



Office of
the Schools
Adjudicator

Determination

Case reference: ADA3843

Objector: Cheshire West and Chester Council

Admission authority: Frank Field Education Trust for Ellesmere Port Church of England College, Cheshire

Date of decision: 27 July 2021

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements for September 2022 determined by Frank Field Education Trust for Ellesmere Port Church of England College, Cheshire.

I have also considered the arrangements in accordance with section 88I(5) and find there are other matters which do not conform with the requirements relating to admission arrangements in the ways set out in this determination.

By virtue of section 88K(2) the adjudicator's decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements within two months of the date of the determination unless an alternative timescale is specified by the adjudicator. In this case I determine that the published admission number must be revised by 31 October 2021 and the other aspects of the arrangements which require revision by 28 February 2022.

The referral

1. Under section 88H(2) of the School Standards and Framework Act 1998 (the Act) an objection has been referred to the adjudicator by Cheshire West and Chester Council (the local authority) about the admission arrangements for September 2022 (the arrangements) for Ellesmere Port Church of England College (the school), an academy school for children aged 11 to 19. The objection is to the published admission number (PAN).

2. The parties to the objection are the local authority, the governing board of the school, the Frank Field Education Trust (the trust) and the Diocese of Chester (the diocese) which is the religious authority for the school.

Jurisdiction

3. The terms of the academy agreement between the trust and the Secretary of State for Education require that the admissions policy and arrangements for the academy school are in accordance with admissions law as it applies to maintained schools. These arrangements were determined by the academy trust, which is the admission authority for the school, on that basis.

4. I have noted that the date on which the trust determined the arrangements was 26 March 2021. This is after 28 February 2021 by when the Code required these arrangements to be determined. This does not affect the status of the determined arrangements or my jurisdiction for this case.

5. The local authority submitted its objection to these determined arrangements on 13 May 2021. I am satisfied the objection has been properly referred to me in accordance with section 88H of the Act and it is within my jurisdiction. I have also used my power under section 88I of the Act to consider the arrangements as a whole.

Procedure

6. In considering this matter I have had regard to all relevant legislation and the School Admissions Code (the Code).

7. The documents I have considered in reaching my decision include:

- a. a copy of the minutes of the meetings of the governing board and trust at which the arrangements were determined;
- b. a copy of the determined arrangements;
- c. the local authority's form of objection dated 13 May 2021 and its responses to my enquiries;
- d. the trust's response to the objection and its responses to my enquiries including copies of minutes of meetings of the trust and the governing board.
- e. maps of the area identifying relevant schools; and
- f. confirmation of when consultation on the arrangements last took place and details of the nature of the consultation and responses to it.

The Diocese of Chester was invited to comment on the objection but did not do so.

The Objection

8. The local authority said that the PAN of 150 determined by the trust for September 2022 was not fair. Previously, the PAN had been 210. The requirement for admission arrangements to be fair is found in paragraph 14 of the Code.

Other Matters

9. When I considered the arrangements as a whole, it appeared to me that they did not, or may not, conform with the Code in the following ways.

- i) The date given in the arrangements for their publication is 1 May. Taken together, paragraphs 1.47 and 1.49 of the School Admissions Code require that arrangements are published before 15 March.
- ii) The arrangements include an oversubscription criterion for “Children of UK Service Personnel”. This may not conform with paragraph 1.8 of the Code which requires that oversubscription criteria are clear.
- iii) Paragraph 2.14 of the Code sets the requirements for waiting lists; these may not be met.
- iv) Paragraph 1.14 of the Code requires that catchment areas are clearly defined. The catchment area may not be clear.

Background

10. The school is one of three state-funded secondary schools in Ellesmere Port. It is recorded on the Department for Education (DfE) database “Get Information About Schools” (GIAS) as having a religious character of “Church of England/United Reformed Church”. One of the other schools in the town is a Catholic school while the other does not have a religious character. From September 2009 until November 2018, the school was in the University of Chester Academies Trust before being transferred to its current trust.

11. The arrangements determined by the trust include a PAN of 150 and oversubscription criteria which can be summarised as follows:

- a) Looked after and previously looked after children
- b) Children of UK service personnel
- c) Children with siblings on roll
- d) Random allocation with 80 per cent of places being offered to children living within a catchment area and 20 per cent to children living outside the catchment area.

Consideration of Case

12. In the objection the local authority said that it was satisfied the trust had consulted on reducing the PAN from 210 to 150 for September 2022 as required by the Code. It had also met with the trust to discuss its concerns before lodging this objection. The local authority argued that it was not fair to reduce the PAN to 150 for six reasons:

“1. The school was built to accommodate a PAN of 210 and a net capacity of 1350 (1050 years 7-10 and 300 post-16 places).

2. The DfE invested approximately £25M of public money into the scheme to provide the number of places as outlined above and therefore we advised that we would be raising our objection to the proposal to the DfE as well as to the school.

3. The Local Authority has a statutory duty to ensure that there is a sufficiency of school places across the Borough and the reduced PAN does not support the sufficiency need for the area.

4. For the September 2021 intake there are currently over 700 pupils within the school’s catchment area and therefore if all pupils expressed a preference for the Ellesmere Port CE College there would be a shortfall of places even at a PAN of 210.

5. The forecasted intake for September 2021 was 99 pupils however the allocation is currently at 140 which is significantly over the numbers that were forecasted [sic] for the school. If this increase in numbers continues the school could exceed the reduced PAN in September 2022.

6. There is a significant housing development underway in the Ellesmere Port area (Ledsham Road where 2,000 dwellings are being built) which will create an additional demand for pupil places within the area.”

13. In response to the objection, the trust said that in virtual meetings with the local authority the data shared with them did not support the objection. In those meetings the trust told me that it had offered to take more than 150 pupils in bulge years if required on a year-by-year basis following discussion. The trust thought that the local authority had made the objection under pressure from local schools. The trust expressed doubts about the forecast future need for places in the area.

14. I asked the local authority for details of its school place planning data and the recent pattern of parental preferences. From the data provided it can be seen that the number of parents listing the school at their first preference (on time and late) has more than doubled in the last three years from 65 in 2019 to 82 in 2020 to 133 in 2021. The number of second preferences has also increased in those years from 34 to 40 to 50. In the same period, the total number of first preferences for state-funded secondary schools made from families living in the planning area has remained at between 522 and 526. To put it another way, the

number of children needing places has not changed but it would appear that the school is becoming more popular with parents.

15. The local authority told me that it expected to need 618 places across the planning area in September 2022 of which 149 were expected to be wanted at the school. These figures are based on the number of children in the year group due to transfer to secondary school at that time together with transfer rates over the last three years. There is no allowance in these forecasts for the effect of new housing on the demand for school places.

16. The local authority expects there to be 187 new homes to be built before September 2022. Typically, this number of homes would be expected to house 5 or 6 children per year of age, but this depends on the type of housing and whether it is bringing new families into the area or redistributing families already there. Across the area this represents less than one per cent of the expected number of places required in September 2022. Over the subsequent five years over 1000 new homes are expected which could add about 30 children to each cohort, depending on the nature of those homes.

17. I have looked at the trust's rationale for setting a PAN of 150. A minute of the governing board meeting held on 11 November 2020 says: "Rationale for this request [the PAN reduction]: EPC want the number of students to be manageable so we know the children and can staff accordingly." At the same meeting it is recorded in response to a question about the benefits of reducing the PAN: "It will decrease the number of in year transfers that we have to accept". At a meeting of the trust on 20 November 2020 it is recorded that reducing the PAN "is an attempt for the College to take control of its intake and the PAN reduction would allow the College to flourish."

18. The consultation paper gave two reasons for the reduction in PAN: "The provision of the most appropriate leaning [sic] environment for all pupils" and "Future resource planning and management". On 29 January 2021, it was reported to a meeting of the trust board that "two major objections had been received." These were from the local authority concerning investment in the school and from a local a school which raised concern about in year transfers. The minutes of the meeting record discussion about these concerns. This is quoted below with the initials of people changed:

"XX informed that he and EPC colleagues had requested a meeting with the Director of Education at the Local Authority and indicated that the matter may need to go to the Regional Schools Commissioner (RSC). YY queried what would happen if the reduced PAN was rejected. XX clarified that the PAN would have to go back up to 210; meaning that EPC would be obligated to accept any student (inclusive of in year transfers), in order to fill that number. XX emphasised that there were of course legitimate reasons for pupils to transfer from other schools, however many of these cases often led to pupils simply being left to any available school, regardless of whether or not it was suitable for the pupil or the school. YY advised XX to inform the Local Authority and indeed the Secretary of State that if there were legitimate reasons for such transfers, EPC would enable access (above 150). ZZ queried who had the authority to make final decision on PAN, which XX confirmed was the RSC,

pointing out that the Local Authority would lose children to cross border institutions and consequently, the PAN reduction request might be declined.

At the meeting of the trust board held on 26 March 2021 the following is recorded:

“Ellesmere Port College Planned Admission Number (PAN) Update — the PAN had been reduced accordingly to 150 for Year 7 in September 2022 with all other Year Groups remaining the same.

AA queried the argument behind reducing PAN. XX explained that the school had never been full. PAN was formulaic according to the building size. The school had unfortunately been left vulnerable to in year transfers and Local Authority movement of excluded students as and where space had been available. Reduction of the PAN would allow EPC to have more control over its admissions when pupil numbers reached 150 as the Local Authority would need to discuss and agree with EPC any additional pupils.”

19. On 7 July 2021 I wrote to the trust to give it the opportunity to offer any further rationale for the reduction in the PAN beyond what appeared in the papers which it had sent to me. In its response on 21 July, it reiterated its view that the local authority’s forecast number of pupils was wrong. From the minutes of the governing board on 11 November 2021 I learnt that children leave the area to attend schools in other towns. One factor which was not mentioned by the local authority which may affect the demand in Ellesmere Port is how any population growth in those other towns could lead to there being fewer places available at the other schools, increasing demand locally.

20. The trust also said that lowering the PAN to 150 “will enable our Academy at Ellesmere Port make the best use of our resources as it recovers from a disastrous experience of the previous trust, confidence in the College is beginning to be restored in the town and we are beginning to be seen as a viable option. Our PAN at 150 would help us focus our efforts on our children most of whom come from significant disadvantaged communities.” However, the trust offered no explanation of the link between the PAN and the success of the school, or how the former PAN of 210 prevented the school from being successful.

21. From the minutes of the meetings, I concluded that the main reason for the school wanting to reduce the PAN was to have more control over in year admissions. The PAN has limited influence on that, and the minutes also suggest that the trust may not have fully understood the provisions in the law around the PAN. This includes the reference to the RSC having a role in setting the PAN. The RSC does not have any role in the initial setting of the PAN; this is a matter for the admission authority alone. It is the case that the Education and Skills Funding Agency (acting on behalf of the Secretary of State for Education) considers any requests by academies to vary determined arrangements, including to reduce PANs after they have been determined.

22. Section 86 of the Act says that other than for designated grammar schools, the only grounds on which an admission authority can refuse to admit a child is that to do so will

“prejudice the provision of efficient education or the efficient use of resources”. For the “relevant age group” (the age group at which children are normally admitted to the school, in this case Year 7 and Year 12) the PAN usually represents the point at which the admission authority decides that prejudice will occur. Whether the PAN is the point at which prejudice will occur is one of the tests that an independent appeal panel will consider.

23. Prejudice cannot be said to arise while the number of children admitted to the relevant age group remains below the PAN during that school year. Indeed, the primary legislation which is applied to the school by virtue of its funding agreement provides in section 86(5) of the Act that there can be no prejudice below PAN (the Act uses the term admission numbers but the meaning is the same) in a relevant age group and this is reinforced in several places in the Code. However, once the Year 7 group reaches Year 8, it is not a relevant age group and so there is no PAN. The minutes refer to the PAN for other year groups remaining the same, but in fact as I have explained, other year groups have no PAN. Admission to year groups which are not normal points of entry is independent of the PAN that applied when they were established and of the PAN for the current relevant age group. For these year groups places can only be refused on the grounds of prejudice to the provision of efficient education or the efficient use of resources. As an example, in September 2020, figures provided show that 87 children were admitted to Year 7 against a PAN of 210. Any child applying for a place in Year 7 before 31 August 2021 would have to be admitted as the PAN was not reached. From September 2021, when those children will be in Year 8 admission could be refused to this year group if to admit an additional child would cause prejudice, whether or not there were 210 or any other number of children in that year group. The arguments for this would have to stand up to scrutiny by an independent appeal panel.

24. Reducing the PAN to 150 in September 2022 would only, to quote the minutes, “allow EPC to have more control over its admissions” in the one year group admitted in September 2022. There is no benefit to be gained for other year groups.

25. The minutes refer to a formula that links PAN to building size; there is no longer any such formula (although the capacity of a maintained school can within limits be affected by the PAN). The capacity of an academy is set in its funding agreement, in this case it is 1350. Admission arrangements, including the PAN, are required by the Code to be reasonable. There is evidence that the school is becoming more popular with parents and 149 children are expected to start Year 7 in September 2021. These will be children for whom the school is either their first preference, or the highest that could be met. Trends suggest it is likely that in 2022 there will be more than 150 children for whom the school is the first preference, or the highest that can be met. I have considered whether it would be reasonable to set a PAN which would deny parental preference when there is clearly no question about physically accommodating more children in the school. I do not think it would be on its own.

26. The only area in which I could see an argument being made to justify limiting parental preference in this way would be around the organisation of classes and the funding of them. Unlike primary schools where infant class size regulations lead to intakes which

are multiples of 30 being the preferred (although not always achievable) model, there are no such restrictions in secondary schools. I note that the DfE school comparison website does not record a pupil to teacher ratio for the school. However, the average secondary school class size published by the DfE for 2020/21 from the most recent school census is 22.3; I have no reason to think the situation at the school would be very much different to this. The school would know at the start of March 2022 what its intake will be in September 2022 and will be able to finalise its staffing requirements in time for whatever intake is expected. This is what the school would have been doing in previous years. While a PAN of 150 may provide a more realistic upper bound to the uncertainty about the intake, it is not necessary to enable the school to organise its classes in a particular way.

27. There is a fundamental issue concerning the reduction in any PAN which I must consider. Paragraph 1.3 of the Code says: “Own admission authorities are not required to consult on their PAN where they propose either to increase or keep the same PAN” and paragraph 3.3b which prohibits objections being brought “about own authority admission’s decision to increase or keep the same PAN”. Consequently, if the PAN is reduced to 150, then the admission authority can leave it at that figure for all future years and no one can raise an objection to it.

28. One issue arising from this is that the school has a physical capacity of 1350 publicly funded places. This is the figure which the DfE will use in calculations of “basic need” (the funding the DfE will approve for new school places in the area). This could leave the local authority in the position where it does not have the funding for new places at other schools because of the capacity of this school, yet children cannot take up those places because of the PAN.

29. Admission authorities may admit above PAN and in a reasonable world the local authority and the trust should be able to agree to use the capacity of the school in the best interests of children in the area. However, this cannot be guaranteed and correspondence I have seen suggests that there are differences of opinion about undertakings from the trust about meeting future demand.

30. The reduced PAN will not achieve the outcomes which the trust thought it would. With the school becoming more popular, it is likely that reducing the PAN will constrain parental preference. Once the PAN is reduced, there can be no compulsion for the trust to increase it, effectively removing publicly funded school places from the town. This will be unfair to parents and children in the area. For these reasons I uphold the objection.

Other Matters

31. The arrangements say: “The College will publish the admission arrangements for the college on the website as required by the School Admissions Code by the required date of 1st May.” Paragraph 1.47 of the School Admissions Code says:

“Once admission authorities have determined their admission arrangements, they **must** notify the appropriate bodies and **must** publish a copy of the determined

arrangements on their website displaying them for the whole offer year (the school year in which offers for places are made). Admission authorities **must** send a copy of their full, determined arrangements to the local authority. Admission authorities **must** send a copy of their determined admission arrangements for entry in September 2016 as soon as possible before **1 May 2015**, and for all subsequent years, as soon as possible before **15 March** in the determination year. Admission authorities for schools designated with a religious character **must** also send a copy of their arrangements to the body or person representing their religion or religious denomination.”

And paragraph 1.49 says:

“Local authorities **must** publish on their website the proposed admission arrangements for any new school or Academy which is intended to open within the determination year, details of where the determined arrangements for all schools, including Academies, can be viewed, and information on how to refer objections to the Schools Adjudicator. Local authorities **must** publish these details in 2015 by **1 May 2015** and in all subsequent years by **15 March** in the determination year.”

Consequently, since 2015 the trust has been required to publish the arrangements before 15 March each year, not 1 May.

32. When I raised this issue with the trust it said it had interpreted these paragraphs to mean “that in the first year of determination of a change that the deadline is 1 May 2021 (for September 2022). We believe the paragraph then says further determined arrangements in subsequent years should be each year by 15 March.” I do not see how the two paragraphs quoted could be interpreted in any way other than by 15 March 2021 the arrangements should have been on the school’s or trust’s website so the local authority could publish on its website where the arrangements could be seen. This would allow the arrangements to be available to the public for two months before the deadline for objection to be made to the adjudicator. In this case the trust did not determine the arrangements until 26 March 2021 when it was required to do so by 28 February 2021 so it could not have met the requirement. The trust has noted that the wording concerning this requirement is clearer in the revised version of the Code which comes into force on 1 September 2021 and apologised for its error.

33. The arrangements include an oversubscription criterion for “Children of UK Service Personnel”. Paragraph 1.9f of the Code prohibits giving priority to children on the basis of parents’ occupational status unless it is permitted by paragraphs 1.39 to 1.39B of the Code. Paragraph 1.39 allows priority to be given to children eligible for the service pupil premium. DfE guidance on using the pupil premiums in admission arrangements was published in December 2014. This allows priority to be given to sub-groups of children within the premiums. It appeared to me that this criterion may not be clear about whether this priority is for all children eligible for the service premium, or a sub-group of them and if so, which one? Paragraph 1.8 of the Code requires that oversubscription criteria are clear.

34. When I raised this matter with the trust it said: “The policy that we have used as a Trust has been a policy that we TUPE’d over from a previous Trust which had been agreed by Cheshire West and Chester. We understand your point that it is unclear what we are referring to. We believe this to mean that this is for the children eligible for the Services [sic] Premium and we will amend this accordingly.” I observe that TUPE stands for the Transfer of Undertakings (Protection of Employment) Regulations 2006. These have no bearing on school admission arrangements.

35. The arrangements say: “a waiting list will operate until the end of the first term (i.e. late December).” Paragraph 2.14 of the Code sets the requirements for waiting lists.

“Each admission authority must maintain a clear, fair and objective waiting list until at least 31 December of each school year of admission, stating in their arrangements that each added child will require the list to be ranked again in line with the published oversubscription criteria. Priority must not be given to children based on the date their application was received or their name was added to the list.”

36. Consequently, waiting lists must be held until 31 December, not “late December” as stated in the arrangements. It must also be stated in the arrangements that “each added child will require the waiting list to be ranked again” and it is not. The trust considered that the end of the first term did mean 31 December and said that as the school was undersubscribed a waiting list had never been needed. That may be the case, but the arrangements must still meet the requirements of the Code and be clear that if a waiting list is required, it must be held until the specified date, not an approximation to it.

37. Paragraph 1.14 of the Code requires that catchment areas are clearly defined. The map of the catchment areas attached to the arrangements as “Appendix A: Map of catchment area” showed a very indistinct map of the town and surrounding area with a shaded circle and an unshaded ellipse containing the circle and other parts of the map. The map legend said “80% of admissions come from here” indicating the shaded area and “20% of admissions come from here” indicating the unshaded part of the ellipse.

38. Not only did the map not appear to me to contain sufficient detail for families living near the boundaries to know whether they were inside or outside of the areas shown, but it did not reflect the oversubscription criterion itself. That said:

“The remaining places will be allocated by Random Allocation as specified below:

- (i) 80% will be offered to students resident within the catchment area as defined by the map attached at Appendix A.
- (ii) 20% will be offered to students resident outside the catchment area as defined by the map attached at Appendix A.”

39. If the shaded circle on the map represents the catchment area from which 80 per cent of places are allocated, then according to the criterion, the other 20 per cent are offered to children wherever they live outside of that circle. Drawing the ellipse therefore is

either unnecessary and so further detracts from the clarity of the catchment area or makes the oversubscription criteria incomplete and unclear as there is no provision for children living outside the ellipse.

40. The trust told me that the map is “guidance for parents” and “In conjunction with the Local Authority a more detailed mapping exercise is used based on distance from the school.” I was also told that as the school was always undersubscribed, the catchment area had never been used.

41. The local authority’s comment on this matter threw further confusion on the issue. It said: “The map of the catchment area attached to the admission arrangements is not recognisable to us” and provided a copy of a map showing what it understands to be the catchment area. It said there had been no consultation on any changes. The trust considered the map provided by the local authority “unhelpful” saying that it included a car factory and the river Mersey where no children live. It is manifest that the catchment area is not clearly defined as required by the Code.

42. I have formed the view that the arrangements have not been properly scrutinised for some time because the school has been undersubscribed and there has been no need to use the oversubscription criteria or establish a waiting list. However, the law still requires the trust to determine arrangements by 28 February each year and to publish them by 15 March. The trust has failed to do this for the 2022 arrangements. Those arrangements must include clear and objective oversubscription criteria and must conform to the requirements of the Code. It is the trust’s responsibility to ensure they do, and the local authority is required by paragraph 3.2 of the Code to refer arrangements to the adjudicator if it is of the view that the arrangements do not conform with the Code.

43. I find that the arrangements do not conform with the Code in the ways I have set out above.

Summary of Findings

44. I uphold the objection because a PAN of 150 will not achieve all of the outcomes which the trust thought it would achieve. With the school becoming more popular, it is likely that reducing the PAN will constrain parental preference. Once the PAN is reduced, there can be no compulsion for the trust to increase it, effectively removing publicly funded school places from the town. This will be unfair to parents and children in the area.

45. I also find that the arrangements do not conform with the Code in the other ways set out above and it is necessary for the trust to revise them accordingly.

46. Paragraph 3.1 of the Code says:

“The admission authority **must**, where necessary, revise their admission arrangements to give effect to the Adjudicator’s decision within two months of the decision (or by 28 February following the decision, whichever is sooner), unless an alternative timescale is specified by the Adjudicator.”

I have considered the time scale which I should specify for these arrangements to be revised given that this determination is being made at the end of July 2021 and the application process begins in September and concludes on 31 October 2021.

47. It is very unlikely that a PAN of 210 will be exceeded for 2022 (although the school is becoming more popular) and so the flawed oversubscription criteria and waiting list will not be called into play. The trust will also need to review the arrangements to give effect to the new Code. I have therefore decided to require the trust to revise the PAN by 31 October 2021 and to revise the other aspects of the arrangements by 28 February 2022 when it sets the arrangements for September 2023. This timescale will allow clarification of the catchment area to include the opportunity for public consultation so that it is clear to all parents in the area.

Determination

48. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements for September 2022 determined by Frank Field Education Trust for Ellesmere Port Church of England College, Cheshire.

49. I have also considered the arrangements in accordance with section 88I(5) and find there are other matters which do not conform with the requirements relating to admission arrangements in the ways set out in this determination.

50. By virtue of section 88K(2) the adjudicator's decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements within two months of the date of the determination unless an alternative timescale is specified by the adjudicator. In this case I determine that the published admission number must be revised by 31 October 2021 and the other aspects of the arrangements which require revision by 28 February 2022.

Dated: 27 July 2021

Signed:

Schools Adjudicator: Phil Whiffing