



Office of
the Schools
Adjudicator

DETERMINATION

Case reference: ADA 2743

Objector: Comprehensive Future

Admission Authority: Old Swinford Hospital School, Dudley

Date of decision: 20 March 2015

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, we partially uphold the objection to the admission arrangements determined by the governing body of Old Swinford Hospital School, Dudley for admissions in September 2015.

We have also considered the arrangements in accordance with section 88I(5). We determine that they do not conform with the requirements relating to admission arrangements.

By virtue of section 88K(2), the adjudicators' decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements.

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 Comprehensive Future (the objector), about the admission arrangements (the arrangements) for Old Swinford Hospital School, Dudley (the school), a voluntary aided school for boys aged 11 to 18 which also admits some girls to its sixth form, for September 2015. The school is a partially selective state-funded boarding school. The objection is to the priority which is given to children of former pupils of the school.

Jurisdiction

2. These arrangements were determined on 18 March 2014 under section 88C of the Act by the school's governing body, which is the admission authority for the school. The objector submitted its objection to these determined arrangements on 30 June 2014. We are satisfied that the objection has been properly referred to us in accordance with section 88H of

the Act and it is within our jurisdiction.

3. Having had the arrangements brought to our attention it appeared that there were other ways the admission arrangements do not, or may not conform with requirements relating to admission arrangements. We have therefore used the power available to us under section 88I(5) of the Act to consider the arrangements as a whole and in accordance with the Act decided whether the arrangements conform and, and if not, in what respects they do not.

4. Both adjudicators attended a meeting at the school on 21 October 2014 (the meeting), as the adjudicator and as the note taker, which is a normal arrangement. However, following concerns expressed by the school about procedural matters that it believed this introduced, both were appointed as adjudicators for this case and have considered all the matters set out in this determination jointly. The school was informed about the joint appointment of the adjudicators and has raised no comment with respect to it. The determination is the shared view of the adjudicators.

Procedure

5. In considering the arrangements we have had regard to all relevant legislation and the School Admissions Code (the Code).

6. The documents we have considered in reaching our decision include:

- a. the objector's email and form of objection dated 30 June 2014;
- b. the response of the school to the objection and subsequent correspondence;
- c. the response of the Dudley Metropolitan Borough Council, the local authority, (the LA) to the objection;
- d. the response of the Diocese of Worcester (the diocese) to the objection;
- e. the LA's composite prospectus for parents seeking admission to schools in the area in September 2015;
- f. a map of the area identifying relevant schools;
- g. confirmation of when consultation on the arrangements last took place;
- h. copies of the minutes of the meeting of the governing body at which the arrangements were determined; and
- i. a copy of the determined arrangements.

7. We have also taken account of information received during the meeting at the school at which we met representatives of the school, the local authority

and the diocese, and of subsequent correspondence. The objector was invited to the meeting, but did not attend.

The Objection

8. The objector stated that the priority given by the school to children of former pupils for the allocation of both “boarding” places and “out boarder” places:

(i) unfairly disadvantages children of first generation immigrants as well as any child whose parent had not wished to attend this boarding school, and that since these constitute particular social groups paragraph 1.8 of the Code is breached; and

(ii) gives priority on the basis of the educational status of the parents of the child for whom a place is being sought, contrary to paragraph 1.9f of the Code.

Other Matters

9. Having viewed the arrangements, the adjudicators considered that they may contain further breaches of the requirements concerning admission arrangements, and wrote to the school setting these out. The following matters were raised in that letter:

(i) that the arrangements for the admission of out boarders in Year 7 appeared to be unclear. Specifically, the phrase “on the basis of performance” is not explained concerning the priority given to candidates for “out boarder” places in Year 7 using the results of the school’s selection test;

(ii) statements concerning both sports aptitude and musical aptitude in connection with Year 12 admissions appear to contain elements of assessment which relate to ability rather than being assessments of aptitude alone;

(iii) the charging of compulsory fees and the making of a request for a financial contribution in respect of children who it appeared to the adjudicators were not boarders at the school appears to be in breach of specific prohibitions of the Code; and

(iv) the statement that priority is given to existing boarders concerning applications for places in Year 12 appears to be unnecessary since such students already have a place at the school and this statement is therefore unclear.

10. Further specific concerns expressed about the arrangements by the adjudicators at the meeting, or in correspondence with the school subsequent to it were that:

- (i) the arrangements as a whole are complex, with both “policy” and “procedures” in the document provided on the school’s website which have to be read together;
- (ii) it is unclear whether external entrants to the sixth form admitted on the basis of their aptitude for sport or music are required also to meet the same academic requirements for entry as other students;
- (iii) the charging of fees may result in unfair disadvantage to those less well-off who would be discouraged from applying for a place at the school;
- (iv) the absence from the arrangements of any reference to the admission of children with a statement of special educational needs that names the school may fail to comply with paragraph 1.6 of the Code where the requirement that such children be admitted is set out;
- (v) the consultation on the school’s proposed admission arrangements carried out on its behalf by the LA may not have met the requirements set out in the Code; and
- (vi) the sixth form admission arrangements appeared to be unclear and in particular there appeared to be a variable published admission number (PAN).

Background

11. Old Swinford Hospital School is a partially selective school for boys aged 11 to 18, which also admits some girls to its sixth form. It is a voluntary aided school with the designated religious character of Church of England and is situated in Stourbridge in the West Midlands. The following paragraphs summarise the school’s admission arrangements.

12. Boys are normally admitted to the school in Year 7, Year 9 and Year 12; girls are also admitted to Year 12. At each of these points there is more than one category of admission. In Years 7 and 9 there are places for “boarders” and “out boarders”, and in Year 12 in addition to further boarding places for boys, there are places for “day students”, some of which are offered to girls. In Years 12 and 13 boys who were out boarders, are referred to as “day boarders” and pay a day boarding fee and so there are three categories of student in Years 12 and 13: boarders (boys), day boarders (boys) and day students (boys and girls). All boarders, out boarders and day boarders are charged fees and parents of sixth form day students are requested to make a specified contribution towards the cost of the induction programme for sixth formers. This contribution is referred to as a fee within the document “admission procedure” which is the single document found on the school’s website under “admission procedure and policy”. This charge is also included in the table of fees set out there.

13. The admission policy says that the following admission numbers apply:

Year of Entry	Boarders	Out boarders	Day students
7	44	16	nil
9	30	12	nil
12	13	nil	47 (31 girls)

14. Boarding places, but not those given to out boarders, at all points of entry are allocated to those deemed suitable for boarding. The criteria against which suitability for boarding is assessed are set out in the arrangements. This is followed by a list of seven oversubscription criteria for boarding places, the sixth of which is *“children of former pupils”*.

15. Admission to Year 7 out boarder places is on the basis of academic ability as determined by the Old Swinford Hospital Online Test (“OSHOT”). The policy says that *“Governors determine the qualification level for the test each year”* and that if more candidates attain this level than there are places then five oversubscription criteria are used, the fourth of which is *“children of former pupils”*.

16. Admissions to Year 9 out boarder places are made according to six oversubscription criteria, the fifth of which is *“children of former pupils”*.

17. Under the heading *“Admissions Criteria for Day Student/Day Boarder Places in Year 12”* the arrangements describe how six *“day places”* in Year 12 are awarded on the basis of aptitude in sport or music without reference to gender, with first priority being given to candidates showing suitable aptitude who are looked after or who were previously looked after, remaining places being awarded according to a rank order of performance *“in trials and auditions”* held at the school.

18. In Year 12 there are another 41 *“day places”* awarded on the basis of estimated academic ability using predicted GCSE grades, with first priority being given to candidates demonstrating a suitable ability who are looked after or who were previously looked after. The *“remaining places will be offered according to a rank order of marks awarded until the number of places offered to girls (including any awarded on the basis of aptitude in sport or music or to children looked after by the local authority) equates to 25 per cent of the projected total number of students in Year 12. No further places will be offered to girls. Should there be no further suitable boy candidates, remaining places will not be filled”*.

19. The arrangements for Year 12 go on to say *“In the case that more candidates qualify”*, five oversubscription criteria will be used, the first of which is *“candidates who are already boarders at the school”* and the fourth of which is *“children of former pupils”*. Candidates will need to obtain GCSE grades A*-C in at least 7 subjects in order to take up a place which has been offered. Although the section in the arrangements is headed *“Admissions Criteria for*

Day Student/Day Boarder Places in Year 12", it is only boys who can become day boarders after having been first admitted as day students, "subject to accommodation being available".

20. The arrangements also set out rules for transferring between categories of school place such as between an out boarder place in Year 11 and a day student place in Year 12 and how waiting lists are maintained. Attached notes say the following about out boarders and day boarders:

"Out Boarders in Years 7 to 11 do everything that boarders do except routinely sleep at the school. They may arrive for breakfast at 7.30 (but do not have to arrive until 8.20) and may depart after the end of Prep. They have full access to the facilities of the Boarding House including study areas. From time to time they may also sleep in the Boarding House if accommodation is available.

The Out Boarder fee relates solely to after school hours provision. It is not a charge for education and so many eligible families may be able to claim at least part of the Out Boarder fee as a Working Tax Credit. Parents should consult www.hmrc.gov.uk for details.

Day Boarders in the Sixth Form are equivalent to out boarders but there is greater flexibility concerning their routine."

21. The school's "Admission Procedures" provides details of three types of entrance scholarship and of a further Bluecoat entrance award. The three entrance scholarships are "awarded to outstanding candidates entering the school and give kudos and privileges to the scholar. The financial award is relatively small and is at the sole discretion of the Headmaster." Two of the awards are "based upon competitive examination and/or interview" and the third is for "outstanding musicians". Bluecoat awards are available to boarders "who have a particular need to board but where the resources of parents/carers cannot meet the full boarding fee. Those offered these awards benefit from a sum or percentage off the full boarding fee at the discretion of the Headmaster.....Those offered ...awards must first have qualified for a boarding place under the general admissions procedure for boarding places."

Consideration of Factors and Other Matters

The Objection

22. The objection is to the priority given to the children of former pupils of the school and is in two parts. First, that giving priority to children whose parents attended the school disadvantages children of first generation immigrants and those whose own parents had not chosen to attend the school; and secondly that this priority is related to the educational status of the parent. The objector said this did not comply with paragraphs 1.8 and 1.9f of the Code. We consider that there may also be disadvantage to applicants whose parents had wished to attend the school in the past but who were not offered places at that time.

23. Paragraph 1.8 of the Code says: *“Oversubscription criteria **must** be reasonable, clear, objective, procedurally fair and comply with all relevant legislation, including equalities legislation. Admission authorities **must** ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group or a child with a disability or special educational needs, and that other policies around school uniform or school trips do not discourage parents from applying for a place for their child.”*

24. Paragraph 1.9f of the Code says admission authorities **“must not give priority to children according to the occupational, marital, financial or educational status of parents applying.”**

25. In a letter dated 19 September 2014, the school resisted the objection which had been made concerning the priority given to children of former pupils and made the following points:

- (i) the priority is “well down” the lists of oversubscription criteria in which it appears, and that therefore its impact is likely to be limited and any unfairness caused by it is similarly limited;
- (ii) in its view the phrases “first generation immigrants” and “parents whose own parents had not chosen the school” are both “devoid of social content” , are not “social groups” for the purposes of the Geneva Convention (citing legal precedent in making this assertion) and that they are not “racial groups” (citing, again, legal precedent);
- (iii) the criterion does not cause unfair disadvantage because its fairness is supported by its objective nature and because it supports tradition, which is part of the ethos of the school, and through that social cohesion; and
- (iv) the term “educational status” is not defined in the Code, and in the view of the school it does not mean the place where someone was educated but rather their level of education and the skills they have obtained. It says that while it is true that the school is a selective school, it selects only 16 boys per year on academic ability and that taken as a whole “former pupils of the school cannot be equated to any particular educational status”.

26. At the meeting the school made the further point concerning the first part of the objection that the objector had stated its view that the criterion disadvantaged certain groups, but not why it considered that this was unfair disadvantage. The school asked the adjudicators to consider the issue of the fairness of the disadvantage which the criterion causes in the light of the school’s view that the position of the criterion in the hierarchy of oversubscription criteria reduced any unfairness. Concerning the second part of the objection, the school made the additional assertion that parents of children at the school came from a wide variety of backgrounds.

27. The school argued that the groups referred to by the objector do not fall within the meaning of social or racial group for the purpose of paragraph 1.8. It says that “a social group” has been defined for the purpose of the Geneva Convention as one distinguished by: *“an immutable characteristic.....that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed”*. The school has told us in correspondence that this meaning is probably wider than the meaning of a social group which is used in the Code because of the context of the Geneva Convention, and that even by this “wider” definition first generation immigrants are not a social group and that *“immigration was something which they brought about and it was and still remains within their power to change.”*

28. We have considered the school’s view on this matter most carefully. It seems material to us that the definition of a social group within the Geneva Convention is designed to remedy a different inequality or injustice to that which might arise in the making of admissions to a school, and that it was for the purpose of deciding who might qualify as an asylum seeker under international law. The purpose of the Code as set out in paragraph 12 of its introduction is to ensure that school places are allocated in a fair and open way, and we have considered what is meant by “social group” with that purpose in mind. Paragraph 1.8 of the Code goes beyond the requirement to comply for example with equalities legislation, which it mentions, but adds that admission arrangements must also not disadvantage unfairly a child from a particular social or racial group. Our view is therefore that the Code’s intention is not to define “a social group” in a narrow sense as the school would have us accept, and rather that the reverse is true. The Code’s reference to “a social group” in our understanding is to be read by admission authorities as having its everyday meaning and had Parliament meant it to be read in the same way as the school indicates, it would have stated such. The Oxford English Dictionary defines the word “social” to mean “relating to society or its organisation, relating to rank and status in society”, and so we believe that the phrase “social group” used in the Code would include those of a particular social status.

29. It seems clear to us that first generation immigrants can be said to have a particular rank or status in society. The term “first generation immigrants” is one which is commonly used without further definition it seems to us, and that there is therefore at least a degree of common understanding as to what the term means and the characteristics that would apply to those it was used to describe. Most would accept, in our view, that first generation immigrants would, for example, be unlikely to speak English as their first language, and that they would not share a common cultural background with the majority of the population. Such characteristics, which are those which society generally would recognise, do confer a particular social status on first generation immigrants in our view. Although this is less evidently the case for those who simply did not choose to or were unable to attend this boarding school, we have come to the view that at least some children potentially disadvantaged by the priority which the school gives to the children of former pupils do constitute a social group for the purposes of paragraph 1.8 of the Code and

that this part of the objection is not ruled out on the grounds put forward by the school.

30. The school considers that the objector has not stated why it considers that there is unfairness in the disadvantage brought about by the criterion. The objector has stated its view that there is unfair disadvantage because the children of first generation immigrants cannot have had a parent who attended the school. It is for adjudicators to consider the arrangements of a school in context when there is an objection about them, and to consider the extent to which they do or do not comply with what admission legislation and the Code require. The objector has referred to unfair disadvantage in the round, without separating out its individual elements as it is entitled to do when reading the Code with its everyday meaning. Our view is that the objection that has been made is that there is such disadvantage caused by the fact that it is impossible for first generation immigrants to satisfy the criterion in question that this is unfair.

31. It is clear to us that first generation immigrants could not have attended the school unless they had been admitted as an overseas student, and that this puts their children at a disadvantage compared to others when applying for a place at the school. We have considered whether this is an unfair disadvantage, taking account of the reasons the school gives for using the criterion. The school has said that its use of this criterion supports “tradition” in the form of what it referred to as “alumni relationships” at the meeting, and has said that this in turn supports social cohesion. We understand social cohesion to refer to the cohesion of society at large and not to the cohesion of a group within society. The group for which the school’s practice provides cohesion, in the form of a continuing familial relationship with the school, is very restricted and limited to former pupils of the school. Its practice has no bearing on the cohesion of society more generally, and we do not consider that this is enough by itself to render the disadvantage caused by the criterion fair.

32. The school also says that the disadvantage which it causes is mitigated by the low position of the criterion within the oversubscription criteria and the corresponding low level of its impact. In response to our request, the school has provided details of the criteria used to determine admission for each point of entry to the school for each of the four most recent admission rounds. The criterion which the objector has complained about has not been used to admit children to Year 7 in the last four years but was relevant to the admission of Year 9 out boarders in each of the last two years. In 2013 one child was given priority for admission under the criterion as the last to be admitted, and in 2014 seven were admitted under a lower ranked criterion. Although it is rare that this criterion is used, it does come into play and it is possible that a child could be deprived of a place because another child’s parent had attended the school. That this should happen, however infrequently, is in our view not acceptable.

33. The reason why we think this is unacceptable is that this is not just a question of it being more difficult for children of first generation immigrants to meet the criterion. If that were the case, it is possible that while the criterion

caused disadvantage this may not be unfair. But it is very unlikely that children of first generation immigrants will be able to meet the criterion which means that, when it is applied, it is likely to operate in an absolute way to prevent priority being given to this group. We are therefore of the view that the criterion causes unfair disadvantage in contravention of paragraph 1.8 of the Code and we uphold this part of the objection.

34. The objector also says that the priority given to children of former pupils breaches paragraph 1.9f of the Code because it gives priority based on the educational status of the parent.

35. The prohibition set out in paragraph 1.9f of the Code prevents admission authorities from using a forbidden characteristic of a child's parent or parents to give priority to children when oversubscribed. Read in context, it also seems to us that it is the current status of that characteristic which is referred to in particular in this sub-paragraph since no reference is made, as it is elsewhere in paragraph 1.9, to previous situations. For example, priority based on "parents' past or current hobbies or activities" is prohibited by paragraph 1.9i. Our view is that it is the current educational status of a parent in particular which must not be used, just as it is their current occupational, marital or financial status which must not be used.

36. The attainment of recognised qualifications clearly confers an ongoing educational status on a person, but we do not think that their previous attendance at a given school does this in anything like as clear a fashion, if at all. We are also mindful that if the Code had intended to rule out the use of the school a parent had attended, as it might have done given the other matters listed in paragraph 1.9, it could have referred to their educational history, but did not do so. However, neither does the Code expressly permit the criterion used by the school, as it could do, and as it does in relation to children of members of staff. So we take the view that the prohibition concerning educational status clearly refers in the Code to an ongoing educational status such as that which is conferred by recognised qualifications, but not clearly so to the school they have attended. We therefore do not believe that use of previous attendance at the school breaches the prohibition in paragraph 1.9f, and do not uphold this part of the objection.

37. However, although the Code does not specifically prohibit using the school attended by one of the child's parents as an oversubscription criterion, any oversubscription criterion must be fair, as required by paragraphs 14 and 1.8. Paragraph 1.8 is quoted above and paragraph 14 says 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."*

38. We have already given our view that this criterion gives rise to unfair disadvantage concerning one particular group in society. More generally it is a criterion which can only be satisfied by a very restricted group of applicants which by definition cannot include members of society at large and whose effect is to retain advantage within families. We do not accept the view of the school that the effect of the criterion is to promote social cohesion and we do

not believe that it meets the general requirement as to its fairness in paragraph 14 of the Code.

The Clarity of the Arrangements

39. In relation to clarity, paragraph 14 of the Code states *“In drawing up their admission arrangements, admission authorities **must** ensure that the criteria used to decide the allocation of school places are fair, clear and objective.”*

40. The school has explained that its admission arrangements are published in a document entitled *“Admission Procedure for 2015”* which also contains its admission policy. This runs to some 12 pages and the need for parents to read both the procedures document and the school’s policy together was referred to at the meeting. The school accepts in the introduction to its document that *“our admission procedure can seem complicated at first”*, and although this was therefore seen as common ground and not pursued further, it is appropriate to state here that although there is a degree of complexity inevitably involved with three points of admission to the school and the categories of place it offers, we believe that the arrangements as a whole could be set out more simply. Paragraph 14 of the Code also says that *“parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated”*, and we are of the view that this is not currently the case for the school.

41. One particular point on which the arrangements appear unclear is for the admission of boys to Year 7 as out boarders. The school has accepted, in two separate letters to the adjudicators, first that the arrangements do not make it clear that scores achieved by applicants on the OSHOT test are used in rank order to offer places to candidates, since this is not made explicit in the arrangements. Secondly, it has agreed that the phrase in the arrangements *“the Governors determine the qualification level for the test each year”* was likely to give those reading the arrangements the impression that a minimum score on the test was necessary, which it says is not the case.

42. The school has said it is willing to clarify the wording of its arrangements to make both these points clear, but as determined they are not clear, and do not meet the requirement set out in paragraph 14 of the Code.

The Categories of Boarding Place and Charges Made by the School

43. In correspondence, the school sought clarification about the concern expressed by the adjudicators of the effect of the charging of fees and financial contributions. The adjudicators replied that their concerns were that under the heading *“Out Boarding Places”* the school’s admission arrangements state that *“a fee is payable for the additional facilities, meals and supervision provided for out boarders”* and that the arrangements also contain the statement: *“The Governors request that parents/carers of day students pay a modest Facilities Fee (currently £173 per year) as a contribution to the cost of the Sixth Form Induction Programme and sundry other items which are not covered by government funding”*.

44. The adjudicators then explained that paragraph 1.9e of the Code prohibits priority being given to applicants on the basis of any financial support parents give to the school, and paragraph 1.9n says that admission authorities must not request financial contributions as any part of the admission process. Since the out boarder fee is mandatory, its effect appeared to the adjudicators to be that it may give priority in admissions to those willing to pay it, in contravention of paragraph 1.9e. Since the request for a Facilities Fee is referred to in the admission arrangements it appeared to the adjudicators that it may contravene paragraph 1.9n. Since both statements involve the making of financial contributions, either compulsorily or on a voluntary basis, they appeared to be likely to deter those parents of reduced financial means from seeking a place at the school, and their effect was therefore to disadvantage a particular social group, in contravention of paragraph 1.8.

45. These matters were explored in detail and expanded on at the meeting.

46. Paragraph 1.9 of the Code has the following to say:

*“...admission authorities **must not**.....*

e) give priority to children on the basis of any practical or financial support parents may give to the school

n) request financial contributionsas any part of the admissions process...”

47. The requirements that arrangements as a whole are “*fair, clear and objective*” and that they do not act to “*disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group...*” are set out in paragraphs 14 and 1.8 of the Code, which are quoted above.

48. Under section 88(5) of the Act, if “*it appears to adjudicators that admission arrangements do not, or may not conform with the requirements relating to admission arrangements*”.... they may consider them and must then “*decide whether they conform with those requirements and, if not, in what respect they do not.*”

49. The adjudicators’ role is to consider whether or not the school’s admission arrangements comply with the law. The adjudicators have necessarily therefore sought to understand both the exact nature of the school’s arrangements and their impact in terms of admissions to the school, and in addition to have clarity concerning how parents are or are not impacted by the school’s regime of charges, since these matters are relevant to the matters which are within their jurisdiction.

50. It is not possible to gain admission to the school in Years 7 or 9 without paying a fee, since all places are either “boarding” or “out boarding” places to which a charge attaches. That is, it is not possible for a boy to live at home and to attend the school only during the day without paying a fee. Admissions to Year 12 are either of boarders, who are charged a boarding fee, or as day

students in respect of whom a “facilities fee” is requested. The term out boarder is not used for students in Year 12 and above, where the term day boarder is used.

51. The adjudicators are satisfied that for “boarding places” the school may charge a fee as provided for by section 458 of the Education Act 1996. They are however concerned that the school categorises “out boarders” as boarders and charges a boarding fee to parents. The Education Act does not define the word “boarding” but consideration of the Statutory Guidance on Charging (DFE, October 2014) alongside a reading of sections 450-459 of the Education Act 1996 makes us consider that those who are “out boarders” are not in fact boarders, but are day pupils who take advantage of an extended day placement and out of hours provision. While such extended day activities can quite lawfully be subject to a charge, we think there must be room for doubt as to whether these are boarding places given that the accommodation to stay overnight is not in fact available other than occasionally.

52. The school has set at zero the PAN for day places in Years 7 and 9. It has explained in detail the nature of what is provided to an out boarder who, in short, in the school’s words *“does everything a boarder is entitled to do except routinely sleep at the school”*. The school said this is sanctioned because the Code at paragraph 1.40 says that a boarding school may set separate PANs for boarding and day places and since a PAN of zero is permitted, and since the school is not obliged to provide boarding places free of charge. It is of course permitted to charge fees to cover the cost of boarding as set out by the Department for Education and to recoup the cost of optional extras taken by pupils, not being the cost of board and lodging, provided these are set out in a charging and remissions policy. The school has a charging policy for school activities displayed on its website.

53. The school argues that out boarders are boarders, even though they do not routinely sleep at the school, and so their parents may be charged fees in respect of additional facilities which are provided for their use. Out boarders are not obliged to make use of all these additional facilities, including sleeping at the school, even though they may be *“expected to depart at night before lights out”* for example, as the school has told us in correspondence. However, their parents are obliged to pay the out boarder fee and may not decline to do so. A single fee is charged to parents of all out boarders and this may not comply with what is permitted since it does not seem to be the cost of the additional facilities provided to individuals. The relevant charging guidance expressly provides that a school can charge for overnight board and lodging provided that the charge does not exceed the actual cost, as set out under section 458 of the Education Act 1996.

54. The definition of boarding provision and matters such as the means by which the school in effect operates on the one hand as if it were exclusively a boarding school and yet on the other provides places for children who do not live at the school but who cannot attend without paying a fee in and of themselves are beyond the remit of the adjudicators and we believe fall to the Department for Education for further consideration. The matter which falls to adjudicators to consider is whether admission arrangements comply with the Code, and the lawfulness or otherwise of fees which are charged does not

affect such a judgement.

55. While the school can set separate PANs for boarding and day places, each is a single PAN. A school may state, within a defined PAN, that it intends some of the places to go to defined categories of student if the school is oversubscribed, but it may not operate more than one PAN other than as allowed under paragraph 1.40 for boarding schools, which may have separate PANs for boarding and day places. So there cannot be two PANs for boarders, only one. We have considered the school's protests to the contrary, but have not been convinced by them. It argues that there can be as many PANs as categories of boarder and to do so relies on its own interpretation of the Education Act 1996 as having introduced into legislation different categories of boarder, which we do not agree was the case. It also relies on its reading of paragraph 1.40 of the Code as speaking of "admission numbers" in the plural, which it does but plainly only to refer to boarding and day places, which may have such separate PANs. Since there can only be a single PAN for boarding places, separate PANs for "boarding" and "out boarding" places are not permitted. A consequence of this is that all of the places defined by the single PAN must be filled if there are suitable applicants for them.

56. If we accept the school's view that out boarders are boarders, not day pupils, then paragraphs 1.40 and 1.41 of the Code, which set out requirements concerning boarding places apply to the oversubscription criteria for out boarding places. The school does not assess the suitability of out boarders for boarding as it does for boarders, which seems inconsistent with the school's treatment of these places as boarding places. The school's oversubscription criteria for out boarders do not include children of members of the armed forces or children with a boarding need, as required under paragraph 1.41.

57. What the school does concerning admissions to Year 7 and Year 9 is to give priority in relation to a defined number of the places which it says are boarding places, to parents who are willing for their children not to sleep at the school but who are nevertheless willing to pay a fee for facilities which they may or may not take up.

58. It is not possible to be admitted to the school in Year 7 or Year 9 without paying a boarding fee. The school has chosen to set the PAN for day places in each case at zero, as it may do without breaching any specific provision. It could also choose not to do so, but does not. While the arrangements in this respect do not fall outside what the law permits, we have the greatest concerns that a state-funded school should create circumstances which mean that a fee is required from all those obtaining a place.

The Facilities Fee

59. The school has stated that the sixth form "facilities fee" is requested of parents and not mandatory. It says that it covers matters which the school would be entitled to charge for under its adopted charging policy, a copy of which we have seen. Although the arrangements say that the charge is requested, it is listed in a table entitled "Fees from September 2014" which also shows the boarding fees that the school charges. The school has offered

to amend its arrangements, but as determined, they are unclear in our view, and contrary to the requirements of paragraph 14 of the Code, since they appear to make a mandatory charge for something which is not a permitted approach.

Admissions to Year 12

60. The school publishes an admission number of 13 for boarders and 47 for “day student” places in Year 12. Of the 47 “day student” places 31 are published as being for girls. No “out boarders” are admitted to the sixth form; however a category of “day boarder” is introduced and described as “*equivalent to out boarders but there is greater flexibility concerning their routine.*” Day boarders in the school’s sixth form are boys who were previously out boarders.

61. The admission arrangements for boarders in the sixth form are not set out separately in the arrangements and are therefore taken to be the same as for boarders in Year 7 and Year 9. That is, if there are more applicants who are deemed suitable to board than the number places available then the same oversubscription criteria are used to allocate the places. However, applicants for sixth form boarding places will need to obtain grades A* to C in seven GCSE subjects in order to take up a place offered.

62. There is a section in the admission arrangements entitled “*Admissions Criteria for Day Student/Day Boarder Places in Year 12*”. This begins by describing how six day places are allocated on the basis of aptitude in sport or music. Paragraph 1.32a of the Code says that admission authorities “**must ensure that tests for aptitude in particular subjects are designed to test only for aptitude in the subject concerned, and not for ability.**”

63. The school has provided details of how it tests for aptitude in music and sporting ability in order to award some Year 12 day student places. It has done so by saying “*The school assesses innate musicianship (aptitude in music)by questioning at interview, through an aural test, the performance of two pieces where musical expression, style as well as accuracy are considered and a sight-reading test.*”

64. It has also stated that it is not prevented from taking into account performance in trials and auditions since this is not prohibited by paragraph 1.32a of the Code and that section 88A(3) of the Act states that for a school which can select by aptitude nothing in the prohibition on interviewing children or parents in connection with applications for school places which is set out in section 88A of the act prevents “*any audition or other oral or practical test to be carried out in relation to an application solely for the purposes of ascertaining the applicant’s aptitude in accordance with the arrangements.*”

65. The school has also stated its view that “*paragraph 1.32 seeks to ensurethat admission authorities do not confuse ability with aptitude and merely test ability or equate it to aptitude.*”

66. We are of the view that while it is true that the Code says this, it also says more. The requirement of the Code is that tests of aptitude should be such.

Practical tests are permitted under the Act, but the overriding requirement is that they should limit themselves to testing aptitude. What cannot be acceptable is the testing of abilities in the guise of testing for aptitude, even unintentionally.

67. It is possible to test for aptitude in music by testing the capacity to identify pitch, melody, rhythm and so on, and there are well known means for doing this in which no performance on a musical instrument is required. The school however requires the performance of two pieces of music, and the sight reading of music, both of which in our view go beyond what the Act says and the Code permits since they are tests of ability and achievement which are not necessary in order to test for musical aptitude. The school's arrangements state that *"All applicants should be capable of playing at least one instrument to a standard roughly equivalent to grade 7 or 8"*. The school has said that students *"are usually able to play at around grade 7 but this is not essential.....an important part of the test is the assessment of the musicality of their performance...."*. It seems clear then that an applicant who had received no tuition and has no ability to perform on a musical instrument would not be able to engage in this part of the school's tests, and yet might have demonstrable musical aptitude if tested differently. We are therefore of the view that the school's practice involves testing for musical ability and that it breaches what paragraph 1.32a of the Code requires.

68. The school's arrangements say, in relation to sports aptitude, that *"All applicants should be able to provide evidence of high achievement at school/club level and beyond"*. While the details provided by the school of its practice concerning the assessment of sporting aptitude does not itself appear to us to contravene what the Code requires in paragraph 1.32a, nevertheless this statement will deter any student who cannot demonstrate previous sporting prowess from seeking such an assessment. In practice, the effect is to introduce into what should be selection purely on the basis of aptitude of an element of selection by ability, and so our view is that this also breaches paragraph 1.32a of the Code.

69. The school has agreed that the arrangements do not make it clear that the minimum entry requirements for the school's sixth form also apply to those given priority on the grounds of their aptitude for music or sport. Nevertheless, as determined, the arrangements are deficient in this respect and fail to meet the requirement that they be clear in paragraphs 14 and 1.8 of the Code.

70. We will now turn to the allocation of the remaining 41 places for day students. These places are awarded on the basis of ability as determined by predicted GCSE grades provided by the applicant's school. First priority is given to looked after and previously looked after children who demonstrate a suitable ability. The school sets the level of suitable ability as seven GCSEs at grades A* to C. The *"remaining places will be offered according to a rank order of marks awarded until the number of places offered to girls (including any awarded on the basis of aptitude in sport or music or to children looked after by the local authority) equates to 25 per cent of the projected total number of students in Year 12. No further places will be offered to girls. Should there be no further suitable boy candidates, remaining places will not be filled"*.

71. Paragraph 2.6 of the Code refers to the fact that Year 11 students from the school are already on its roll and do not need to apply to be admitted to the school's sixth form. If they meet the school's academic entry requirements for the sixth form and any specific course requirements then their place continues and they are not being admitted. A PAN for Year 12 admissions is in respect of the admission of students to the school from elsewhere and any oversubscription criteria relate only to such students.

72. Correspondence from the school indicates some confusion on this point where they say "The admissions number is based on an overall expected PAN size for Year 12". The arrangements are consequently not clear because they state that internal students have priority concerning some of the 41 places offered to candidates from other schools. The school's view that the arrangements clarify the position for all applicants is in our view mistaken since they fail to accommodate the different position for internal and external students concerning sixth form places, and so misrepresent the position to both groups. The arrangements are therefore insufficiently clear and fail to meet the requirements of paragraphs 14 and 1.8 of the Code.

73. A further point on which the arrangements are not clear is that they do not set out what the "*marks*" are and how they are awarded. The school has explained that eight points are awarded for an estimated A*, seven for an A and so on, and has acknowledged that this is not clearly set out in the arrangements. Again this does not comply with paragraphs 14 and 1.8 of the Code which require arrangements to be clear.

74. Paragraph 2.6 of the Code allows schools to set an academic entry level for the sixth form. However, it continues by saying that this **must** be the same for internal and external places. We have considered whether these arrangements comply with this paragraph. Internal applicants simply have to achieve a threshold of seven GCSEs at grades A* to C, while external applicants must do more. They are required to achieve this threshold and to have been given estimated grades which place them in the highest 41 places when points are awarded for these estimates. An internal applicant would be able to continue into the sixth form having just reached the threshold; an external applicant may have to do more. This does not comply with paragraph 2.6 of the Code.

75. A further consequence of these arrangements is that the number of day student places available is variable. It depends upon the school's estimate of how many Year 11 students will continue into Year 12 and how many boys and girls apply from other schools. The school has however published an admission number of 47 for day students, 31 of which are for girls. The Code says in paragraph 2.8 that "*with the exception of designated grammar schools, all schools..... that have enough places available **must** offer a place to every child who has applied for one...*" The school is not a grammar school. There are clearly combinations of estimates and numbers of applications that could lead to places not being allocated when there are other applicants who meet the required standard. This is stated in the school's policy, and in our view this approach does not comply with the Code. The school is not required to limit the proportion of girls in the school's sixth form to a maximum of 25 per cent as it seems to believe, but is required to ensure that they remain a

“comparatively small number of pupils” under the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013.

76. The school acknowledged that the PAN for girls is variable and said in correspondence that “*the 25% refers to the 6th form as a whole.*” This is not consistent with the wording in the arrangements which say the 25 per cent is of “*the projected number of students in Year 12.*”

77. The adjudicators also sought clarification of the meaning of the term “*qualify*” where the arrangements say “*in the case that more candidates qualify the following criteria will apply*”. The school has explained that the criteria are used when it is necessary to differentiate between two or more applicants for the last place when they have the same number of points based on predicted GCSE grades and that it has not been necessary to use these criteria in recent years. However, the wording of this part of the arrangements is not clear and therefore does not comply with what the Code requires.

78. Paragraph 1.8 of the Code requires oversubscription criteria to be objective and procedurally fair. Offers of places in the school’s sixth form to external candidates are based on predicted GCSE grades, not what is actually achieved. Existing students at the school transfer to the sixth form by meeting the threshold of 7 GCSEs above grade C. Not only does this not comply with paragraph 2.6 of the Code, but we do not consider this fair to the external applicant whose school underestimates their ability and as a result is not offered a place, but who subsequently achieves GCSE results that if properly estimated would have secured an offer. The estimate and level of achievement could both be higher than the threshold that allows an existing student to move into the sixth form. If another school overestimates an applicant’s ability leading to them being offered a place, but subsequently the applicant fails to reach the seven A* to C threshold this would leave an empty place which could have been filled by another candidate. We are of the view that this is unfair and does not comply with what paragraph 1.8 of the Code requires.

79. Paragraph 14 of the Code says “*admission authorities **must** ensure the practices and criteria used to decide the allocation of places are fair, clear and objective.*” The number of places available to external applicants is not a fixed minimum figure as required by paragraph 1.2 of the Code, in practice it varies based on an estimate of either the number of students in Year 12 or the number of students in the whole sixth form, depending on whether it is the arrangements or the school’s description of the process that is used. Priority for external applicants is based on further estimates of their future attainment. The adjudicators do not think that with this level of estimation the arrangements are sufficiently objective and that parents will be able to look at the arrangements and “*understand easily how places for the school will be allocated*” as set out in paragraph 14.

80. Finally, by admitting those with the highest “marks” first, the school is not simply making a further level of demand as to the academic entry level to its sixth form which is permitted by paragraph 2.6 of the Code, but is selecting from those who meet the stated academic entry level. This is a form of

selection which is not sanctioned by paragraph 2.6 as it is different from the academic criteria set for existing students to continue into the sixth form.

81. The school is a partially selective school and so “**must not exceed the lowest proportion of selection that has been used since the 1997/98 school year**” as stated in paragraph 1.22 of the Code. The school has stated in correspondence that:

“the school offers 16 selective places in the Year 7 out boarder admissions group. This number has not changed since selective entry on this basis was introduced in 1996. Neither has it changed in terms of relevant proportion.”

82. The school clearly also selects students for 41 of the 60 places in its sixth form which it makes available and this does not conform with what the school has told us about its status as a partially selective school and so breaches paragraph 1.22 of the Code.

The admission of children with a statement of special educational needs

83. Paragraph 1.6 of the Code says that:

*“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.....All children whose statement of special educational needs names the school **must** be admitted.”*

84 This means that the arrangements must make it clear that such children will be admitted, whatever the circumstances. Such admissions reduce the number of places available for other children at the school. The fact that the school’s arrangements make no mention of children whose statement of special educational needs names the school was raised with it at the meeting, but the school made no response to the concerns of the adjudicators then, and has not done so subsequently. It is clearly good practice that arrangements make a statement setting out the position for such children both for the benefit of their parents and so that other parents are aware of the priority for school places which they are given. Such a statement is also necessary if arrangements are to make clear how all places will be allocated if the school is oversubscribed. We are of the view that the school’s arrangements fail to comply with what paragraph 1.6 of the Code requires.

Consultation on the arrangements

85. Paragraph 1.42 of the Code requires admission authorities to consult those listed in paragraph 1.44 if they propose making changes to their admission arrangements, or if they have not consulted on them for seven years. These requirements are also set out in regulation 12(2) of the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2002. At the meeting the LA confirmed that it consults “electronically” on behalf of the school and that parents are consulted through the schools which their children attend.

86. The school has provided us with evidence that it placed a consultation document concerning its proposed admission arrangements for September

2015 on its website in December 2013, and with copies of an email from the LA to local headteachers and of a letter to parents from the LA dated December 2013 referring them to its own website to find copies of consultation documents and how detailing to respond to them. We have been given no indication of how this letter was brought to the attention of parents of children aged 2 to 18 as required by paragraph 1.44 of the Code. The minutes of the meeting of the school's governing body on 18 March 2014 at which the arrangements were determined record that the school had received no response to the consultation.

87. The responsibility for ensuring that the persons and bodies listed in paragraph 1.44 of the Code are consulted rests with the admission authority itself. While it is clear that there has been some attempt to carry out a consultation, we have not been provided with the evidence we have asked to see that the school has consulted all those listed in paragraph 1.44 and so are of the view that it has not complied with this requirement.

Conclusion

88. We have set out above our reasons for concluding that the school's arrangements fail to comply with what the Code requires:

(i) in paragraph 1.8 by causing unfair disadvantage to children from a particular social group whose parents did not attend the school, and by being unclear in the circumstances in which oversubscription criteria are used and in not adopting fair procedures for the admission of students to the school's sixth form;

(ii) in paragraph 14 by being unclear concerning the admission of Year 7 out boarders and the nature of the "facilities fee" in respect of sixth form students, and because the arrangements as a whole do not allow parents to understand easily how places will be allocated, and because they employ an unfair oversubscription criterion;

(iii) in both paragraph 1.8 and 14 because they are unclear concerning admissions to Year 12 in their description of how internal students from the school's Year 11 transfer, the basis of the admission of external students and how day places are allocated;

(iv) in paragraph 1.41 by not meeting the requirement concerning the priority given for out boarder places;

(v) in paragraph 1.32a in failing to ensure that tests of aptitude do not test for ability;

(vi) in paragraph 1.6 concerning the admission of children with a statement of special educational needs and in failing to say clearly how places are allocated;

(vii) in paragraph 1.44 concerning the consultation which must be undertaken prior to their determination;

(viii) in paragraph 2.8 because they could result in available sixth form places remaining unallocated for which there are suitable applicants;

(ix) in paragraph 2.6 because different academic requirements are set for internal and external applicants to the sixth form; and

(x) in paragraph 1.22 by failing to comply with the limitations associated with its status as a partially selective school.

89. We have also said why we do not believe that the arrangements take into account the educational status of parents, and so do not fail to comply with paragraph 1.9f of the Code.

Determination

90. In accordance with section 88H(4) of the School Standards and Framework Act 1998, we partially uphold the objection to the admission arrangements determined by the governing body of Old Swinford Hospital School, Dudley for admissions in September 2015.

91. We have also considered the arrangements in accordance with section 88I(5). We determine that they do not conform with the requirements relating to admission arrangements.

92. By virtue of section 88K(2), the adjudicators' decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements.

Dated: 20 March 2015

Signed:

Schools Adjudicators:
Dr Bryan Slater
Phil Whiffing