whose risk assessment determined that was the right course of action.</p> <p>Therefore in order to ensure the best provisions for Tameside's children and young people, and to limit the likelihood of complaints and ultimately litigation the Council must ensure that risk assessments in relation to all with a EHC plan are undertaken and kept up-to-date to reflect any changes in circumstances, including changes to coronavirus alert levels and other relevant factors. The use of the risk assessment appended to this report will assist in this process. Contemporaneous records of any decisions are paramount as the Courts will consider the circumstances at the time of the decision and not with hindsight vision unless there are no such records to advise them what was in the decision makers mind.</p> <p>Whilst not required to be a treatise they must clearly state what was taken into account and the justification of any decision being basic principles of public law.</p>
<b>CONFLICT OF INTEREST:</b>	None
<b>DISPENSATION GRANTED BY STANDARDS COMMITTEE ATTACHED:</b>	N/A
<b>ACCESS TO INFORMATION:</b>	<p>Background papers relating to this report can be inspected by contacting:</p> <p>Charlotte Finch, Head of Service, SEND</p> <p> Telephone: 07854679971</p> <p> E-mail: <a href="mailto:charlotte.finch@tameside.gov.uk">charlotte.finch@tameside.gov.uk</a></p>



1. **REASONABLE ENDEAVOURS TO SECURE PROVISION FOR CHILDREN WITH EHCPs**
- 1.1 The coronavirus (COVID-19) outbreak has put significant extra pressure on local authorities and health commissioning bodies to secure, or arrange, in full the provision set out in EHC plans.
- 1.2 Temporary legislation, drafted in response to the current situation, does not absolve Local Authorities or CCGs of their duty to secure or arrange provision for children with Education Health and Care Plans. Rather the guidance sets out an expectation that LAs and CCGs must use “reasonable endeavors” to secure or arrange the provision. This is on the basis that the Local Authorities and CCGs at a local level will be dealing with:
  - Reduced staffing.
  - Children and young peoples with plans being at home and not in school.
  - The effect of social distancing on delivery.
  - The lack of effective alternatives.
- 1.3 The impact of Covid-19 in Tameside has extended across all these issues. In particular although all Tameside schools have remained open throughout the “closure” period, attendance has been low. In all schools it has fluctuated between 2 and 3%. For children with an EHCP it is currently 6%. Furthermore the risk assessment process for children in Tameside schools has only identified just over 100 children considered safer at school. Therefore the Council is only able to operate at a reasonable endeavours level.
- 1.4 The Council must consider the needs of all children and young people with an EHC plan. A further piece of work is now required, demonstrating how the Local Authority and CCG are using “reasonable endeavours to secure or arrange provision for children with EHCPs. Whilst it is recommended that educational settings are to lead on this further assessment (in partnership with associated key services), the Council needs to be cognisant that the statutory duty, and therefore any liability lies with it.
- 1.5 In addition the local situation is being kept under constant review especially as schools start to reopen.
- 1.6 Local authorities and health bodies must consider what they can reasonably provide in the circumstances during the notice period for each child/Young Person with an EHCP. For some, this will mean that the provision specified in their plan can continue to be delivered; but for others the provision may need temporarily to be different to that which is set out in their EHC plan. Whilst it is anticipated that the number of children with an EHCP attending school will increase as part of the wider opening of schools. The exact number of children who will require changes to the delivery of the provision outlined in their plan can only be known following a review of their current risk and assessment alongside the process outlined in **Appendix 1** to this report.
- 1.7 As part of the ongoing review local authorities, health services and other relevant bodies should communicate regularly with the families of those children and young people with EHC plans, or who are being assessed or applying for assessment. Where the temporary covid related changes affect what families’ experience, they need clarity as to:
  - what provision will be secured for each child and young person and the reason for any difference from what is specified in the EHC plan
  - when decisions will be made as part of the various processes relating to EHC needs assessments and plans
- 1.8 Due to these temporary changes and the expectation that schools, LAs and CCGs agree, deliver and record provision to meet needs specified in EHCPs at this time, it is necessary

to establish a robust process to achieve this. We have been given a 6 week timeframe in which to complete this piece of work.

- 1.9 In deciding what provision must be secured or arranged in discharge of its duty, the local authority and health commissioning body should consider:
- the specific local circumstances (such as workforce capacity and skills and that of others whose input is needed to undertake an EHC needs assessments and plans processes, temporary closures of education settings, guidance on measures to reduce the transmission of coronavirus (COVID-19) and other demands of the outbreak)
  - the needs of and specific circumstances affecting the child or young person
  - the views of the child, young person and their parents/carers over what provision might be appropriate
- 1.10 The local authority or health commissioning body should keep a record of the provision it decides it must secure or arrange, and keep under review whether the provision remains compliant with the reasonable endeavours duty, recognising that the needs of a child or young person may change over time (particularly in the current circumstances) as may the availability of key staff or provision
- 1.11 It is proposed that a school-led process (outlined in **Appendix 1** to this report) to determine what provision is to be delivered for each child with an EHC Plan and to consider if that is reasonable. In addition to robust consultation with key partners, it is crucial that we ensure parents / carers and where possible children / young people have been involved in the decision-making process and fully concur with what has been agreed. These measures will therefore be completed as a partnership between schools, families, the Local Authority, and CCG to ensure we remain faithful to the spirit of co-production, enshrined in the Children and Families Act 2014.
- 1.12 Schools will lead this work, completing the template at **Appendix 1** for each child with an EHCP. The Local Authority will provide guidance for completion and will offer individual officer support to all settings for the duration of the task.
- 1.13 Whilst this is a significant undertaking, particularly for specialist settings where all children will require completion of a provision template, the 6 week time frame should be sufficient to ensure this work can be fully completed. Elements of the template will be completed in cooperation and discussion with key partners from health and social care. Tameside SEND service will provide schools with a named officer until all templates have been completed, and to assist with reviewing arrangements. The officer will support settings in whatever capacity required to alleviate pressure and add resource where necessary.
- 1.14 The template has been designed in accordance with the Government framework acknowledging that what constitutes reasonable endeavours will vary according to the needs of each child and young person and the specific local context. In deciding what provision would be required there should be a focus on:
- the provision that the EHC plan describes as needed by the individual child or young person.
  - the availability of those who should usually deliver what is needed.
  - what can be done to deliver provision differently.

## **2. RECOMMENDATIONS**

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