



DETERMINATION

Case reference: ADA2981

Objector: Hertfordshire County Council

Admission Authority: The academy trust for Hockerill Anglo-European College

Date of decision: 27 November 2015

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the academy trust for Hockerill Anglo-European College, Hertfordshire for admissions in September 2016.

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 arrangements must be revised by 28 February 2016.

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 Hertfordshire County Council (the objector), about the admission arrangements (the arrangements) for September 2016 for Hockerill Anglo-European College (the school), a partially selective academy school in Hertfordshire with both day and boarding places for pupils aged 11 – 18. Hertfordshire County Council is the local authority (LA) for the area and is referred to in this determination as the objector. The objection concerns whether the school's day boarders can be considered to fall within the definition of boarding places in the School Admissions Code (the Code).

Jurisdiction

2. The terms of the academy agreement between the academy trust and the Secretary of State for Education require that the admissions policy

and arrangements for the 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. The objector submitted the objection to these determined arrangements on 30 June 2015. 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.

Procedure

3. In considering this matter I have had regard to all relevant legislation and the Code.
4. The documents I have considered in reaching my decision include:
 - a. the objector's email of objection dated 30 June 2015;
 - b. the school's response to the objection and supporting documents and subsequent submissions;
 - c. the LA's composite prospectus for parents seeking admission to schools in the area in September 2016;
 - d. the Department for Education (DfE) publication "Boarding Schools National Minimum Standards", 2015;
 - e. the DfE publication "Charging for school activities", 2014;
 - f. the Ofsted Welfare inspection for a boarding school report for the school from 2012;
 - g. the Ofsted framework for inspection of boarding and residential provision in schools 2015;
 - h. confirmation of when consultation on the arrangements last took place;
 - i. copies of the minutes of meetings including the meeting at which the academy trust determined the arrangements; and
 - j. a copy of the determined arrangements.

The Objection

5. The LA as the objector refers to footnote 34 to paragraph 1.40 of the Code. This footnote defines boarding places as "*places for pupils who are provided with overnight board and lodging at the school.*" Day places are defined in the same footnote as "*places for pupils who attend school on a daily basis, including pupils who participate in optional school activities outside school hours (for example breakfast club, after-school clubs, music lessons, tea and supervised homework sessions).*" The objector considers that as the school's day boarders

are not routinely provided with overnight board and lodging at the school, the provision does not fall within the Code's definition of boarding places and that the school's arrangements may accordingly be in breach of the Code.

Background

6. Hockerill Anglo-European College has been a publicly funded boarding school since 1980. The school became an academy in 2011 when it converted from foundation status. The school admits both day pupils and boarding pupils. The school's arrangements make clear that parents can apply for their child to be considered for a boarding and a day place; that they should make clear that they are doing so on the common application form (CAF) when they apply and that the applications for a day and for a boarding place will be treated as separate preferences. The boarding category is further divided into full, weekly and day boarding. Parents seeking a boarding place for their child complete a supplementary information form (SIF) which asks for certain information including whether they wish their child to be have a full, weekly or day boarding place. For pupils in years 7 to 11 the annual fees for boarding are £12,597 for full boarding, £11,670 for weekly boarding and £6,216 for day boarding.
7. The school has two published admission numbers (PANs) at Year 7 (Y7) - one each for day and boarding pupils. This is specifically provided for in paragraph 1.40 of the Code. The PAN for boarders is 52 and the PAN for day pupils is 68. The school is popular and oversubscribed and has to apply its oversubscription criteria each year as shown in the table below.

	2013	2014
Number of day places available	68	68
Number of applications for day places	784	774
Number of boarding places available	52	52
Number of applications for boarding places	194	197

8. As well as setting separate PANs for boarding and day places the school has separate oversubscription criteria for boarding and day places. As provided for in paragraph 1.40 of the Code, the school assesses those who have applied for boarding places (including for day boarding places) in order to assess their suitability for boarding. Paragraph 1.41 of the Code provides that once a boarding school has assessed applicants for boarding suitability it **must** give priority to certain groups of children and in a certain order, namely:

1. Looked after and previously looked after children.
 2. Children of members of the UK Armed Forces who qualify for Ministry of Defence financial assistance with the cost of boarding school fees.
 3. Candidates who demonstrate a need for boarding.
9. The school's oversubscription criteria for boarding places follow this requirement and the school has told me that for 2013 and 2014 all boarding places – including day boarding places - were allocated to those who had demonstrated a need for boarding. As also required by paragraph 1.41, the arrangements set out what is meant by “boarding need”, explaining that:

“This category [boarding need] includes but is not limited to children of Crown Servants serving abroad; children at risk or with an unstable home environment; children whose parent/s spend much of the year abroad for work purposes; children whose parent/s is/are temporarily or permanently resident abroad; children who will be subject to a high degree of mobility over the next 7 years; children whose parents’ work pattern compromises their effective care outside the normal day school hours”

10. The school last consulted on its arrangements in 2012 for admissions in 2013. The arrangements for 2016 were determined by the academy trust on 3 December 2014. At a further meeting on 27 June 2015 the governing body varied the arrangements as provided for in paragraph 3.6 of the Code in order to comply with mandatory requirements of the Code. Those variations are not relevant to the objection.

Consideration of Factors

11. The school has three categories of boarding pupils. Two of the categories (full and weekly boarders) regularly stay overnight every night or six nights each week at school during term time and are not the subject of the objection. The third category are day boarders who are defined by the school as: *“student[s] who arrive[s] at the College for breakfast, stay[s] until after prep on Monday to Friday and ha[ve]s breakfast at the College on Saturday during non-exeat weekends.”* It is this group which is the subject of the objection. All three categories of boarding pupil are included within the school's PAN for boarding places and there is no published division of boarding places into numbers of full, weekly and day boarding places.
12. The Code defines “boarding” and “day” places as follows:

“Boarding places are places for pupils who are provided with overnight board and lodgings at the school. Day places are for pupils who attend school on a daily basis, including pupils who participate in optional school activities outside school hours (for example breakfast club,

after-school clubs, music lessons, tea and supervised homework sessions."

13. The school contends strongly that its arrangements do not breach the Code and that it is lawful and in accordance with the Code to include day boarders within the wider boarder group. The school has set out its arguments in a detailed paper and responded also comprehensively to my further enquiries. The objector has not commented subsequent to the initial objection. The school makes the following points in relation to day boarders:
- a. applicants for day boarding places are assessed for boarding suitability and ranked in line with the admissions policy's published oversubscription criteria for boarders;
 - b. day boarders are provided with 'accommodation' within the boarding houses;
 - c. the pastoral care for day boarders is in line with the National Minimum Standards for Boarding and far exceeds the provision of care and support offered by breakfast clubs or after-school activities;
 - d. day boarding serves a genuine need in the local community, and cases cited for need illustrate that not having this facility would deny several students and families the ability to access the school or access a level of provision which they have been assessed to need;
 - e. day boarders are able to make the most of overnight stays/flexi-boarding as and when required (if there is the capacity to accommodate them) especially at weekends due to their assessment for boarding suitability;
 - f. some cases of 'boarding need' require specialist pastoral care which goes go well beyond supervisory responsibility for day pupils, including those who take part in extended day activities;
 - g. the school has been praised by Ofsted and the DfE- removal of a source of income such as fees from day-boarding would seriously constrain plans for ongoing development and provision of key services.
14. The school argues that it – and, it says, the Department for Education - draws a distinction between boarders "*who have accommodation provided by the school*" and day pupils who "*attend extended day sessions outside the normal teaching day*". While the school offers extra-curricular activities to its day and boarding pupils, it says that

“the boarding component of our school day is available only to our boarders and involves the provision of accommodation (in the boarding houses including study areas and support, changing, washing and storage facilities) and, furthermore supervised meals, prep, free time and boarders' sport. The boarding component of our offering is thus a distinct and entirely separate provision from our "extended day sessions"”.

15. The school goes on to argue that day boarders are provided with “accommodation” for the following reasons:
- a. day boarding pupils have access to the boarding houses whereas day pupils do not;
 - b. day boarding pupils have work spaces within the boarding houses and access to computer facilities and the College IT network;
 - c. each day boarder has a space within the boarding house for storage of possessions as per the National Minimum Standards for Boarding;
 - d. the boarding component of the school’s offering is a distinct and entirely separate provision from its "extended day sessions"

16. The school points out that it has been inspected by Ofsted in respect of its boarding provision twice since it started to admit day boarders along with full and weekly boarders. It says that in both inspections day boarders were included within the judgement for boarders and it quotes from its 2012 inspection in support of its arguments (underlining added by the school):

“Hockerill Anglo-European College is an Academy, situated within easy access of Bishop’s Stortford town centre. It offers education to 812 pupils aged from 11 to 17 years, including 341 boarding students. Students come from many nationalities and there are 35 mother tongues spoken in the college. Boarding students are accommodated in five boarding houses, which are located within the college grounds. All boarding houses provide self-contained facilities that include showers, bathrooms, toilets, common rooms, games rooms and kitchen facilities.”

17. The school says that as Ofsted did not ignore this group of students (day boarders), and in fact treated them as ‘boarders’ this should raise questions “as to the methodology for the insertion of footnote 34 in the Schools Admission Code”. The school adds that its day boarders are covered by the National Minimum Standards for Boarding which place specific responsibilities upon the school and that the staff supervision levels and responsibilities are far more stringent than for day students and as a consequence more costly.

18. In relation to footnote 34 to the Code, the school draws attention to the distinction this makes between pupils who are provided with overnight board and lodging on the one hand and those who attend school on a daily basis and take part in optional out of school hours activities on the other. The school argues that, in its case, involvement in boarding activities for day boarders is compulsory and the fee charged is for provision received. The school notes that day boarding is very much part of its boarding offering and that the fees charged are based upon the cost of this provision (with an additional rate of return as required previously by the DfE). It argues that there is no financial contribution for compulsory attendance at extended day sessions but a contractual payment for boarding accommodation and services as with all boarding parents. The school goes on to argue that:

“the inclusion of footnote 34 must be considered in the context that the Code provides Guidance rather than any statutory interpretation. As such, the Code should not be interpreted strictly as it has never been considered with the level of scrutiny to which a statutory provision would be subjected. This is perhaps most clearly demonstrated by the fact that the definition chosen for ‘boarder’ by the drafter of the Schools Admission Code is not one which is contained in other documents relating to educational provision:

DfE National Minimum Standards for Boarding Schools, (1 April 2015) makes no connection between ‘boarding’ and residential provision. This allows many schools accountable to these standards to offer ‘flexi’ boarding

The Ofsted document ‘Inspections of boarding and residential provision in schools: The inspection framework’ (March 2015) does not include a definition akin to that in the Schools Admission Code

The Education Act (1996) makes no definition of ‘boarding’ as appears in the Schools Admission Code

Accordingly, the College would submit that the application of the new definition of Boarder, as contained within the Code, to the provision of Day Boarding at Hockerill would be entirely unreasonable.”

19. The school then adds that it considers that there is a lack of understanding of ‘day-boarding’ and that it is not aware that any representative of *“those drafting the Code has visited a school with ‘day-boarding’ provision with the purpose of attempting to understand the provision and its obvious differences from ‘extended provision’ or ‘wrap-around childcare’”*. The school compares this with the determination (ADA001389) issued in October 2008. In this determination, the adjudicator was content with the inclusion of day

boarders within the school's categories of boarding pupils. I am clear that the definition of day boarding used by the school at the time of that determination has not changed and is the same as the definition used today. In other words, I recognise that the aspect of the school's arrangements which is the subject of the objection and of this determination is the same as that which was found by the adjudicator in ADA001389 not to be in breach of the Code then in force.

20. The school has pointed out that "*the loss of Day Boarding as a distinct category will have a significant impact upon the College's finances and its plans for development of boarding facilities.*" It has also pointed out that if there were no day boarders, the school would have to increase the fees for remaining boarders as those fixed costs for boarding currently split across all areas of boarding would fall in total upon weekly and full boarders. The school has provided me with detailed financial information to support this argument and I have no reason to question its assessment of the impact of a decision that it could no longer have a category of day boarders.
21. I am conscious from the school's response to the objection and from the minutes of meetings of the governing body which have been provided to me of the importance the school attaches to its boarding provision and to the inclusion within this of its category of day boarders. I accept, as the school's guidance says, that: "*The College aims to provide day boarders with an experience... similar to that enjoyed by full and weekly boarders, despite obvious time limitations and the fact that day boarders will not be at College after lunch on Saturdays or sleep in their boarding houses*". I note that day boarders are assessed for suitability for boarding and considered against the mandatory oversubscription criteria for boarding places laid down in paragraph 1.41 of the Code. I accept too that the nature of the day boarding offer will be valuable to certain pupils and their families and I note, in particular in this regard, the inclusion in the school's definition of boarding need the references to those whose parents' work pattern affects their effective care outside normal school hours and those from unstable home environments or at risk. I recognise that such children might well benefit from being able to spend a large part of their waking hours at the school regardless of whether they sleep there or at home. I accept that there is difference between what makes up the school's offer of day boarding and what is offered by way of extended and after school provision in this and, indeed, in most other schools.
22. The question before me is whether the school's arrangements conform with the Code. The school has argued that the "*Code provides Guidance rather than any statutory interpretation [and].....that it should not be interpreted strictly as it has never been considered with the level of scrutiny to which a statutory provision would be subjected*".

23. The statutory basis for the Code is set out in its first three paragraphs and its application to academies is then set out in paragraph 4. By virtue of section 85 of the Act, the Code is in fact subject to the same level of Parliamentary scrutiny which applies to statutory instruments subject to the negative resolution procedure. Furthermore, it is not the case that the Code merely provides guidance. Rather, section 84 of the Act provides that it “*may impose requirements and may include guidelines*” and it “*shall be the duty...*” “*to act in accordance with any relevant provisions of the code*”. Paragraph 3 of the Code also explains that it “*imposes mandatory requirements.*” Paragraph 12 states that the Code has the force of law. There is nothing in the Code or Act to suggest that footnotes should be treated any differently from the main body of the text or should have any less force than the rest of the Code. Footnote 34 defines boarding and day places. There is no suggestion that the footnote is a guideline (with flexibility) as to how it is applied; it is rather, a definition which separates places and pupils into two categories – day and boarding.
24. Footnote 34 says in terms that “*boarding places are places for pupils who are provided with overnight board and lodging at the school.*” Day boarders at Hockerill Anglo-European College are not provided with overnight board and lodging except on an ad hoc basis. It is quite clear that a pupil could be a day boarder at the school without sleeping at the school at all and so without being provided with overnight board and lodging. The school’s guidance recognises this when it says that day boarders can stay overnight at the school if there is capacity and that: “*Unfortunately, as boarding spaces are normally fully allocated, overnight boarding accommodation cannot usually be provided unless there are beds available.*” The school in one of its submissions on the objection says “*Despite not offering a guarantee, day boarders can and do stay overnight on occasions, subject to availability. This year we have already had requests for weekend stays and midweek stays which we were able to help with. We do try to be as accommodating as we possibly can be and parents are grateful to us for this*”.
25. As noted above, the school also makes the point that for its day boarders, attendance at extensive out of school hours provision is compulsory whereas footnote 34 in its definition of day places refers to those who participate in optional activities out of school hours (my underlining). However, schools cannot, in relation to pupils who are not boarding pupils, lawfully require pupils to take part in out of school hours activities (with some very limited exceptions such as lawfully imposed detentions) so there would be no reason for footnote 34 to refer to compulsory out of school hours activities. The DfE guidance on Charging for School activities also makes clear that in relation to out of school hours activities for pupils who are not boarding pupils, charges may only be made for “optional extras” which by definition cannot be compulsory. Footnote 34 does say that boarding places are for those provided with overnight board and lodging and that day places are for those who attend school on a daily basis.

26. I consider that the text of footnote 34 means day place pupils includes all who attend school on a daily basis and this category includes, but does not wholly constitute, pupils who participate in optional school activities outside school hours. While day boarders at Hockerill are not participating in optional out of hours activities, they do meet the central element of the definition by attending on a daily basis. The fact that day boarders attend for a very long day, have all their meals and do their homework at the school and have special facilities provided for them does not alter the fact that they attend on a daily basis. This is reinforced in the references in the school's Guide to Boarding which explain that for day boarders the House cannot provide laundry facilities and that should a day boarder become sick a parent is expected to collect them from school (as would be the case for a day pupil in any school), that a sick child who is a day boarder cannot stay overnight at the school and that once the child is collected by the parent, responsibility for the child's care passes to the parent.
27. The school in its submission has drawn my attention to the treatment of the concept of "boarding" in other documents and statute, arguing that in none of these is boarding or accommodation synonymous with staying overnight at a school. There is no legal definition of "boarding school" in the Act or any other Education Act. Section 87C of the Children Act 1989 which provides the statutory authority for the Boarding Schools National Minimum Standards refers to "*children for whom accommodation is provided by a school or college.*" The standards themselves do refer under the heading "Standard 5 – Boarding accommodation" in 5.1 to "*Suitable sleeping accommodation is provided for boarders.*" For the purposes of admissions, however, it is what is in the primary and secondary legislation relating to admissions and in the Code which is relevant, especially as there is nothing elsewhere which explicitly contradicts what is said in the Code. The school drew my attention to determination ADA001389. The Code in force at the time of that determination did not include footnote 34. I must consider the school's arrangements against the Code now in force including footnote 34.
28. I have considered the school's arrangements and its cogent and clear arguments and I have tested these against the relevant provisions of the Code. I have set out my assessment of the school's arguments above and I have also set out my own assessment of the meaning of footnote 34. The day boarders at the school are not required to sleep at the school and, while they can stay overnight if they wish and there is a bed available, the school makes no specific provision for this. Day boarding at Hockerill Anglo-European College does not include any requirement or entitlement to sleep at the school. It does not meet the terms of footnote 34 and so does not conform with the Code.

Conclusion

29. I have determined that the school's inclusion of a category of day boarders within its wider group of boarders is contrary to the definition of boarding places in footnote 34 to the Code. The Code requires the admission authority to revise its arrangements within two months of the date of this determination unless I specify an alternative timescale. In this case, I recognise that my determination will have a significant impact on the school and that it will want to consider and consult on the changes it will need to make to give effect to my determination. I recognise also that parents will already have applied for places for admission for their children for September 2016. I therefore determine that the arrangements must be changed by 28 February 2016 which is the deadline for determining arrangements for 2017.

Determination

30. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the academy trust for Hockerill Anglo-European College, Hertfordshire for admissions in September 2016.

31. 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 arrangements must be revised by 28 February 2016.

Dated: 27 November 2015

Signed:

Schools Adjudicator: Shan Scott