



Meeting of the

# CABINET

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Tuesday, 4 October 2016 at 2.00 p.m.

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## TABLED PAPERS

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If you require any further information relating to this meeting, would like to request a large print, Braille or audio version of this document, or would like to discuss access arrangements or any other special requirements, please contact:

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<p><b>Cabinet</b></p> <p>Date 4th October 2016</p>	
<p><b>Report of:</b> Debbie Jones, Corporate Director (Children’s Services) and Melanie Clay, Corporate Director (Law, Probity and Governance).</p>	<p><b>Classification:</b> Unrestricted</p>
<p>Academy Conversions: Mulberry School for Girls and Ian Mikardo High School</p>	

<b>Lead Member</b>	<b>Cllr Rachael Saunders, Deputy Mayor and Cabinet Member for Education and Children’s Services</b>
<b>Originating Officer(s)</b>	Kate Bingham, Service Head, Children’s and Adults Resources Peter Stone, Academy Conversion Project Manager
<b>Wards affected</b>	All
<b>Key Decision?</b>	Yes
<b>Community Plan Theme</b>	A great place to live A fair and prosperous community A safe and cohesive community A healthy and supportive community

## Executive Summary

This report asks for Mayoral approval for completion of lease arrangements and commercial transfer, related to the academy conversions of Mulberry School for Girls and Ian Mikardo High School.

Both schools have indicated their wish to convert to academies on 1 November 2016.

## Recommendations:

The Mayor in Cabinet is recommended to:

1. Note that the land disposal for both schools is subject to the Commissioners’ consent;
2. Approve that the appropriate lease arrangements should be entered into for both schools;
3. Approve the Council to enter into commercial and staffing transfers for both schools;
4. Approve the Council to enter into all other necessary documentation to ensure the liabilities under the PFI arrangements for Mulberry School for Girls are transferred to the Academy;
5. Authorise the Corporate Director Children’s Services, in conjunction with both the Corporate Director Law, Probity and Governance and the

- Corporate Director, Resources to enter into and undertake any remaining issues associated with the conversion of the two schools;
6. Authorise the Corporate Director Law, Probity and Governance to execute all documentation required to implement those decisions at 2 to 5;
  7. Authorise the Corporate Director, Resources (the S151 Officer) to execute the Local Government (Contract) Act 1997 Certificate required to implement the decisions at 2 to 5.

## **1. REASONS FOR THE RECOMMENDATIONS**

- 1.1 Mulberry School for Girls is a maintained community school and received an academy order on 17 March 2016.
- 1.2 Ian Mikardo School is a maintained community special school and received an academy order on 14 July 2016.
- 1.3 Both schools have indicated their wish to convert to academies on 01 November 2016.

## **2. ALTERNATIVE OPTIONS**

- 2.1 There is no alternative to the planned course of action. Once applications from Governing Bodies have been approved by the Secretary of State, the expectation is that the Council will work with schools on all transfer matters.

## **3. ACADEMY CONVERSION**

### *Background*

- 3.1 Conversion usually involves two key transactions for the Council, these being the land transfer and commercial transfer. The commercial transfer deals with the transfer of existing contracts, staff and associated assets and is affected by a Commercial Transfer Agreement (“CTA”). The Council is the employer of staff at both schools in this case and staff consultation will be carried out with the support of the Council’s HR team. Execution of the CTA is the final severance between the school and the Council.
- 3.2 Both schools currently planning to convert are community schools and, as such, the land is owned by the Council. The expectation therefore is that the Council will transfer the land to the Academy Trusts. The Guidance from the Department of Education is that this transfer is to be by way of a 125 year lease for a peppercorn rent. Failure to transfer or to delay transferring can lead to intervention by the DfE under the Academies Act 2010. Each lease seeks to protect the Council’s interests in the following ways:
  - the stipulated use in the lease is for education purposes and community, fundraising and recreational purposes ancillary to the provision of educational services

- not to assign/transfer the lease to anybody other than a successor charitable or public body approved by the Secretary of State
- not to take out any charge or loan on the schools without prior approval by the Council
- not to underlet the whole of the school or underlet part for a term in excess of seven years
- the lease will automatically end upon termination of the funding agreement between the school and the Department for Education (DfE).

3.3 As these conversions will involve “disposal” of land, the Commissioners’ consent is required. The Commissioners have confirmed that they are minded to agree, subject to Cabinet approval of the recommendations detailed above on October 4<sup>th</sup> 2016.

*Conversion process – property implications*

3.4 Mulberry School for Girls is a maintained community school. As such, the Council is the employer of all staff employed by the school and owns the land and buildings from which the school operates.

3.5 Mulberry School for Girls is also subject to a single school PFI contract and benefits from ongoing life cycle investment through the contract. Therefore the lease granted to the academy must be made subject to the rights of access granted to the PFI contractor via a lease for the contract term. The Academy’s lease will be subject to the existing sub-lease to LBTH.

3.6 The Mulberry School PFI contract is a contract for Mulberry as a single school. The Council, the DfE and the school will enter into a set of agreements to retain the existing arrangements until the end of the PFI term (2029). The agreements require the school to continue to pay the agreed contributions to the Council for the contract payments to be made. A deed of variation in the contract between the Council and the PFI contractor will also be required. The contractor is D4E (Mulberry) Ltd. The agreement with the school will preserve the existing arrangements for review and adjustment of charges.

3.7 Mulberry School’s facilities are used outside of school hours largely managed as part of the PFI contract so these arrangements will continue.

3.8 The Council has leased a plot of land for 30 years to the Richard Street Education Trust to build the Mulberry & Bigland Green Centre which provides some school teaching accommodation (principally a theatre) as well as community use space. The land includes a small area of Mulberry School land and a larger area of Bigland Green School land. The school funded the cost of building the centre and the Council contributed to the build costs to provide a children’s centre space which is occupied by way of a sub-lease. No rent is paid by the school trust in recognition of the services provided. However, the children’s centre pays a service charge in respect of running costs. These leases will be unaffected by the academy conversion.

- 3.9 For Ian Mikardo High School, the Council is required to enter into a long (125 year) lease with the academy trust in the standard DfE form and at a peppercorn rent. There are no special property issues which need to be taken into account.

*Conversion process – commercial transfer*

- 3.10 In general, the Commercial Transfer Agreement (CTA) is intended to ensure that all information on the transferring staff is recorded and transferred to the academy trust so that the appropriate arrangements for payment of salaries, pension contributions, etc. can be made. The CTA also includes details of any assets, liabilities and contracts that will transfer to the academy trust and those that will remain with the Council.
- 3.11 Unlike the conversion of St. Paul's Way Trust School, in these cases there **will** be transfer of staff, as the Council is the employer. Staff are entitled to transfer under their existing employment terms and conditions, under the Transfer of Undertakings Protection of Employment (TUPE) regulations. The newly formed trusts must inform the current employer (the Council) in writing, of any measures it envisages taking in relation to staff after transfer. For Mulberry School for Girls, this may affect up to 216 Council employees and for Ian Mikardo School, up to 28 employees.
- 3.12 The consultation will be led by the Council HR Schools' team, in conjunction with the schools.
- 3.13 As regards pensions, when a maintained school becomes an academy, they must continue to provide access to the Teachers' Pension Scheme (TPS) for teaching staff and remit contributions to the TPS. Support staff who transfer will simply continue their membership of the Local Government Pension Scheme (LGPS), as an academy is a scheme employer in the LGPS. On conversion, the school becomes a separate employer in the LGPS and a separate employer contribution rate will need to be calculated by the relevant LGPS fund.
- 3.14 Specific advice has been sought in relation to pensions liabilities and the recommended approach is to follow the same route as that taken in previous conversions, i.e. to agree fourteen year recovery period for the amount of deficit attributable to active transferring members and that attributable to deferred and pensioner members of the LBTH Local Government Pension Scheme to Mulberry School for Girls and Ian Mikardo High School.
- 3.15 Ultimately, the Pensions Committee must approve the factors which influence the employer contribution rate and a report will be presented to the Pensions Committee on 22 September. The report will also cover any potential future issues, such as pooling arrangements.
- 3.16 Both schools have a number of SLAs with the Council. It is likely that the schools will confirm their intention to carry on with these arrangements until

the end of the 2016-17 financial year, at which point they will be able to enter into new contracts with the Council like any other school.

#### *Conversion Process - Assets (not including land and buildings)*

- 3.17 An asset register is being completed and all “other” assets will be transferred to the respective academies.

#### *Conversion Process - Contracts*

- 3.18 All contracts and licences currently held by the schools are being confirmed, along with the schools’ intentions regarding the continuation of the contracts.
- 3.19 If the contracts are to cease, any remaining liabilities will be transferred via the CTA. All continuing contracts will be novated.

#### *PFI contract arrangements - Mulberry School for Girls School*

- 3.20 Mulberry School for Girls is subject to a PFI contract. The DfE has established arrangements for these circumstances whereby the school will remain part of the contract and new contractual arrangements between the school, the Council and the DfE are put in place to ensure that the existing PFI contract arrangements can continue. The PFI contract remains between the Council and the contractor. The new agreements for the academy school ensure that the Council will continue to receive the financial contributions from the school as it would have done without the conversion, and that there is no impact on the contractor or its funders.
- i. The School Agreement: this is between the Council and the Academy Trust. It sets out the school’s liability for the continuing financial contribution for the contract services and the school’s obligations relating to the contract.
  - ii. The Principal Agreement: this is between the DfE, the Council and the Academy Trust. It provides that the Council can call on the DfE should the academy fail in its obligations, including payments, in relation to the contract.
  - iii. Deed of Variation to the PFI contract: this is between the Council and the PFI contractor. It allows for the change of status of the school, requires the academy trust to be named on insurances and allows the contractor to retain access to the transferred land in order to provide the services. The Deed also includes (at Schedule 2) a Local Government (Contract) Act Certification, which certifies the vires (power) of the Council to enter into the contract.
- 3.21 These documents will remain in force until the expiry of the Mulberry School PFI contract in 2029.

## **4 CONTINUING RELATIONSHIP**

### *Admissions*

- 4.1 All academies are required to adopt clear and fair admission arrangements in line with admissions law and the School Admissions Code. When schools convert, they become admission authorities and therefore responsible for their own admission arrangements. This will involve periodic consultation, and regularly publishing their admission arrangements. Please see paragraph 4.3 below for separate arrangements regarding Special Schools.
- 4.2 The Council retains the responsibility for ensuring that all children and young people in the borough have a school place. Mulberry School has expressed their intention to adopt the admissions arrangements that the Council uses for its community schools, including the use of pupil ability banding at the point of entry in Year 7.
- 4.3 Ian Mikardo school is a Special School and therefore must convert “as is”. This means that they will not be able to alter their main characteristics during the course of the conversion process. In addition, the Council will continue to maintain its responsibility for admission processes and has published guidance which sets out the appropriate local protocols. Please see paragraph 4.4 below for more detail regarding special education needs.

### *Special Education Needs*

- 4.4 Local authorities retain responsibility for pupils with statements or Education, Health and Care (EHC) plans in academies on the same basis as for such pupils in maintained schools. The Council will continue to commission special places and they must:
- Ensure that academy pupils are appropriately assessed and have EHC plans as part of the entry criteria
  - Consider parents' representations for an academy to be named on an EHC plan and act reasonably in considering those representations
  - Fund any individually assigned SEN Top up resources
  - Monitor arrangements for SEN pupils in academies
  - Conduct reviews of the SEN statements or EHC plans of children in academies at least annually and each six months for children under five.
- 4.5 There is no specific guidance in respect of converting schools with special units and it is assumed that the guidance in relation to maintained special schools wishing to convert to academy status applies.



- 4.6 The guidance states that they will not be able to change their characteristics, including the number of places for which they are funded and the types of special educational needs they provide for, as part of the conversion process. The number of pupil places for which the academy will be funded will be based on the number of places for which the special school is funded currently. Likewise, the types of special educational needs the special academy will provide for will be based on the types of needs provided for currently by the special school.
- 4.7 Any future proposed change to their characteristics would have to be considered by the Education Funding Agency (EFA), with the final decision resting with the Secretary of State. Any special provision which is an academy wishing to change its designation must involve the Council in the consultation process that it leads.

### *Sixth Form*

- 4.8 Mulberry School has a very well established girls' sixth form and a strong tradition of progression to higher education and employment with training. The school has an inclusive curriculum for level 1, 2 and 3 student groups at 16-19 and with the planned University Technical College (UTC); this provision will become even stronger. Mulberry School has worked with a number of other schools in the borough in helping them develop their sixth forms. The school also takes a full part in borough events – such as conferences and professional development sessions – and is an active member of the head of sixths forum.

### *Exclusions*

- 4.9 The DfE statutory Guidance on Exclusion is equally applicable to Academies and Free Schools. Whilst Academies are not required to invite the Council Exclusions Officer to Governors' Pupil Discipline Committee hearings, parents can request the Council Exclusions Officer to attend the hearing. Schools often seek advice on the use of exclusions. Especially as much greater emphasis is now placed on avoiding indirect (or direct) discrimination against vulnerable groups of pupils. There can also be additional financial implications for the school, on top of any funding that would normally follow an excluded pupil.
- 4.10 All Tower Hamlets Secondary schools (together with the other partners) are part of the Behaviour and Attendance Partnership and have agreed on ten common principles that guide governing bodies in developing and reviewing the behaviour policies for their own schools. This is a statement of shared principles and promotes partnership working. Furthermore, the Tower Hamlets Secondary Schools Behaviour and Attendance Partnership involves secondary schools working collaboratively to address issues surrounding behaviour management, persistent truancy and alternative provision during exclusion. The Partnership operates a Fair Access Protocol (FAP) which seeks to ensure that all schools admit a fair share of pupils who have either been permanently excluded or are at risk of permanent exclusion through the

process of a managed move transfer. Schools seeking to arrange a managed move transfer for pupils at risk of exclusion do so in accordance with the locally agreed FAP arrangements.

### *Trading*

- 4.11 The Council will continue to offer a range of support services to academies and free schools on a traded basis. Academies are currently charged an additional 10% for services as there are additional administrative costs to the Council. It is proposed that any existing SLAs are honoured at current rates until the end of the academic year.

### *School Forum*

- 4.12 Under the School Forum Regulations 2012, the Council was required to secure representation from academies in proportion to the number of pupils. In July 2012, The LBTH School Forum agreed to increase the membership of the Schools Forum with one academy representative to comply with those Regulations.

### *Governance*

- 4.13 The Governing Body of an academy must currently have two parent governors although the White Paper, "*Educational Excellence Everywhere*", proposes that academy trusts will no longer be required to reserve places for elected parents on GBs.

### *Insurance*

- 4.14 Schools must ensure that adequate insurance cover has been arranged prior to conversion, to take effect from midnight at the date of conversion. The DfE has produced a guidance note on the issues arising from this and the way in which costs are reimbursed.

### *Landlord responsibilities*

- 4.15 Whilst there is a lease of the buildings and land for 125 years, the Council retains the responsibility for landlord functions under all academy leases. In general terms this is about ensuring the academy has adequate insurance, due regard to health and safety of staff and pupils, maintains the buildings in fit and proper state etc.

### *Policies*

- 4.16 Academies are required to have the following policies and other documents in place, by law.

Statutory policies required by education legislation:

- Charging and remissions policy
- School behaviour policy

- Sex education policy
- Special educational needs policy.

Statutory policies required by other legislation, which particularly impact on schools:

- Data protection
- Health and safety
- Accessibility Plan
- Central record of recruitment and vetting checks
- Complaints procedure statement
- Freedom of information
- Home-school agreement document
- Minutes of, and papers considered at, meetings of the governing body and its committee
- Premises management documents
- Equality information and objectives (public sector equality duty) statement for publication
- School information published on a website
- Register of pupils' admission to school
- Register of pupils' attendance
- Staff discipline, conduct and grievance (procedures for addressing).

Documents referenced in statutory guidance:

- Child protection policy and procedures
- Early Years Foundation Stage
- Statement of procedures for dealing with allegations of abuse against staff
- Supporting pupils with medical conditions.

## **5 COMMENTS OF THE CHIEF FINANCE OFFICER**

- 5.1 The school as an academy will receive funding from the Education Funding Agency on the basis of School Funding Reform, with the vast majority of their funding based on the same formula as for maintained schools. [The only differences being for those services for which funding has been de-delegated for maintained schools, with the agreement of the School Forum. The academies will also receive Education Services Grant equating to the amount per pupil that the Authority receives for pupils in maintained schools]. Each academy school will also receive grant funding to meet the additional VAT that they incur and to meet their insurance costs. A government grant of up to £25,000 is made available to each school to assist with the cost of conversion; the Council will need to consider what proportion of the grant the schools will be asked to contribute to fund the costs of conversion incurred by the Council as these are not funded by government grant.

- 5.2 In order to protect the Council, the appropriate financial arrangements have been made for assets and ensuring financial liability transfers with those assets, as per the Commercial Transfer Agreement. There are particular issues regarding the transfer of Mulberry School For Girls because of the School's PFI contract, but the regulations are clear that the academy would continue to be part of the contract and would continue to make contributions on the same basis as maintained schools.

## **6 LEGAL COMMENTS**

- 6.1 The Academies Act 2010 ('**the 2010 Act**') introduced a fast track procedure for maintained schools wishing to transfer to academy status. The Act provides a procedure for the transfer of assets, land and buildings to the newly established academy. Section 5B(1) of the 2010 Act provides that where an Academy order has effect in respect of a school, the governing body of the school and the Council must take all reasonable steps to facilitate the conversion of the school into an Academy. Section 5B(2) of the 2010 Act provides that where the Secretary of State notifies the governing body or Council that the Secretary of State is minded to enter into Academy arrangements with a specified person then they are under a duty to take all reasonable steps to facilitate the making of Academy arrangements with that person. This therefore imposes a statutory duty on the Council.
- 6.2 Ian Mikardo school is a special school and on conversion to academy status, a special school will become a 'special academy'. Certain characteristics of the special school that existed prior to conversion will remain the same once it becomes a special academy. For example, the funding agreement sets out that the academy is established to make special education provision for pupils with special educational needs ('SEN') and that it will make this provision in certain categories. These categories will be the same categories of SEN designated to the school prior to conversion. This also means that the number of pupil places for which the academy will be funded is based on the number of places for which the special school is currently funded.
- 6.3 The conversion process for special schools is very similar to the process for mainstream schools. However, the Department for Education ('DfE') has prepared a suite of model documents which are specific to special schools. There is a specific application form and pages 10 to 13 of that form sets out Supporting Notes for the purposes of completing the form. Paragraph 4 of those notes specifically states: "Schools wishing to convert to academy status must convert "as is". This means that they will not be able to alter their main characteristics during the course of the conversion process. Please note that we will corroborate this information with the Council. If there is a discrepancy between the views of the school and the Council, your project lead will seek to understand the reasons for this and will work with both parties to agree a position before the application can be considered further."
- 6.4 The 2010 Act requires Academies to follow the same statutory framework for SEN as Council schools. Schools will receive funding for children with

statements of SENs / Education Health Care Plans ('EHP') in the same way, whether they are Academies or local authority schools. If children have statements/ EHCPs with an enhanced package of support, both types of school will get additional funding directly from the Council, again, in the same way. Where children have special needs, but do not have a statement/ EHCP, once again, Academies are required to have regard to the Code of Practice for SEN in exactly the same way as Council schools. This means that in both types of school, children will be supported according to the level of need and involvement of external agencies.

- 6.5 Where the school land is Council public land (as is the case here) then the DfE's expectation is that all land and facilities used wholly or mainly for the purpose of the converting school will transfer and be made available to the academy in accordance with the mechanisms set out in the guidance titled "Land Transfer Advice 2013". In that regard, the Council is to lease the land to the academy trust on a 125 year lease for a peppercorn rent. Under the Education Acts, local authorities require the consent of the Secretary of State to dispose of any interest in land. This includes where a school converts to academy status. Consent would normally involve application to the Secretary of State through the Education Funding Agency, but in the case of conversions, this need for consent is taken forward as part of agreeing the conversion, and the Department of Education ('DfE') does not require a distinct application.
- 6.6 The requirement for a 125 year lease is not contained in statute, but is the expectation of the DfE and the DfE provides model leases on its website and which can be used. There are also model land clauses preventing the academy trust from disposing of its leasehold interest in the public land and which will need to be included in the relevant academy's Funding Agreement.
- 6.7 The DfE expects local authorities and schools to take timely steps to ensure that such transfers are completed in time for conversion. However, in circumstances where the parties concerned cannot reach agreement and/ or in the DfE's view there are unacceptable delays to the process then the Secretary of State can exercise powers under Schedule 1 of the 2010 Act to either make a scheme compulsorily transferring school land, or a scheme or direction transferring any existing interest, rights, or liabilities.
- 6.8 The Direction issued by the Minister on 17th December 2014 requires the Council, until 31<sup>st</sup> March 2017, to "..... *obtain the prior written agreement of the Commissioners **before** [emphasis added] entering into any commitment to dispose of, or otherwise transfer to third parties, any real property other than existing single dwellings for the purposes of residential occupation.*" Therefore, as this report involves the disposal of land by way of a 125 year lease, written consent will be required before any commitment to dispose takes place.
- 6.9 As to the transfer of assets (other than land), contracts and employees, this is done by way of a "commercial transfer agreement" and is based on the model transfer agreement as published by the DfE.

- 6.10 As set out in the report, it is considered that the Transfer of Undertakings (Protection of Employees) (“TUPE”) Regulations 2006 apply to this academy transfer and to the staff of the existing two primary schools.
- 6.11 The model transfer agreement deals with the transfer of things necessary for the operation of the Academy, namely:
- Transfer of Assets
  - Assignments/novation of contracts
  - Employee/TUPE issues
- 6.12 Typical terms of the model transfer agreement also cover issues such as:-
- Transfer and apportionment of assets
  - Transfer, novation/apportionment and termination of contracts which are either school specific or council wide contracts
  - transfer of employees in accordance with TUPE regulations e.g. staffing information and warranties, apportionments, information and consultation, indemnities and warranties, pensions
  - transfer of records e.g. documents on personnel, pupils
- 6.13 In preparing this documentation account is taken of any contracts that need to be novated or assigned to the Academy e.g. for existing equipment. Where the school is receiving services under Service Level Agreements from the Council and wishes to continue these arrangements, the Service level Agreements are converted into formal contracts.
- 6.14 As part of the work on this Academy conversion process officers have liaised closely with DfE to ensure the PFI liabilities are passed to the new Academy Trust and although the Council remains primarily liable under the PFI agreements there is provision for the financial liability to be discharged by the new Academy Trust.
- 6.15 The Council is required when exercising its functions to comply with the duty set out in section 149 of the Equality Act 2010, namely to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity between those who share a protected characteristic and those who do not, and foster good relations between those who share a protected characteristic and those who do not. There are no direct equality implications arising from the proposed transactions as they are statutorily required to be made but relevant considerations have been made in the One Tower Hamlets Section of the report.

## **7 ONE TOWER HAMLETS CONSIDERATIONS**

- 7.1 Both schools work collaboratively to enable all children to experience the best possible educational opportunities, outcomes and life chances. Mulberry School is at the heart of the developing Tower Hamlets Education partnership. Ian Mikardo School provides outreach services to the Borough’s schools to support the management of pupils with challenging behaviour.

**8 BEST VALUE (BV) IMPLICATIONS**

8.1 None Identified.

**9 SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT**

9.1 None identified.

**10 CRIME AND DISORDER REDUCTION IMPLICATIONS**

10.1 None identified.

**11 SAFEGUARDING IMPLICATIONS**

11.1 New statutory guidance for schools and colleges will come into effect from September 2016. This updated guidance lays greater emphasis on schools and colleges and their staff being part of a wider safeguarding system for children, as described in “Working Together to Safeguard Children” (March 2015) and the need to fulfil responsibilities in relation to this. On conversion, the Council will continue to work collaboratively with both schools, to safeguard and promote the welfare of all children in the borough.

**Linked Report**

None.

**Appendices:**

None.

**Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012**

None.

**Officer contact details for documents:**

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