



Office of
the Schools
Adjudicator

Determination

Case reference: ADA3718

Objector: A member of the public

Admission authority: The governing board for Menorah Primary School, Barnet

Date of decision: 27 April 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 2021 determined by the governing board for Menorah Primary School, Barnet.

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.

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 a member of the public, the objector, about the admission arrangements (the arrangements) for Menorah Primary School (the school), a voluntary aided school with a Jewish religious character for children aged 4 to 11 for September 2021. The objection, amongst other things, is to the priority given to children who have attended the school's nursery and to the nature and clarity of the faith-based oversubscription criteria which are employed.
2. The local authority (LA) for the area in which the school is located is the London Borough of Barnet. The LA is a party to this objection. Other parties to the objection are the

objector, the governing board of the school and the school's religious authority, the Golders Green Beth Hamedrash.

Jurisdiction

3. These arrangements were determined under section 88C of the Act by the school's governing board, which is the admission authority for the school. The objector submitted their objection to these determined arrangements on 12 May 2020. The objector has asked to have their identity kept from the other parties and has met the requirement of Regulation 24 of the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012 by providing details of their name and address to me. 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

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

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

- a) the objector's form of objection dated 12 May 2020;
- b) the school's, the LA's and the faith body's responses to the objection, information which I requested from them and subsequent correspondence from the parties;
- c) copies of the minutes of the meeting of the governing board at which the arrangements were determined; and
- d) a copy of the determined arrangements;
- e) information received during a meeting I convened on 22 December 2020, which took place remotely, and correspondence received subsequent to it from the parties, and
- f) previous adjudicator decisions in:
 - ADA1379 Menorah Primary School
 - ADA2577 Independent Jewish Day School
 - ADA2779 King David High School
 - ADA2820 Beit Shvidler Primary School
 - ADA2821 Hasmonean Primary School

ADA2823 Menorah Foundation School

ADA2865 Rimon Primary School

ADA3362 Avigdor Hirsch Torah Temimah Primary School

ADA3380 Pardes House Primary School

ADA3505 Menorah High School

ADA3530 Pardes House Primary School.

The Objection

6. The objection listed ten matters which the objector said were contrary to the requirements of the Code. When I wrote to the parties following my receipt of confirmation of the determination of the arrangements by the school's governing board, I set out these matters, and my understanding of them, as follows:

- (i) that the arrangements were not published on the school's website in accordance with paragraph 1.47 of the Code;
- (ii) that the priority given to children who have attended the school's nursery contravenes paragraphs 14 and 1.8 of the Code by being unfair;
- (iii) that the priority given to children of members of the Golders Green Beth Hamedrash Congregation irrespective of their attendance there is "discriminatory". The objector did not say which provision within the Code may be breached as a result, but I understood this to be paragraph 1.9i);
- (iv) that the priority given to children who are Orthodox Jews for whom a Rabbi is asked to confirm that they are halachically Jewish via the school's supplementary information form, contravenes the Race Relations Act 1976¹ and so is not permitted under Appendix 1 of the Code;
- (v) that the definition of "frequent attendee" in the admission arrangements is unclear, and so contravenes paragraph 1.8 of the Code. I considered that this may also breach paragraph 14 of the Code;
- (vi) that the attendance requirements are insufficiently clear, not procedurally fair and fail to comply with equalities legislation, in breach of the requirements of

¹ The Race Relations Act 1976 has now been repealed and replaced, so far as is relevant here, by the Equality Act 2010. The objector has referred to the Race Relations Act and I am treating that reference as if it were a reference to the Equality Act.

paragraph 1.8 of the Code. I considered that this may also breach paragraph 14 of the Code;

- (vii) that the term “Orthodox Jews” as used in the arrangements to give priority to applicants is not defined, and therefore unclear. The objector did not say which provision within the Code may be breached as a result, but I understood this to be paragraphs 14 and 1.8;
- (viii) that the description of the school’s ethos is insufficiently detailed to allow parents to affirm their support for it with certainty. The objector did not say which provision within the Code may be breached as a result, but I understood this to be paragraphs 14 and 1.8;
- (ix) that it is not possible for a Rabbi to attest to the religious observance of parents as required by the arrangements. The objector did not say which provision within the Code may be breached as a result, but I understood the objection to be that this renders the oversubscription criterion which gives priority to parents who are supportive of the school’s ethos lacking in objectivity and therefore in breach of paragraph 14, and procedurally unfair in breach of paragraph 1.8;
- (x) that the arrangements are unclear concerning the effect of the participation of parents in religious activities as evidenced by the supplementary information form, and that the arrangements are therefore insufficiently clear or objective and that they fail to comply with paragraph 1.8 of the Code. I considered that this may also breach paragraph 2.4 of the Code as the information collected does not appear to have a direct bearing on any of the stated oversubscription criteria.

7. I also informed the parties at that point that, having considered the arrangements as a whole, it appeared to me that there were a number of other matters which did not, or may not, conform with the relevant requirements, which I will set out below.

8. The objector wrote to me and did not disagree with my explanation of the elements of the objection, but raised a further matter. This concerned the school’s practice regarding the admission of boys and girls. The objector said that the school took gender into account and that it tried to balance the number of boys and girls in each of its two reception classes. The arrangements make no reference to any such practice, but paragraph 1.6 of the Code requires admission authorities to set out in their arrangements the criteria which are used to decide on the allocation of places. I therefore asked the school to comment on the point made in order that I may understand the issue more fully. I shall return to this matter below.

Other Matters

9. The matters which I raised with the school as possibly failing to comply with the requirements concerning admission arrangements were:

- (i) that the arrangements do not state that any child whose Education, Health and Care plan names the school will be admitted, in contravention of paragraph 1.6 of the Code;
- (ii) that the arrangements do not set out the entitlement of parents of children who have been offered a place at the school to defer their entry up to the point at which the child is of compulsory school age, or for the child to attend on a part-time basis prior to this point, as required by paragraph 2.16 of the Code;
- (iii) that the statement made in the arrangements that repeat applications in the same academic year will not be considered contravenes paragraph 1.9a) of the Code since this is not itself an oversubscription criterion, and
- (iv) that the supplementary information form breaches paragraph 2.4 of the Code by seeking information about a child's father, as this does not have a bearing on the application of any of the stated oversubscription criteria.

10. I informed the parties that I had accordingly decided to exercise my power under section 88I of the Act to consider the arrangements as a whole and whether they conform with the requirements relating to admissions.

11. At the meeting which I held with the parties I explained that on further consideration it seemed to me that that there was an additional matter which was also of concern, namely:

- (i) whether the priority given to looked after and previously looked after Orthodox Jewish children was compliant with the requirement of paragraph 1.37 of the Code in view of the school's designated religious character.

Background

12. The school was kind enough to give me a background history of the school, which I summarise here for the reader. The Golders Green Beth Hamedrash (the GGBH) was both a synagogue and community of refugees from Nazi Germany when it founded the school in 1944 in order "to ensure the continuation of Orthodox Jewry in their new homeland". The school became state funded in 1970, but it "has always maintained close links with the GGBH." In the school's own words, it "falls between the ultra-orthodox single sex Jewish schools on the one hand and those under the aegis of the Chief Rabbi on the other." The school is popular and oversubscribed.

13. The school also referred me to a previous determination by the adjudicator which it said had "basically fixed" the school's arrangements, in 2008 (ADA1379). I shall refer to this again below. The school has told me that it has not received previous complaints about its admission arrangements and that "those parents who wish their children to join our school do not appear to have a problem understanding our criteria." It said it believed that it has tried to ensure that its oversubscription criteria are fair, clear and objective.

14. The arrangements state that “The school is provided primarily for children of Orthodox Jewish families who maintain strict observance of Orthodox Jewish religious and cultural norms in accordance with the Shulchan Aruch and based on the three pillars of Ahavas Torah, Yiras Shomayim and Middos Tovos. Other children are admitted only if there are still places available after all Orthodox Jewish children applying have been offered places.” The foregoing terms are not defined in the arrangements, but my understanding is that the Shulchan Aruch is the standard of Orthodox Jewish religious observance as specified by the code of Jewish law, Ahavas Torah means love of the Torah (the books of Moses), Yiras Shomayim means reverence for the Divinity and Middos Tovos means good character, or good deeds.

15. The published admission number (PAN) is 50, and the arrangements state that “Children will normally only be admitted to the Reception Class if they have reached the age of four by 1st September in the year of desired entry.”

16. The oversubscription criteria are, in summary:

- a) Looked after and previously looked after Orthodox Jewish children
- b) Orthodox Jewish children who have attended the school’s Nursery
- c) Orthodox Jewish children whose parents:
 - (i) are members of or frequent attendees (as defined) at the GGBH and
 - (ii) maintain a strict observance of Orthodox Jewish religious and cultural norms in accordance with the requirements of the Sulchan Aruch assessed on the basis of the supplementary information form and written confirmation from the Rabbi of the GGBH
- d) Orthodox Jewish children with a sibling at the school
- e) Up to five Orthodox Jewish priority children (as defined)
- f) Orthodox Jewish children of families whose ethos matches that of the school (as defined) assessed on the basis of the supplementary information form and a reference from an Orthodox Jewish Rabbi
- g) Other looked after and previously looked after children
- h) Other children with a sibling at the school
- i) Other children.

Random allocation is used as a tie breaker if the school becomes oversubscribed within any of these oversubscription criteria. A footnote says that:

“It is the policy of the Governing Body not to consider repeat applications for admission in the same academic year unless there has been a significant change in circumstances relevant to the application.”

17. The supplementary information form (SIF) includes:

- (i) A request for the title and first name of the child’s father (but not for that of the mother)
- (ii) A request that the person filling in the form attests to the statement: “We confirm we are Orthodox Jews”, that they answer the question: “Do you support the ethos of this school?”, and to provide “a certificate of an Orthodox Rabbi to support the statements in this form”
- (iii) An invitation to provide on the reverse of the form details of the applicant’s relationship with each synagogue they attend or their “participation in religious activities such as services, shiurim (lectures), learning or Chessed (religious welfare activities)”.

The Rabbi’s certificate asks for confirmation that:

- (i) The child is halachically Jewish
- (ii) The parents are Orthodox Jews
- (iii) “The parents are supportive of the ethos of the school namely instilling in the pupils a firm foundation which will prepare them for a life of committed Torah observance based on the three pillars of Ahavas Torah, Yiras Shomayim and Middos Tovos.”
- (iv) For the Rabbi to sign the form and to provide a contact telephone number.

18. I think it is worth making clear that I take “halachically Jewish” in the context of this case to mean children who are Jewish by reason of matrilineal descent or conversion to Judaism under the auspices of a synagogue which the GGBH would recognise for this purpose.

Consideration of Case

19. The objector has raised two substantive issues – the use of a priority for children attending the school’s nursery and the school’s faith-based admission arrangements. The school’s website displays the admission arrangements for the nursery, which are not themselves subject to my jurisdiction. However, given the school’s use of a nursery priority, they are relevant to my consideration of the admission arrangements for the school. Like the school, the nursery has 50 places, and the arrangements for admission to it are, other than concerning the date of application and the age of admission, in every respect identical to the admission arrangements for the school (but do not of course have a nursery priority

and employ an application form rather than a SIF as well as a Rabbi's certificate). I have decided that after I have disposed of the other element of the objection - that concerning the publication of the arrangements - it will be helpful if I consider first the objector's complaints about the school's faith-based admission arrangements in order that I can refer to those matters when considering the objection about the nursery priority.

Publication of the arrangements

20. When I looked at the school's website on 3 June 2020, the admission arrangements which I was able to access were provided under the heading "2018 and 2019". These were identical – other than so far as the dates - to those which the school had provided for me a few days earlier in response to the objection and which were entitled "Admission Arrangements for September 2020 and 2021". The school provided me with the minutes of the meeting of its Governing Board on 27 November 2019 at which the arrangements were determined, the wording of the minute being that the previous arrangements were to remain unchanged "for admissions in September 2020 and September 2021". I was happy to accept this minute as confirmation that the arrangements for September 2021, which were the subject of the objection, had been determined in the relevant period for that to take place, which is prior to 28 February 2020. When the school responded to the objection, it apologised that it had "failed to realise that there were dates on the arrangements that should have been changed even if the actual arrangements on the website were correct".

21. It is of course correct that if a school's admission arrangements for a given year are determined as unchanged from those determined for the previous year, that the same arrangements will apply to both years and that at the point when that takes place, those for the former year will not yet have been employed. However, the school's practice of displaying the admission arrangements for two separate years at the same time under the same heading is I think unhelpful, as well as being very unusual. In the first place, it cannot be the case that the admission arrangements for two years are determined at the same time, and so when the Governing Board met on 27 November 2019 it was only determining the arrangements for September 2021, the determination of those for 2020 having happened previously, and so these should have also been displayed previously. Second, this way of displaying determined arrangements is only accurate if arrangements are determined as identical from one year to the next, which cannot be assumed. The school has told me that it does determine its arrangements annually, as it must do in order to comply with paragraph 1.46 of the Code, and so I see no difficulty for it in displaying its arrangements on its website "once determined", as required by paragraph 1.47 of the Code, and for the year in question solely. As far as the arrangements for 2021 are concerned, the school did not publish them on its website once it had determined them, and so it failed to comply with paragraph 1.47 of the Code. I uphold this aspect of the objection.

22. I turn now to my consideration of those aspects of the objection which concern the faith-based aspects of the admission arrangements –including here the oversubscription criteria which are employed, and the SIF and Rabbi's certificate.

Membership of the GGBH

23. After the priority for Orthodox Jewish children who have attended the nursery, the arrangements give priority to “Orthodox children whose parents (i) are members of or Frequent Attendees....at the GGBH”. The school has made it clear to me in correspondence that it regards membership (as I understand it, of the GGBH synagogue) and attendance there as alternatives, either of which would result in a child being given priority for admission. I shall consider the issue of attendance requirements below, but am considering here the objection that giving priority to children whose parents are members of the synagogue is “discriminatory”.

24. When I saw the objection, it seemed to me that this element of it concerned a matter which was a religious activity, and was therefore subject to the provision in paragraph 1.9i) of the Code, which says:

“admission authorities **must not**prioritise children on the basis of their own or their parents’ past or current hobbies or activities (schools which have been designated as having a religious character may take account of religious activities, as laid out by the body or person representing the religion or religious denomination)”.

25. At the meeting which I held, I explained that clarification of the phrase “laid out” had been provided in the High Court by Mr Justice Cobb in a judgment about the London Oratory School (Governing Body of the London Oratory v The Schools Adjudicator [2015] EWHC 1012 (admin)). Mr Justice Cobb held that:

“....the phrase “laid out” means specifically ‘laid out’ in schools admissions guidance published by the religious authority – ie ‘specifically provided for in or authorised by’ such guidance.”

I also explained to the parties that I infer from this that guidance should be in written form, and should be clear enough for the admission authority to identify which specific religious activities its religious authority permits it to take into account.

26. The school had described membership and attendance at the GGBH in different ways in the exchange of correspondence concerning the objection, and so I asked it if it could provide confirmation as to whether each constituted a religious activity in its view. The school explained that when it had in previous correspondence said that it does not consider membership of the GGBH to be a “test of religious observance”, it meant that it did not wish to indicate that the person concerned “is more religiously observant than” someone who is a member of another orthodox synagogue. It confirmed that it does consider membership of GGBH to be a “religious activity” which enables “the more effective undertaking of the various religious activities that form part of Jewish life”. It also said that it acknowledged that “membership of a synagogue is not an absolute requirement”, which I understand to mean that it is possible for someone to attend services or Shiurim (religious lectures) and to participate in other religious activities without having synagogue membership, either of the GGBH or of another synagogue.

27. In view of the school's confirmation of the status of membership of GGBH membership as a religious activity, when I referred at the meeting to the clarification of "laid out" by Cobb J, I also referred to correspondence which I had received from the GGBH in its role as the school's religious authority, which had replied to my request to be provided with any written guidance which it provides to the school by saying "we have not issued any specific written guidance". I explained in the meeting that, in the absence of specific written authorisation concerning a particular religious activity from a school's faith body, it was not possible for a school to prioritise applications on the basis of its performance by applicants for a place at the school. I explained that in the school's case, given the response of the GGBH to my request, there was no such authorisation.

28. When the school wrote to me following the meeting, it attached a letter to the school governors from the GGBH which contained the following paragraph:

"The GGBH considers that religious activities of parents that the school may take account of in deciding which children to admit to the School include participation in Shiurum (lectures) given by Orthodox Jewish lecturers, attending synagogue services, membership of Orthodox Jewish synagogues, Jewish learning and welfare activities."

It is entirely welcome that the school's religious body has provided this guidance, which will be of value to it in responding to this determination, and in deciding what matters it will include in admission arrangements for the school in the future, although this may be limited by the imprecision of a phrase such as "Jewish learning and welfare activities". As far as my consideration of the objection is concerned, this relates to the admission arrangements which have already been determined for 2021, and it is clear that the priority which they include for children whose parents are in membership of GGBH concerned a religious activity which had not been laid out by the religious authority at the time the arrangements were determined, and that this therefore offends against what paragraph 1.9i) of the Code requires.

29. However, that does not conclude my consideration of this aspect of the objection, as there are further matters for me to take into account. Prior to the meeting, I had also asked the school to provide full details of what is involved in a person becoming a member of the GGBH. I asked whether membership was open to any person, or whether there were qualifying criteria, and also whether there was any fee involved. The school replied in the following terms:

"There are no formal written qualifying criteria to becoming a member. A person would need to apply to become a member and would only be accepted as a member if the Rabbi and Board of Management are in agreement that the person intends to maintain a connection with the GGBH, attending services and Shiurim, and maintains the standard of observance of Judaism represented by the GGBH being along the same lines as set out in our Admission Arrangements ie in accordance with the requirements of the Shulchan Aruch."

30. At the meeting which I held, I asked the school whether it was a requirement that a person would need to be halachically Jewish to be considered for membership of the

GGBH, and was told that this was the case. The Supreme Court has ruled that school admission arrangements that give priority on the basis of being halachically Jewish amount to unlawful discrimination on grounds of race in the Jewish Free School case (R on the application of E v Governing Body of JFS and others [2009] UKSC 15). The school's admission arrangements say that priority is given to children whose parents are members of the GGBH or who are frequent attendees at GGBH. So far as the arrangements give priority on the basis of membership of GGBH which is limited to those who are halachically Jewish, they are in breach of equalities legislation.

31. The school told me that:

“There is no upfront fee payable before one can become a member. However, there are annual membership rates which members are asked to pay.....if a member found it difficult to make any payment, then his or her membership would continueeven though no membership payments were being made. The services which the GGBH provides for members are provided irrespective of any payment.”

Paragraph 1.9e) of the Code, to which I referred earlier in connection with the nursery priority, says:

“....admission authorities.... **must not**give priority to children on the basis of any practical or financial support parents may give to the school or any associated organisation, including any religious authority.”

The school's reply does not state that fees are optional, only that they can be waived, as it would seem, for a period of time. There is therefore a financial contribution to the religious authority involved in GGBH membership, and this is a breach of what paragraph 1.9e) stipulates.

32. My view is that the priority given to children whose parents are members of the GGBH synagogue fails to comply with the requirements of the Code in paragraphs 1.9i) and 1.9e) and with equalities legislation. I uphold this aspect of the objection.

Rabbi's Certificate and Halachically Jewish children

33. The school has acknowledged the binding nature of the decision of the Supreme Court which I explained above, and has said that it is willing “albeit with great reluctance” to delete the word “halachically” from the Rabbi's Certificate which accompanies the school's SIF. As determined, however, the arrangements, which include the SIF and the Rabbi's Certificate, fail to comply with equalities legislation for the reasons I have discussed above. I uphold this aspect of the objection.

34. I note in passing that the arrangements give priority to those who are Orthodox Jews, for which they provide a definition, and which the SIF also requests parents to affirm. I shall consider below the objector's view that this definition is insufficiently clear. However, putting that issue to one side for the moment, the arrangements clearly require self-certification by applicants against whatever definition is provided in the arrangements. It seems to me that

self-certification – as opposed to certification by a third party – is the only possible approach here since many of the elements of being Orthodox Jews which are being attested to largely do not take place in the public arena. I shall also discuss this further below.

35. Given that self-certification by applicants is the process used by the school in the arrangements concerning an applicant's status as an Orthodox Jew, it is not appropriate for the school to seek third party verification of this in every case, since otherwise the self certification is of no value and, as I have noted, third party verification is not objectively possible. However, if there are other matters which are relevant to the application of an oversubscription criterion and which take place in the public domain, such as the attendance of a person at public religious observance, then all applicants wishing to be given priority as a result would need to provide evidence from the relevant authority. It is common and unexceptional to use a SIF for this purpose and for the relevant faith leader to endorse or confirm the attendance or participation claimed by the parent. It is necessary only for the school to know enough about the Rabbi to be able to satisfy themselves as to their authenticity, and it does not seem to me to be necessary for the school to know the Rabbi's telephone number for that to happen. The SIF, and any associated form, must comply with the requirements of the Code which are in essence that they can only be used to "request additional information when it has a direct bearing on decisions about oversubscription criteria" (Code, paragraph 2.4).

36. I will discuss the school's use of synagogue attendance in its admission arrangements and the recording and confirmation of this below.

Frequent attendance

37. The arrangements give priority to those who are "frequent attendees" at the GGBH, and define this as being someone who has "attended either services or Shiurim at the GGBH on average at least four times a week for a period of no less than 12 months in the 16 months prior to the closing date."

38. The objector complained that this requirement in the arrangements was unclear because it did not state whether a single visit to the synagogue to participate in both a service and a shiur (lecture) would count as two attendances or only one. The school responded to the objection by providing suggested wording which would clarify that it was the latter (one attendance) that was meant. As determined, however, the definition of frequent attendance is not clear, and so the arrangements are unclear in contravention of paragraph 14 of the Code and contain an unclear oversubscription criterion in breach of paragraph 1.8. I uphold this aspect of the objection.

The clarity, fairness and legality of the attendance requirements

39. The objector considered that the attendance requirements are also unclear because there is no formal monitoring system to record attendance at the synagogue, that women are disadvantaged because shiurim cannot be attended by them and because the lack of a system of recording attendance means their presence may not be noted even if they do

attend synagogue. Further, the objector said that single women would find it difficult to attend synagogue if they have children who are too young to walk because they would not be permitted by the GGBH to carry them or push them on the Sabbath and so are effectively not permitted to leave their homes on that day, and because of the timing of services which are themselves not child-friendly. In correspondence the objector expanded this last point, complaining that the level of attendance that the school requires of “frequent attendees” adds to this difficulty and means that it also discriminates against single fathers, albeit to a lesser extent.

40. The school acknowledged that “there are no detailed requirements as to logging of attendances”, and suggested that the arrangements could state that a person wishing to seek priority as a frequent attendee could ask to have their attendance logged and verified by the synagogue. The objector suggested alternative methods by which attendance could be recorded. However, I do not consider that it is necessary for the arrangements themselves to specify how a person’s attendance at a place of worship is to be recorded in order for the arrangements themselves to be clear, and it is not necessary for the adjudicator to be concerned with the precise methodology adopted for such recording. If the arrangements set out clearly how any means of obtaining priority on the basis attendance is to be achieved, they themselves will be clear.

41. A school needs evidence that a person wishing to be given priority on this basis has fulfilled the requirement as claimed, and so has to rely on the relevant body to provide that evidence. In this case, what the school’s arrangements and the school’s SIFs do not do, however, is to allow an applicant to indicate that they seek priority on the basis of their attendance, or to allow for verification of that attendance to be provided. A person reading the arrangements will therefore be uncertain as to how they should proceed in making their application for a school place if they wish to be considered for priority on the basis of their attendance, and this means the arrangements fail to comply with the requirement in paragraph 14 of the Code that they be clear. Indeed, the school has also told me that: “To date we have only had one set of parents informing us before the start of the admissions process that they wanted to rely on that criterion and one further set who only told the School after the admissions process had concluded.” I uphold this aspect of the objection.

42. The “frequent attendee” requirements in the arrangements are set out above. The objector has complained that these are unfair to any single parents, particularly to any single mothers because of the level of commitment required. The objector has pointed out that, in addition to the reasons given above, daily communal worship is a requirement placed in Orthodox Judaism on men but not on women, and that the former would therefore more easily satisfy the attendance requirements of the school. In various letters to me on this point, the school has said that “the test was put forward by the GGBH”, agrees that it requires at least 200 attendances in the specified period, says that it was introduced “to enable people who were not members of the GGBH but nevertheless maintained a close connection with the GGBH to have precedence to others without such a connection”, that it was not a test of “religious observance” but of having this specific connection and was nevertheless a religious activity, stated that it did not want it to become “an easy route into

the School” and agreed that it “may prove more difficult for single parents” but that it does not breach equalities legislation as it applies equally to single mothers and to single fathers.

43. The objector has expressed the view that if attendance at GGBH is not a test of religious observance, it can hardly be a religious activity as the school claims. My view of this is that if the school’s religious authority specifically sets this out as a religious activity, then it is permitted as such, even if the purpose in using it is to define those with a close relationship with the GGBH rather than those with a given level of religious observance. I note here, however, that it is my view that the religious authority has not laid out attendance at the GGBH as a permitted religious activity, even in recent correspondence where it refers “membership of Jewish Synagogues” (in general) as membership is not the same as attendance, and that it had set out no religious activities for the school prior to the determination of the arrangements, as discussed above. Its use therefore does not conform with the requirements of paragraph 1.9i) of the Code, for the reasons given above.

44. The school accepts that the frequent attendee criterion is not an easy test to satisfy, and that it is more difficult for any single parent families than for others, possibly for the reasons given by the objector, although it has not said this. Paragraph 1.8 of the Code requires that admission arrangements are reasonable and that they do not “disadvantage unfairly, either directly or indirectly, a child from a particular social...group....”. That being the case, my view is that the “frequent attendee” oversubscription criterion fails to comply with what paragraph 1.8 of the Code requires as it constitutes an unfair disadvantage for single parent families and I consider that single parent families fall within the meaning of “social group”. That being the case, it adds nothing for me to consider separately whether there is an even greater unfairness to single parent families headed by women. I uphold this aspect of the objection.

45. I have understood that in the case of this community synagogue attendance is not required of women, but neither is it forbidden, and so I do not take the view that the requirement placed on men to attend daily communal worship constitutes an unfair disadvantage suffered by women in meeting the school’s attendance requirements, even though it might be more unusual in this community for women than for men to attend daily communal worship. There is currently no system for recording attendance at the GGBH, although the school has suggested that this could be established particularly if those wishing to rely on this oversubscription criterion were to provide notice of this, and this impacts equally on men and women. I see no reason why, if such a system is instituted, that it would fail to register the attendance of men more accurately than that of women, particularly if care is taken to ensure that is the case. However, and by contrast, women may not attend shiurim and so, given that this would constitute an attendance at the GGBH for a man if it took place on a day when he did not also attend a service, the opportunities for women to meet the attendance requirements are fewer than those for men. In my view this acts to discriminate unfairly against women in meeting this oversubscription criterion because the child of a single mother would suffer an unfair disadvantage. Paragraph 1.8 of the Code requires admission authorities to: “...ensure that their admission arrangements will not disadvantage ... a child from a particular social....group”. Gender is a protected

characteristic in the Equality Act 2010, and so the inclusion of shiurim attendance as a way of helping to gain priority for a place at the school also breaches equality legislation, as would any activity that would be counted as an attendance at the GGBH and which could not be equally undertaken by a woman, even if it appears in any list of religious activities which the religious authority has provided for the school. I uphold this aspect of the objection.

46. Paragraph 1.38 of the Code says:

“Admission authorities for schools designated as having a religious character **must** have regard to any guidance from the body or person representing the religion or religious denomination when constructing faith based admission arrangements, to the extent that the guidance complies with the mandatory provisions and guidelines of this Code. They **must** also consult with the body or person representing the religion or religious denomination when deciding how membership or practice of the faith is to be demonstrated.”

The school has told me that the level of attendance at the GGBH specified as necessary in order to benefit from the oversubscription criterion was suggested to it by the GGBH, although I understand that there is no written guidance on this point. In order for the school to be required to have regard to such guidance however, it must satisfy the proviso in paragraph 1.38 of the Code concerning other mandatory provisions, which include those set out in paragraphs 1.4 and 1.8. That is to say, it is a material factor as to whether the resultant arrangements and criteria are fair, and whether oversubscription criteria that follow that guidance are reasonable. It seems to me to be evident that the requirement of an average of four attendances per week is a high one, and the school has itself used the phrase “not easy” to describe it. At the meeting which I held, the school told me that the level of attendance it requires is intended to be “a challenging test”, pointing out that there are three services and between five and seven prayer services each day at the GGBH, which they regard as a “unique cultural community”. That may be the case, but my concern here is whether what the school, not the community, requires is reasonable. It is also the case, as the objector has pointed out, that the community - that is to say, the GGBH – does not remove what others might consider are barriers to attendance. The school has not challenged the objector’s statement that the GGBH does not accept the authority of the “eruv”, which allows young children or babies to be carried or pushed in a pram on the Sabbath, which clearly has a consequence for single parent families in particular.

47. The school will need to modify its arrangements in the light of this determination and so will need to take account of the fact that I have found that including shiurim attendance in this oversubscription criterion does not comply with what the Code requires, and revise the minimum attendance requirement as a result. The school has helpfully already stated its willingness to consider making its attendance requirements different for different parental entities (married couples, men, women, single parents). I am also conscious, as the school will be, that this criterion was added to the arrangements as an alternative to GGBH membership, which I have said also fails to comply with these requirements, but that “frequent attendance” has hardly ever been relied upon by applicants in its present form.

The clarity of "Orthodox Jew", the school's ethos, SIF completion and Rabbi's certificate

48. The objector has said that the arrangements do not define clearly what is meant by "Orthodox Jew", that the attestation requested of applicants concerning the school's ethos cannot be objective since the requirements involved are not clear, and that a Rabbi would not be able to attest to this as it would not be known what took place in the family in private. These matters are interrelated, since all are contingent on the clarity of what is meant in the arrangements by "Orthodox Jew". I will therefore look at them together.

49. The arrangements give priority to children from Orthodox Jewish families, and they define what this means by referring to families which "maintain strict observance of Orthodox Jewish religious and cultural norms in accordance with the requirements of the Shulchan Aruch and based on the three pillars of Ahavas Torah, Yiras Shomayim and Middos Tovos". However, they do not elaborate further.

50. The objector says that different people who consider that they are Orthodox Jews can be observant in very different ways. I take this to mean that different people have different criteria for considering themselves to be Orthodox Jews. The school has told me, concerning what the objector sees as a lack of clarity in the arrangements on this matter, that "we do not consider this is a problem for any parent wishing to apply who will know if they are an Orthodox Jew or not". What is in question, however, is not whether someone who might apply for a place at the school for their child thinks themselves to be an Orthodox Jew, but whether it is possible for someone reading the arrangements to understand who is an Orthodox Jew as far as the school is concerned. If people with differing levels of observance but who nevertheless consider that they are Orthodox Jews apply for a place, and if their attestation to this is subject to affirmation by a Rabbi on a basis which is not known, then it remains unclear how the requirement to be an Orthodox Jew in order to be given priority in the admission arrangements is to be satisfied.

51. Paragraph 1.8 of the Code requires oversubscription criteria to be objective, but does not provide a definition of that term. I take it to have the everyday meaning when applied to the context in which it appears in the Code. It is a requirement that applies to all oversubscription criteria, whether faith-based or not, and it means that oversubscription criteria which might reasonably be understood differently by different people are not permitted.

52. The school has told me that the Shulchan Aruch "runs to 10 volumes so it is not practical to detail all its provisions". That is, of course, correct but even if this were practical, admission arrangements that were so extensive would not meet the requirement of paragraph 1.37 of the Code that:

“Admission authorities [for schools designated as having a religious character] **must** ensure that parents can easily understand how any faith-based criteria will be reasonably satisfied.”

For this requirement, and that in paragraph 14 that :

“Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated.”

to be met, the arrangements themselves must be neither too complex nor insufficiently explicit that parents will know how the school decides that a faith based oversubscription criterion has, or has not, been satisfied.

53. I indicated to the parties when requesting a meeting via a video link that I was particularly concerned that I should understand the means which the school uses to recognise parents and children as being Orthodox Jews. When this was discussed, the school referred to the importance in Orthodox Jewish practice for individuals to ask the Rabbi questions about their religious observance. Subsequently in writing the school maintained its view that “this is adequately covered by our admission arrangements”. It said:

“We are quite clear that any Rabbi who is signing the Rabbi’s Certificate in support of the SIF will have good awareness of whether their constituent applicant, male or female, is an Orthodox Jew not least because regular engagement with a Rabbi with regard to religious issues or questions is a vital part of Orthodox Jewish practice.”

My view of this is that if individuals cannot be clear as to whether their practice will enable them to know that a Rabbi will be able to certify that they are Orthodox Jews, then it cannot be clear from the school’s admission arrangements what is required, and they fail to satisfy paragraph 1.37 of the Code as a result.

54. It is at the heart of this matter that the issue for the adjudicator is not what a faith body considers is required to be accepted as a member of the faith, or of a defined group within that faith. That is a matter for the faith or the group itself. The adjudicator is concerned with how school admission arrangements enable any reader to understand what is involved in securing priority for admission to the school, including for schools which are permitted to use faith-based oversubscription criteria. The Code insists that all oversubscription criteria are clear and objective in nature. Any faith-based oversubscription criteria which are used by a school may not therefore rely on subjective judgements to decide whether they have been satisfied. It is for the school, if necessary, to grapple with different understandings of what a religion’s practice might require before it can satisfy this requirement. If it is then able to provide clear descriptions of what is required, as far as gaining priority for admission to the school is concerned, that may form the basis of a clear oversubscription criterion which can be objectively assessed. If it is not able to do so, the matter in question may not appear as part of the faith-based admission arrangements for the school, if these are to comply with the requirements of the Code.

55. It is my belief that it is possible for schools with a Jewish faith character, as for schools with other faith characters, to define clear and precise faith based oversubscription criteria that are publicly verifiable. As determined, the school's arrangements do not provide this clarity for those reading them concerning the meaning of "Orthodox Jew", since there is no information given as to the expectations which the school has concerning observance of the requirements of the Shulchan Aruch. The oversubscription criteria which give priority to those described as Orthodox Jews therefore fail to comply with paragraphs 14 and 1.8 (as well as paragraph 1.37) of the Code. I uphold this aspect of the objection.

56. The arrangements include the following oversubscription criterion:

"Orthodox Jewish children of families whose ethos matches that of the school (the ethos being a desire to instil in their children a firm foundation which will prepare them for a life of Totah observance in accordance with the requirements of the Shulchan Aruch based on the three pillars of Ahavas Torah, Yiras Shomayim and Middos Tovos) assessed on the basis of the supplementary information form and a reference from an Orthodox Jewish Rabbi."

The objector complains that the arrangements do not make clear what its understanding is of these requirements, and that this oversubscription criterion is as a result unclear. The school has said, mirroring its view about the clarity of the term Orthodox Jew, that: "...the ethos is clearly set out ...and will be understood by anyone who meets the criteria." However, for the reasons given above, I am of the view that the description in the arrangements concerning the requirements of the Shulchan Aruch is not clear, and that this oversubscription criterion is therefore also not clear, and in breach of paragraphs 14 and 1.8 of the Code. I uphold this aspect of the objection.

57. I come now to the related elements of the objection concerning the completion of the SIF and the Rabbi's Certificate. The SIF asks applicants to make the affirmation that:

"We confirm we are Orthodox Jews", and asks the question:

"Do you support the ethos of the school ?".

The Rabbi's Certificate asks for confirmation of both parental statements.

58. I have already referred to the matter of self-certification by applicants and whether it is then appropriate for that self-certification to subject to the confirmation of a Rabbi. Nevertheless, I also take the view that self-certification and confirmation by a Rabbi can both be lawful approaches because both can be objective, provided that the requirements that are being attested to are clear. I have already said that that is not the case concerning the relevant matters related to the definition of Orthodox Jew and of the school's ethos. Since these matters are not clear in the arrangements, the attestation to or confirmation of them cannot be objective and so these elements of the forms, which form part of the school's admission arrangements, fail to meet the requirements set out in the Code in paragraphs 14 and 1.8. I uphold this aspect of the objection.

59. I note in passing that it is also necessary that the procedure being adopted by the school, that is to say whether a particular matter is to be verified by self-certification or by confirmation by a Rabbi, is clearly set out in the arrangements for applicants to understand, and I have also already said that I do not think that the arrangements do make this clear. It is also relevant for me to say, again as I have already indicated, that I do not consider that some matters are capable of being attested to by a Rabbi as they do not take place in public. For example, one translation of “Yiras Shomayim” is that it means “behaving in private as one would do in public”, and I take that to mean what it says.

Parental participation

60. The objector is of the view that the invitation in the SIF to provide details of the applicant’s relationship with the synagogues they attend or details of their participation in religious activities is unclear, since there is no specification of how many of these activities or what level of participation in them is necessary to qualify for a place. The school responded to the objection by making reference to paragraph 1.6i) of the Code, which I have understood to mean paragraph 1.9i) Code, since it said that this allowed the school to take into account religious activities “as laid out by the body representing the religion.”

61. I have dealt with this same matter above when considering membership of the GGBH. As far as the arrangements for 2021 are concerned, there were no religious activities laid out by the religious body for the school to take into account and so the use of religious activities at a synagogue other than the GGBH is not compliant with paragraph 1.9i) of the Code.

62. I have explained why membership of any Orthodox Jewish synagogue, while constituting a religious activity which could be laid out in guidance by the faith body, is not compliant with the requirements concerning admission arrangements on other grounds. The school says that it uses the information about the other activities mentioned “to ascertain whether a person is committed to Torah observances and Jewish religious and cultural norms”, but it does not say how it does this. Even if a religious activity is laid out by a school’s faith body as something which may be taken into account in its admission arrangements, the school must provide an oversubscription criterion which is clear and capable of being assessed objectively in accordance with paragraphs 1.4 and 1.8 of the Code if it wishes to take the religious activity into account. The arrangements do not do this concerning the information referred to above, and I uphold this aspect of the objection.

63. The arrangements also do not comply with paragraph 2.4 of the Code, which says that:

“...admission authorities...**must** only use supplementary application forms that request additional information when it has a direct bearing on decisions about oversubscription criteria...”

because they contain no oversubscription criterion to which the information collected as described above is relevant.

64. I will now set out my consideration of the objection concerning the priority given in the arrangements to children who have attended the school's nursery.

The nursery priority

65. This matter has been the subject of extensive correspondence from the objector and the school, which I shall refer to before setting out my own consideration of this aspect of the objection.

66. The objector's form of objection referred to a determination in a previous case concerning a school with a Jewish faith character which had a nursery, quoting the adjudicator's conclusions that the priority the school gave in its admission arrangements to children who had attended its nursery was unfair. The objector said that the priority given to children who attend Menorah Primary School's nursery is therefore also unfair, and contrary to paragraphs 14 and 1.8 of the Code. These paragraphs say, respectively, that:

"In drawing up their admission arrangements, admission authorities **must** ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective." (paragraph 14) and;

"Oversubscription criteria **must** be reasonable, clear, objective, procedurally fair, and comply with all relevant legislation, including equalities legislation." (paragraph 1.8)

67. The objector subsequently referred me to three other cases involving Jewish primary schools with nurseries and quoted extensively from the adjudicator's findings in two of them. In each of the three cases the adjudicator had found that the priority given to children from the school's nursery offended a provision, or more than one provision, of the Code. This was not the version of the Code in force when the determination was made in 2008 concerning Menorah Primary School's arrangements.

68. The school referred me to this determination, saying that in not upholding an objection to the use of nursery attendance as an oversubscription criterion, the adjudicator in 2008 had "decided in our favour". It then referred to the provision in the Code which applied at that time which required that if children attending a school's nursery were given priority for admission to the school, this should not cause disadvantage to certain other groups. It continued by saying that since this provision was not present in the current Code that "it must follow that there is now a much stronger right for us to be allowed to retain a priority for nursery." It added that "such a provision should not be re-introduced through the back door having been removed from the Admissions Code by the Department for Education."

69. There are a number of things for me to say at this point. The first is that the school's arrangements were not "basically fixed" by the decision of the adjudicator in 2008 as it has asked me to accept. It is the case that at that time adjudicators were able to decide the form of a school's admission arrangements, and to decide that they should be "protected" in that form, that is protected from any changes, for a period of time. The adjudicator in 2008 did

protect the arrangements that he determined should apply for the school, but for one year only. The present requirement that admission arrangements must be determined annually, to which I have referred previously, makes it abundantly clear that the admission arrangements for a school apply only to the year for which they have been determined by the admission authority, and so are not “fixed”.

70. Second, it seems to me that it can be seen from the preceding paragraphs that, from their different standpoints, both the objector and the school have sought to persuade me that giving priority to children who have attended a school’s nursery is essentially either always allowed (in the case of the school), or always forbidden (in the case of the objector). I have referred above to what the previous Code said, and it should be evident that there was no “blanket” authorisation or prohibition in it of the use of a nursery priority in a primary school’s admission arrangements. In the school’s previous determination a nursery priority was found not to offend against the Code in force in 2008, whereas in the cases cited by the objector considered against a rather different Code in force from 2014, it was. Then, as now, any oversubscription criterion must comply with all the other requirements in the Code, such as those which require fairness and reasonableness in admission arrangements, if it is to be in conformity with the Code. Previous determinations which found that a priority given to children who had attended a school’s nursery offended against the requirements concerning admission arrangements did so on such grounds, and not because giving priority to children in a school’s nursery was itself specifically forbidden.

71. Any determination by an adjudicator applies to the circumstances of the school in question at the time, and is made in that context and in relation to the then current requirements concerning admission arrangements. That is what previous adjudicators have done, and that is what I shall now proceed to do in respect of this aspect of the present objection. I note here that, in relation to the adjudicator’s previous determination concerning the school’s arrangements that the context in which it was issued was not only that there was a different School Admissions Code at that time, but that it took place prior to two landmark legal judgments – that in the case of the Jewish Free School in the Supreme Court and that concerning the London Oratory school by Cobb J (to which I have already referred). I shall start by setting out what the Code which is now in force says about this matter.

72. The Code is not silent on giving priority to children from a school’s nursery in its admission arrangements (as the school told me at an early point in our correspondence is the case) but, as the school later pointed out, the Code refers to this matter in paragraph 1.9e). This allows parents to pay optional fees to a school nursery to top up funded part-time provision without falling foul of the prohibition on priority being given to parents who make a practical or financial contribution to a school. The Code also refers to the possibility of priority being given to children attending a school’s nursery in paragraph 1.39B, which allows schools to give such priority for children eligible for the early years pupil premium, the pupil premium or the service premium.

73. So the present Code clearly allows for the possibility that nursery attendance can be used as an oversubscription criterion in a primary school's admission arrangements. However, that does not mean, for the reasons I have given above, that its use by the school is necessarily compliant with the Code. The Code does not apply to the admission arrangements for the nursery, which means that it is perfectly permissible for an admission authority to use arrangements which would not be allowed for admission to Year R in its nursery arrangements (such as giving a higher priority to those who applied earlier) if it wishes. If, however, children who have attended the nursery are then prioritised for admission to the school, a child can be admitted to the nursery and subsequently to the school when they would not have been admitted under Code-compliant admission arrangements for Year R. In the case of the school, I have set out above the reasons why the faith-based oversubscription criteria which are used for both nursery and Year R fail to comply with the Code requirements concerning the latter, and why aspects of the SIF and Rabbi's certificate cause further breaches. In as much as these same faults apply to the nursery arrangements, they have the exact same effect. It is my view that the use of admission arrangements for a nursery which would not comply with the requirements concerning admissions to Year R renders any priority given to children who have attended a nursery unfair and in breach of paragraphs 14 and 1.8 of the Code.

74. The school and the objector have also presented me with opposing arguments concerning the relevance of the fact, acknowledged by the school, that there is no right of appeal for a parent if their child does not secure a place in a nursery, the objector arguing that this has a bearing on the fairness of the school's use of the nursery priority in its admission arrangements for the school, the school refuting this. If a child were refused admission to the nursery, say, because of a mistake in the application of the arrangements, then the child's parent not only has no remedy at that point but would be likely to suffer the consequences again at Year R as a result of not having been admitted to the nursery. Even though the school has told me in correspondence that it would expect a mistake in a nursery admission to be rectified on appeal for a place in Year R, I do not consider that this nullifies the point, as such remediation cannot be relied upon. The school could allow appeals against a refusal of a nursery place, and in my view it needs to do so if it wishes to use attendance at the nursery as an oversubscription criterion for admission to the school in a manner which is not unfair. My view is that the absence of any appeal at the nursery stage is a further reason why the priority given to children from the nursery renders the admission arrangements for Year R unfair, and in breach of paragraphs 14 and 1.8 of the Code.

75. Since it was my view that the relationship between nursery and Year R admissions would also be relevant to my consideration of the fairness of the latter, I asked to be provided with recent admission data for both. I will begin by looking at recent admissions to the school's nursery.

76. The school has confirmed that nursery admissions take place annually in September. I have already mentioned my concern that the admission arrangements for the school do not comply with what the Code requires concerning the dates of admission to reception

classes, and I note here that the wording of the school admission arrangements differs from that of the nursery only in the age at which it says children are “normally admitted” (three by 1 September for the nursery, and four by 1 September for the school).

77. The number of children admitted to the nursery in recent years under each of its oversubscription criteria, is :

Criterion	2017	2018	2019
Orthodox Jewish children prioritised on the basis of:			
Membership of GGBH	19	19	16
Sibling (non-GGBH)	20	20	28
Priority Jewish children	5	5	5
Other Orthodox Jewish Children	9	6	4

78. The school has not explained why there were more than 50 admissions to the nursery in 2017 and 2019 although there is no reason why this is not allowed. It can also be seen clearly from these figures that all the children admitted to the nursery each year met the school’s faith-based tests for priority for a place. Also, the school has told me that it uses random allocation to determine admissions to the nursery when it is oversubscribed, meaning that it must be oversubscribed with “other Orthodox Jewish Children” in the years when it does so.

79. Data given to me by the local authority shows that the school has been oversubscribed at Year R in each of the years 2018 to 2020 .

Year of entry	On-time first preferences
2018	61
2019	58
2020	62

In each of these years, the school has told me, all of the 50 available places “were offered to children in the nursery”, having been admitted to it as described above. So, more first preferences for a place at the school were expressed than the number of children who effectively transferred to the school from the nursery in each of these years. This means that some children who had not attended the nursery but who might well have met the school’s other (faith-based) criteria could have been admitted to Year R had the nursery criterion not been in place. Instead, to gain a place in Year R at the school a child would in practice have to be a looked after or previously looked after Jewish child, or to have attended the nursery. In effect the arrangements require a parent to send their child to the school’s nursery in order to secure a place at the school.

80. My consideration of what this means in terms of the fairness of the arrangements is based on the fact that there is no requirement for children to attend nursery provision and that parents are perfectly entitled to keep their child at home with them, as some will choose to do. For others who do want pre-school provision, that offered by this school may not fit with their working patterns and they may choose to send their child somewhere else if that better meets their needs.

81. It is always unfortunate when more children wish to attend a school than it has places and especially so when more satisfy the same criterion. Admission arrangements are expected to be as fair as is possible in the prevailing circumstances and in order for them to be unfair, must result in there being an actual unfairness to somebody. In the case of the school, I am persuaded that some children are likely to be denied the opportunity of being considered for a place in Year R on a basis which is fair, and therefore to suffer an unfairness, as a result of the priority given to children who have attended the nursery, for the following reasons:

- (i) because all the places are taken up by children who have attended the nursery, yet parents may legitimately choose not to or may for practical reasons be unable to send their child to it,
- (ii) because any mistake in making admissions to the nursery does not have a right of being appealed against, and
- (iii) because criteria used to prioritise admissions to the nursery would not be compliant with the requirements concerning admissions to Year R.

82. I have therefore concluded that the priority given to children who have attended the school’s nursery renders the arrangements unfair and in contravention of paragraphs 14 and 1.8 of the Code. I uphold this part of the objection on each of these grounds.

83. The school made the argument that since the Early Years Foundation Stage framework (the EYFS) of the National Curriculum covers the nursery and reception years, having nursery attendance as the first oversubscription criterion (after looked after and previously looked after children) enable it to provide a “seamless” experience of the EYFS with which “children and parents are very pleased”. Doubtless that is true, but the EYFS

provides a framework from birth to age five and its importance lies in the fact that, as the school itself pointed out, children are likely to attend more than one setting in this time. It enables movement between settings, rather than the reverse.

84. The school also argued that the use of nursery attendance enabled it to avoid using distance from the school as an oversubscription criterion in the arrangements for the school, which it says it wishes to do because house prices are high near to the school. It said it uses random allocation for its oversubscribed nursery and that it would not “make sense” if a further random allocation (for example) were then used for admissions to its reception class, but I do not see why that should be so, and the school has not explained this view. In any case, neither of these points have a material bearing on my consideration of the objection, which concerns what the school does, not what it might otherwise do.

85. The school has chosen nursery attendance to distinguish between children who meet its religious practice test, and this disadvantages children who have not attended the nursery, in my view unfairly. An approach based on distance will advantage those who live near the school and disadvantage those who live further away and an approach based on random allocation will equalise the chances of all those who meet the criterion concerned. In all cases, the ability for the school to prefer children who meet the school’s religious practice test is not diminished; it is simply a question of what is a fair way of choosing between these children when there are more of them than there are places.

86. While I recognise the school’s arguments as to the benefits of continuity in the learning experience for children, they do not amount to a reason for effectively linking nursery and Year R admissions for the reason I have given above, which argues instead for the absence of any such need. I have also said that I do not accept the school’s reasoning about avoiding the use of distance as an oversubscription criterion for Year R admissions as many alternative oversubscription criteria are plainly possible. The school has also said that it does not want to use random allocation again at Year R having used it at nursery, but that would be one way of avoiding using distance and of ensuring an equal opportunity to gain a place to all who satisfied any particular criterion. Instead, gaining a place at the school’s nursery is effectively a condition of gaining a place in the school. For all these reasons, my view is that the arrangements fail to be reasonable in addition to being unfair, and that this constitutes a further breach of the requirements of paragraph 1.8 of the Code.

87. In view of the contrasting viewpoints which have been put to me concerning the issue of giving priority to those attending a school’s nursery, and which I have described above, I feel it will be helpful if I explain my understanding of the effect of the decision which I have set out above, given its nature. I have found that the arrangements fail to comply with the requirements in the Code, for the reasons which I have given. It will be for the admission authority to amend its arrangements, as I shall set out in due course. When it does so, it will need to be mindful of each of these reasons. First, any priority given on the basis of nursery attendance will in my view render the admission arrangements for a school non-compliant if the criteria which determine nursery admissions would not be permitted for the school itself, and also if there is no right of appeal against the refusal of a nursery place.

Second, the other reasons for my conclusion about the unfairness and unreasonableness of the nursery priority in the case of the school derive from the proportion of the available school places which are prioritised on the basis of nursery attendance. In this case, there is effectively no chance of admission to year R for a child who has not attended the nursery: all available places are taken by children from the nursery. Whilst the decision in any case will depend on the specific facts, and it is not for me to prescribe the new admission arrangements (which will have to be substantially different to the existing ones, for the reasons already set out above), in order for the arrangements to be fair there would need to be a reasonable prospect of a child who had not attended the nursery being admitted to year R.

88. Before coming to the further elements of the objection, I need to deal with one further matter concerning the school's nursery. The objector has complained in correspondence that the school is not "gender blind" because it balances the gender ratio in the nursery, which then feeds through to the school's reception class. In response to my request on this point, the school has kindly provided me with the gender break down of the admissions shown in the table above, which will have determined, to all intents and purposes, the gender balance of the school's reception class in the subsequent year. I was not able to discern in these figures any evident balancing of the sort complained of by the objector, who did not comment on them, and I have not considered this matter further.

Other Matters

89. I now turn to the matters which I have raised with the school. Paragraph 1.6 of the Code says the following:

"The admission authority for the school **must** set out in their arrangements the criteria against which places will be allocated at the school when there are more applications than places and the order in which the criteria will be applied. All children whose statement of special educational needs (SEN) or Education, Health and Care (EHC) plan names the school **must** be admitted."

The school has told me that "We had previously been told to remove this provision as the acceptance of a child with a statement or EHCP falls within a different admissions procedure." It also helpfully told me that it would be happy to include an appropriate addition to its arrangements, if required to do so. It is true that the entitlement of a child with a statement or EHC plan which names a school entitles it to be admitted, and so the child does not need to apply for a place and be considered alongside other applicants against the school's oversubscription criteria. However, there is only one admissions procedure for a school – that set out in the Code, and it includes this provision. It is important that schools make it clear that, like all other schools to which the Code applies, they are subject to this requirement. Any child so admitted reduces the number of remaining places available, and so parents reading admission arrangements, especially those for heavily oversubscribed schools, need to be aware that the number of places available may in practice be lower than that set out as the PAN in the arrangements. My view is that the wording of paragraph 1.6 of the Code makes it clear that a school's arrangements should include a statement to

that effect, but as determined the arrangements did not do so and so were in breach of this requirement.

90. When referring to schools which admit children to the Reception year, paragraph 2.16 of the Code says:

“Admission authorities **must** provide for the admission of all children in the September following their fourth birthday. The authority **must** make it clear in their arrangements that, where they have offered a child a place at a school: a) that child is entitled to a full-time place in the September following their fourth birthday; b) the child’s parents can defer the date their child is admitted to the school until later in the school year but not beyond the point at which they reach compulsory school age and not beyond the beginning of the final term of the school year for which it was made; and c) where the parents wish, children may attend part-time until later in the school year but not beyond the point at which they reach compulsory school age.”

The school responded to my concern that the arrangements did not contain a statement of that met this requirement by saying “We are happy to include this statement relating to deferment of entry.” The statement which is required must cover all the matters required by paragraph 2.16, including the entitlement to part-time education. As determined, the arrangements failed to do so, and failed to comply with a mandatory requirement of the Code.

91. The school told me that it had thought it useful to include in the arrangements the statement: “It is the policynot to consider repeat applications for admission in the same academic year unless there has been a significant change in circumstances relevant to the application.” Paragraph 1.9a) of the Code says that:

“Admission authorities.... **must not**...place any conditions on the consideration of any application other than those in the oversubscription criteria published in their admission arrangements.”

I am not clear why the school considers such a statement to be useful. If an application for a place at the school is unsuccessful, that application will remain on the school’s waiting list until at least 31 December of the school year if the parent desires this, in accordance with paragraph 2.14 of the Code, and as stated in the next explanatory point in the school’s arrangements. Waiting lists must be kept in the order of the oversubscription criteria, and priority cannot be given on the basis of the date of the application. If an applicant had asked to have their name removed from the waiting list but then changed their mind even though their circumstances had not changed materially such that their place on the waiting list might change, I see no reason for the school not to then reinstate them on the waiting list and continue to consider their application. The arrangements as determined place a condition on the consideration of such a repeat application in contravention of paragraph 1.9a) of the Code, since that condition does not relate to any of the oversubscription criteria. Paragraph 2.22 of the Code also states, in terms, that:

“Any parent can apply for a place for their child at any time to any school outside the normal admissions round.”

I note that the school has expressed itself willing to remove the statement above from its arrangements, but as determined, the arrangements do not comply with paragraph 2.22.

92. I was concerned that the school’s SIF asks for the title and first name of the applicant’s father, and that it does not ask for the first name of any other parent or carer. I have quoted above the prohibition in paragraph 2.4 of the Code from an admission authority seeking any information unless it has a direct bearing on decisions about oversubscription criteria. The school says that it collects this information so that it would know “who he is if there are two parents with the same surname and how to address him”. The school has available to it the information provided on the common application form (CAF) which parents will have completed in order to express a preference for a place at the school, and this includes the parent’s name (or names) as allowed for on that form. That is sufficient information for the school’s purposes and it only needs enough information on the SIF to allow it to identify the application, for example by asking for the name of a parent or carer or for more than one such if that is the applicant’s preference. Information such as a parent’s title is not material to the consideration of the application as it does not relate to any oversubscription criterion and so may not be sought on the SIF. In asking for information specifically about only a child’s father, the school is also putting itself in the position of potentially knowing more than it needs to about a child’s parenting relationship. The school has offered to ask for the title and first name of the applicant’s mother as well as for that of the father. However, such additional information provided on the SIF would also breach paragraph 2.4 of the Code for the reasons I have given concerning fathers. The school’s SIF fails to comply with paragraph 2.4 of the Code.

93. At the meeting which I held, I raised one further matter with the school concerning its arrangements. This was the priority which the arrangements give to children who are looked after or who have previously been looked after by a local authority.

94. I have already said that the school’s faith character is Jewish. Paragraph 1.37 of the Code has the following to say:

“Admission authorities for schools designated with a religious character may give priority to all looked after children and previously looked after children whether or not of the faith, but they **must** give priority to looked after children and previously looked after children of the faith before other children of the faith. Where any element of priority is given in relation to children not of the faith they **must** give priority to looked after children and previously looked after children not of the faith above other children not of the faith.”

This is set out more plainly in the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012 (the Regulations), where regulation 9, cited as a footnote to paragraph 1.37 of the Code, refers to children “of the same faith as that of the school according to its designation”, making it clear that the term “the faith” in the Code means the faith character of the school, as designated. The

school's arrangements do not give priority to all looked after and previously looked after Jewish children, but only to those who are Orthodox Jewish, and as the arrangements also make plain, this does not include all Jewish children. As a result, the arrangements fail to comply with the requirement set out in paragraph 1.37 of the Code.

Summary of Findings

95. In the above, I have explained why the admission arrangements for any school must:

- (i) be published on the school's website;
- (ii) state that children whose statement of special educational needs or education, health and care plan names the school will be admitted;
- (iii) comply with equalities legislation;
- (iv) not give priority to children based on any financial contribution made by their parents;
- (v) only use oversubscription criteria which are clear, which are fair and which can be assessed objectively, and
- (vi) place no condition on the consideration of applications other than those in its oversubscription criteria.

I have also explained why the admission arrangements for a primary school which admits children to Year R must:

- (i) give priority to children attending a nursery at the school only to the extent that doing so complies with all the relevant provisions of the Code, and
- (ii) include a statement which explains a parent's entitlement to defer the admission of their child or for the child to attend on a part-time basis.

For schools which are designated as having a religious character, I have explained the need for admission arrangements to:

- (i) give priority on the basis of religious activities only if these have been specifically laid out in guidance provided by the school's faith body;
- (ii) use a SIF which gathers only additional information which has a direct bearing on decisions about oversubscription criteria;
- (iii) be clear how any faith-based priority is to be sought;
- (iv) ensure that faith-based oversubscription criteria can be easily understood and that they can be verified objectively, and

- (v) be mindful of the school's faith designation.

96. I have set out my reasons for finding that the school's arrangements fail to meet these requirements by:

- (i) failing to publish the arrangements after they were determined;
- (ii) including no statement concerning children with a statement of special educational need or EHC plan which names the school;
- (iii) giving priority to parents who are members of the GGBH synagogue as this requires a person to be halachically Jewish, asking a Rabbi to certify that children for whom a place is being sought are halachically Jewish and by including a frequent attendee oversubscription criterion which unfairly disadvantages single parents and women;
- (iv) giving priority on the basis of an activity (GGBH synagogue membership) which involves the payment of fees;
- (v) using oversubscription criteria which are unclear and which cannot be assessed and attested to objectively concerning the definition of frequent attendance, of the term Orthodox Jew, of the school's ethos and concerning the use of information gathered about parental activities;
- (vi) stating that certain applications for places will not be considered;
- (vii) giving priority to children who have attended the school's nursery in a way which is unfair and unreasonable;
- (viii) failing to include a statement in line with that required by paragraph 2.16 of the Code;
- (ix) giving priority to children on the basis of religious activities carried out by their parents concerning membership of the GGBH, frequent attendance there and activities carried out in connection with other synagogues which have not been laid out for this purpose by the school's religious authority;
- (x) asking a Rabbi to certify what has already been attested to by a parent, asking for information about parental participation in religious activities which does not relate to an oversubscription criterion and gathering unnecessary information about a child's father;
- (xi) failing to be clear about how "frequent attendees" should seek priority, and
- (xii) giving priority only to some Jewish looked after or previously looked after children.

97. The school will need to revise its arrangements accordingly. I hope that it will do so as soon as possible. I am mindful that the national offer day for primary school places for September 2021 was 16 April 2021 and that applications and allocations will have been made on the basis of the arrangements as they were determined and concerning which I have made this determination, not on the basis of the required revision of them. I would expect the school to make every effort to ensure that any disadvantage caused by the matters in those arrangements which I have found to fail to comply with the relevant requirements are minimised. The school's revised admission arrangements for September 2021 will remain relevant to admissions to the school for the remainder of the school year 2021/2022.

Determination

98. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements for September 2021 determined by the governing board for Menorah Primary School, Barnet.

99. 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.

100. 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.

Dated: 27 April 2021

Signed:

Schools Adjudicator: Dr Bryan Slater