

LONDON BOROUGH OF BRENT

EXECUTIVE 13 OCTOBER 2003

FROM THE DIRECTOR OF EDUCATION ARTS AND LIBRARIES

REPORT TITLE: Provision of indemnities to Capital City Academy Trust against liabilities connected with Willesden High School

Above Below Confidential Line

1. Summary

1.1 This report concerns whether the Council should enter into a deed of indemnity with

Capital City Academy Trust. The deed has been requested by the Trust. The principal purpose of the deed is to ensure that any liabilities the Council had to staff prior to their transfer from Willesden High School to Capital City Academy on 1st September 2003 will remain the responsibility of the Council.

2. Recommendations

2.1 The Executive is asked to decide whether or not to enter into the requested deed of indemnity.

3. Financial Implications

3.1 Information regarding financial implications can be found in the details of the report, and specifically at paragraph 6.6

4. Staffing Implications

4.1 There are no staffing implications associated specifically with the subject matter of this report.

5. Legal Implications

5.1 The Transfer of Undertakings Regulations (TUPE) applied to the closure of Willesden High School on 31st August 2003 and the establishment in its place of the Capital City Academy from 1st September 2003. The effect of TUPE is that any liabilities the Council owed to the staff transferring from the School to the City Academy as the employer of the staff at the School will have been transferred to the Trust which runs the City Academy from the time it opened on 1st September 2003. The liabilities that transferred would have been all the Council's liabilities under or in connection with the employment contracts of the transferring staff (other than in relation to pensions) and would therefore have included current or potential claims for compensation for personal injury, unfair dismissal and discrimination. The deed

of indemnity sought by the Trust would have the effect of transferring these liabilities back to the Council.

- 5.2 The requested deed of indemnity also provides for the Council to indemnify the Trust against any current or potential claims connected with the operation of the School prior to the 1st September 2003. Examples of such claims being debts, failure to comply with legal or regulatory requirements, failure to adequately terminate contracts and litigation. These provisions in the deed are unnecessary because unless TUPE applies liability for these claims would not have passed from the Council to the Trust.
- 5.3 The deed of indemnity contains indemnities from the Trust to the Council against any liabilities to the transferring staff arising as a result of the actions or inactions of the Trust on or after the 1st September 2003. These provisions are of no benefit to the Council because these liabilities would always have been the Trust's and not the Council's.
- 5.4 In a situation where there is no tangible benefit to the Council in agreeing to give an indemnity, the potential liability under which is unquantified, it is unlikely that a decision to do so would be reasonable. Members should give careful consideration to whether the benefits of giving an indemnity identified under paragraph 6.4.1 of this report are adequate reason for the Council to take on the unquantified risks under the suggested deed of indemnity.

6. Detail

- 6.1 Willesden High School closed on 31st August 2003. The Council employed the staff based at the School. Capital City Academy, a new secondary school based within the grounds of the School, opened on 1st September 2003. The City Academy is operated as a type of independent school by the Capital City Academy Trust, a charitable company independent of the Council. The Trust employs the City Academy's staff. The majority of Willesden High School's staff have transferred to the City Academy.
- 6.2 It has been common ground between the Council and the Trust that the Transfer of Undertakings Regulations (TUPE) applied to the closure of the School and the establishment of the City Academy in its place. One consequence of TUPE applying is that any liabilities the Council may have owed to the staff who transferred from the School to the City Academy also transferred to the Trust when the City Academy opened. For example, any claim a member of the transferring staff would have against the Council for compensation for an accident at the School which occurred before the School closed will have become the legal responsibility of the Trust from 1st September 2003.
- 6.3 Solicitors acting for the Trust contacted the Director of Education Arts and Libraries at the start of August about the possibility of the Council giving indemnities to the Trust in respect of liabilities that would transfer to the Trust under TUPE. Subsequently the Trust has provided the Council with the draft of a deed of indemnity which it has requested the Council to enter into. The deed provides for the Council to indemnify the Trust against any current or potential claims made by the transferring staff against the Trust in connection with the acts or omissions of the Council or the Governing Body of the School prior to the 1st September 2003. If entered into the deed would transfer liability for these claims back from the Trust to

the Council. The draft deed also provides for the Council to indemnify the Trust against any current or potential claims connected with the operation of the School up to 31st August 2003, one example of such a claim being outstanding invoices of any nature. There is no time limit after which the indemnities cease to apply and no ceiling on the financial value of claims covered by the indemnities.

- 6.4 It has not been suggested by the Trust that the Council has any legal obligation to enter into the proposed deed or that the Council has given any commitment to do so. In correspondence the Trust have stated that they would hope the Council would feel able to enter into the deed given their partnership with the Council and the Council's support for the establishment of the City Academy. The only benefit to the Council in agreeing to give the requested indemnities seems to be that as a gesture of goodwill it might strengthen its partnership with the Trust. The Trust has already begun to operate the City Academy without indemnities being given. The good will of the Trust is important. The Council's vision has always been for the Academy to be an active member of the Brent collaborative partnership of schools. Further the good will of the Trust is essential in relation to the partnership with the Council for the development of the Council's Sport and Leisure strategy. The Trust will be providing community access to facilities and will help in relocating clubs and users while the Willesden Sports Centre is being upgraded. The Executive will need to weigh the value of the goodwill against the potential financial risk of the indemnity.
- 6.5 Enquiries have been made by Legal Services of the Headteacher of the City Academy and with Governors of the School to ascertain whether there are any actual or potential claims for which the Council would become liable if it was to enter into the deed. These enquiries have not revealed any such claims. However it should be borne in mind that claimants with personal injury claims have three years in which to start court proceedings.
- 6.6 Brent Financial Services have confirmed that in the case of claims for personal injuries by the transferring staff arising out of accidents occurring before the 31st August 2003 the Council would continue to have insurance cover against such claims should it enter into the deed. However the relevant policy provides that the Council must meet the first £250,000 of any claim so potentially the Council would have to pay compensation of up to this amount out of its own resources to a successful claimant. Brent Financial Services have also confirmed that insurance cover would not be available against other claims such as claims for breach of contract or discrimination by transferring staff for which the Council would become liable if it was to enter into the deed. This is because the risk cannot be quantified and therefore insurers are reluctant to accept the risk at any price.
- 6.7 Information obtained from the DfES indicates that a number of authorities have given indemnities in relation to the establishment of City Academies. However, the nature of the indemnities and the detailed circumstances in which they were given are not known. Details are known in respect of a nearby London Borough in which a City Academy opened at the same time as the City Academy. The Council concerned has given indemnities concerning TUPE transferred liabilities to staff to the company running their City Academy which are very similar to those sought by the Trust. However, discussions with that authority have established that the circumstances in which the indemnities were sought in that case were significantly different from the circumstances in Brent. In that authority the indemnities were sought by the City Academy's sponsor at a very early stage in the process of

establishment of the City Academy as part of a list of matters on which the sponsor wanted clarification. This was at a time when the sponsor was apparently not finally committed to the establishment of the City Academy. They therefore formed part of the basic understanding upon which the proposal for that City Academy was progressed. By contrast, the Trust sought the indemnities from Brent very shortly before the City Academy started operating with no suggestion that financial support would be withdrawn by the sponsor if the indemnities were not forthcoming.

- 6.8 The benefits to be gained from giving the indemnities requested need to be weighed against the potential costs of doing so. The Executive is asked to consider this report and determine whether the proposed indemnities should be given by the Council.
- 6.9 If the deed of indemnity is not entered into it would still be open to the council to consider whether an indemnity should be agreed in any particular situation where a claim which has transferred to the Trust under TUPE arises.

7. Background Information

Legal Services File containing draft deed of indemnity

Anyone wishing to inspect the above papers should contact: -
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