



Office of
the Schools
Adjudicator

DETERMINATION

Case reference: LAN68

Applicant: Cobblers Lane Primary School, Pontefract

Application: Regarding the Behaviour Support Unit at Cobblers Lane Primary School, Pontefract

Date of direction: 29 June 2016

Direction

Under the powers conferred on me by regulation 7 of, and paragraph 17 of Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby direct that the transfer of land at Cobblers Lane Primary School from Wakefield Metropolitan District Council to Pontefract Education Trust consequent upon the school becoming a foundation school, shall not include the land held for the purpose of a behaviour support unit and that Wakefield Metropolitan District Council must negotiate a written agreement with the Pontefract Education Trust that protects the interests of both parties and includes:

- **agreement on the shared use of the car park and administration facilities;**
- **the means to ensure that the cost of utilities, caretaking, cleaning and janitorial services will be met by the behaviour unit;**
- **agreement about two-way access arrangements through the internal door;**
- **agreement about who manages, funds and ensures the maintenance and repair of the unit and its site to ensure that they remain in keeping with the existing school buildings; and**
- **agreement about the future of the land in the event of the behaviour support centre ceasing to operate.**

The referral

1. The governing body of Cobblers Lane Primary School (the school) wrote to the Office of the Schools Adjudicator (OSA) on 15 December 2015 applying for land at the school used as a behaviour resource centre to be included with the land to be transferred from Wakefield Metropolitan District Council (the council), which is the local authority (LA) which maintains the school to the Pontefract Education Trust (the trust) which is the Foundation Trust holding land on behalf of the school. The school became a foundation school on 1 March 2011.

Jurisdiction

2. Under the terms of regulation 7 of, and Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 (the Regulations), the prescribed land transfers to the Pontefract Education Trust, pursuant to the school becoming a foundation school in March 2011. Failing local agreement within six months of the school becoming a foundation school, either the council or the governing body may apply to the adjudicator for a direction concerning disputed land. Since no agreement was reached within the prescribed period over the land in dispute and the transfer of any land has yet to be formalised, and the school has confirmed its request that a determination be made by the adjudicator, I am satisfied that I have jurisdiction to consider this matter under the powers conferred on me.

Procedures

3. In considering this matter I have had regard to all relevant legislation and guidance.

4. I have considered all the papers put before me including:

- a. correspondence from the school with supporting documents;
- b. correspondence from the LA with supporting documents;
- c. plans of the site and buildings of the school and behaviour support unit.

5. Correspondence submitted to me following the application has been seen by the LA or the school, as appropriate, and there has been the opportunity for each party to comment on this correspondence.

6. I visited the school on 25 May 2016 in order to view the school site and to understand the geography of the locality. I held a meeting with representatives of the LA and the school while I was at the school. I have considered the representations made to me at the meeting and subsequent correspondence.

Background

7. In 2004 the LA began planning for a new school building for a primary school that would replace an existing infant and an existing junior school on adjoining sites – those sites being the site now occupied by Cobblers Lane Primary School. This new building opened on 2008 as a new community primary school following the closure of the infant and junior schools.

8. On the site of the previous schools there had been a behaviour support unit run by the LA. When the new school building was constructed an extension was added and funded by the LA comprising a classroom, office and cloakroom to provide for this unit to continue in existence alongside the new school. At the time the LA gained the support of the school governing bodies to establish this and an additional £69,000 was added to the new build cost to fund this additional resource. The unit was not, however, part of the

school but was managed directly by the LA.

9. When the new school opened it had a new governing body. In 2011 the school had an Interim Executive Board that replaced the governing body as a response to an Ofsted inspection. This Board established a new governing body as its successor. It is this governing body that is currently responsible for the school and pursuing the matter that is the subject of this determination.

The application

10. The school became a foundation school on 1 March 2011, when a land transfer took place on the basis of law. At the time of writing this determination the land transfer has not yet been concluded but the overall transfer of the school site is not a matter of dispute between the school and the LA. The dispute is about the transfer of the behaviour unit that adjoins the school.

11. The school argues that there is no written agreement between the LA and the governing body regarding the use of the facility by the LA as a behaviour unit and that it should be considered as part of the school. The school wishes to see the end of the use of that part of the buildings on the site as a behaviour support unit. Instead, it wishes to see the rooms become part of the school and to use the space to extend its facilities and provide additional behaviour support for its own pupils.

12. The school acknowledges that the LA is currently using the rooms in dispute for the purposes of a behaviour support unit and that it has done so since the school was opened in 2008. However, the school argues that the rooms should transfer to the school's foundation as part of the freehold of the overall school site. It states that the rooms are part of the building; that the rooms are not designed to be separately maintained; the utilities are all on shared systems and not separately metered and there is internal access between the school and the unit. The school further argues that the recent register figures for the unit show that although there are 9 places available the average attendance is 3.83 pupils per day. The school supplied me with a map of the site on which the disputed areas are clearly outlined. There is no disagreement as to the area of building in dispute.

13. The school explains that the unit not only uses the part of the building under dispute but it also uses the hall and the cooking facilities in the school central area.

14. The school comments that there is a lack of soundproofing between the behaviour support room and the school staff room which is the other side of the adjoining wall. It alleges that whenever a pupil in the unit has a tantrum, and it says this is a frequent occurrence, there can be shouting and swearing for up to an hour which makes it difficult for school staff to use their staff room effectively. The school says that the staff room is the only available space in school for staff to undertake their planning and preparation work.

15. The school argues that the security of the site is compromised if the school does not oversee the janitorial arrangements; that the school's provision of services to the unit and the connecting door between the school

and the unit are important features and evidence that it is not a facility that can easily be divided from the day to day working of the school.

16. The school states that at the time of transfer to foundation status, it had believed that the unit's building was to be transferred as the land that it occupies has always been part of the school site and the building is attached to the school building.

The view of the local authority

17. The LA, in its comments dated 6 February 2016, set out its case for retention of the behaviour unit. The LA's view is that the building is a behaviour unit that was purpose built with the agreement of the school. The land is within the school site but has never been used by the school and this is a LA commissioned facility. The LA says that it funded the construction of the unit which was added to the footprint of the new build school and has had uninterrupted use of the space since the new school was opened. The LA intends to continue the behaviour unit and does not wish to transfer the freehold to the school. The LA acknowledges that the provision of utilities through the school is an expedient but says that it does not bring with it landlord responsibilities.

18. The LA argues that because it had decided that the Unit is not part of the school, the Regulations concerning disposal of land do not apply because the Regulations only apply to land that is "*used wholly or partly for the purposes of the school*".

Consideration of Factors

19. I shall first consider the opposing arguments. The school claims that in 2008 (when the new buildings were erected and the primary school established) it was unaware of the LA's discussions about the unit before the new build and the closure of the previous schools and the opening of a new community primary school. At my meeting I was able to establish that there are no governors from those previous governing bodies serving on the current governing body and so there are no governor memories of that period amongst the current membership. The school argues that the LA has been unable to find any documentary evidence of an agreement concerning the unit. However, the LA produced notes of meetings with the previous governing body and the associated committee report that demonstrated there had been discussions. The LA believes that there was an agreement but observes that irrespective of whether there was an agreement or not, the fact is that the unit has operated at the school since it was opened as an independent unit under the management of the LA and not the school. At the time the LA held the land for the purposes of the school and the school was a community school. It could be argued that the LA did not need to have a written agreement with itself to establish the unit on that site.

20. I now turn to the Regulations and consider how these relate to the land transfer dispute. New Regulations have now been made (the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013). By virtue of transitional provisions in those Regulations the old Regulations (with the same title, but dated 2007) continue to apply to any

proposals (that is the proposals for the school to change category) published before 28 January 2014 and thus apply to this case.

21. Schedule 6 to the 2007 Regulations sets out what is to happen to land when a school changes category and becomes a foundation school with a foundation and it is to this schedule that the paragraph references given below refer. The key principle is that all land held or used by the local authority for the purposes of the school should transfer to the foundation to be held and used for the purposes of the school. Paragraphs 10 and 15 allow the parties to depart by agreement from the principle that all land should transfer. Paragraph 10 provides for land to be excluded from the transferring parcel if both parties agree in writing and paragraph 15 deals with the position when land is held for purposes which are wider than the purposes of the school or partly for the purposes of the school and partly for other purposes. In the circumstances covered by paragraph 15, land should be divided if that is possible, or retained or transferred if that is not possible. If division is not possible, the parties are required to agree appropriate safeguards to protect their respective interests. Paragraph 16 obliges the parties to enter into written agreements identifying the land that will be subject to the statutory transfer with any additional conditions/provisions agreed under paragraph 15.

22. Paragraph 17 empowers an adjudicator to decide what should happen if the parties cannot agree what land should be excluded under paragraph 10. Paragraph 16 gives powers to assist in arriving at an agreement identifying the land that should transfer or be retained, and recording what has been agreed to protect the different interests of parties involved.

23. The Regulations refer to land that is used wholly or partly by the school. In this case, the land on which the behaviour unit is built is within the boundary of the school site and is an extension to the front part of the building; however, it is not used wholly or partly by the school. Neither the school nor the LA is arguing that the school has any current or, indeed, past use of the facility. The school's argument is that the LA makes poor use of the facility and that it should transfer the land to the school so that the school has more space to accommodate its pupils and provide additional facilities. I do not consider that this is a relevant argument in this context. The question here is whether or not the unit is used wholly or partly by the school and the answer is that it is not. I considered whether paragraph 15 applies and the land is used for purposes wider than that of the school and concluded that this paragraph does not apply because this is not a shared facility and the school has no current use of the disputed classroom which is run as an entirely separate entity by the LA. If the school needs to expand this is a different discussion and not related to the use of the space as a behaviour unit.

24. Before 2008 when the school was built, the land in question was "*held and used by the local authority for the purposes of a school*". This school was closed and the new community school opened with an attached behaviour unit which was not managed by the school even though it was attached to its building and had an internal access available. Additional funding was provided by the LA to fund the extension over and above the allocation provided to build the school to comply with the building bulletin in force at that

time.

25. The behaviour support unit has been in continual use as a behavioural support unit since the building opened. It is separately managed and funded. To the credit of the school it has a close and constructive relationship with the school so that children attending the unit can have a school lunch and use some of the school facilities to ensure that they do not feel completely isolated from a school environment. It is intended that this will assist them in returning to their home school after a period in the unit. The fact that the classroom is used only by the behaviour support unit and neither "*wholly or partly for the use of the school*" is the key argument. Neither party argues that the unit should be split or apportioned as this is clearly impracticable, inappropriate and would serve no purpose.

26. I considered which of the parties has the greater need for the land and building. The LA has stated that it has a need to provide the behaviour resource unit. There must be a sufficient controlling interest to ensure the security of tenure of the facility for as long as there is a requirement for there to be a unit in that location. The unit is provided for the local community and works with more schools than the one it is physically attached to.

27. The school has argued that it has lost the use of a piece of land that is wholly enclosed within the perimeter of the school. However it has never had the use of this land as it has been a behaviour support unit since the new building opened. The school argues that if it does not have some long term interest in the land, then if, funding for the unit comes to an end, the LA could decide to use the land for some other purpose that is not compatible with the primary school that surrounds it and there is no guarantee that the governing body would be consulted over this. This is an important point and I shall come back to the issue of what happens if the unit closes later.

28. I consider that the arguments to be weighed in considering which party has the greater need for the security of ownership of the site are as follows:

The LA needs:

- to be able provide a behaviour resource unit and to do this it needs to have a sufficient controlling interest. This could be through having the freehold of the site or a suitable lease from the school if the school holds the freehold.

The school needs:

- the existing security arrangements to be maintained;
- security that services and utilities provided through the school do not put the school financially at risk; and
- the security that if the site ceases to be used as a behaviour unit the LA will consult with the school about future use and preferably decide to allocate it to school use.

29. I have concluded earlier that the land is not currently used by the school so unless the school has a greater need for the security of owning the

land than the LA I can see no justification for it to be transferred to the school. The arguments above lead me to conclude that the LA has the greater need for the security of the site in order to secure the provision of the unit but at the same time the school has security needs.

30. As the landlord, the LA must protect the school's interests and take immediate steps to put in place the means to do this through a written agreement. The areas that the written agreement must cover include:

- agreement on the shared use of the car park and administration facilities;
- the means to ensure that the cost of utilities, caretaking, cleaning and janitorial services will be met by the behaviour unit;
- agreement about two-way access arrangements through the internal door;
- agreement about who manages, funds and ensures the maintenance and repair of the unit and its site to ensure that they remain in keeping with the existing school buildings; and
- agreement about the future of the land in the event of the behaviour support centre ceasing to operate.

31. The school has been content to have the unit on site up until now and while there are benefits to be gained from integrated working, the LA must take an active role as landlord of the facility and ensure that all parties are happy with arrangements.

32. The issue of what happens if the unit cease to be used as a behaviour unit needs to be addressed. This was discussed at the meeting I held at the school and the LA has shared some possible words that could give the school some comfort over this. The school has responded to this proposal and suggested some amendments. Each party has their respective legal advisers advising them so I do not intend to become involved in the detail of the discussion. I am content that the LA is proposing a means of giving the school first option on the site if it were to become vacant. The LA must also ensure that if the site did not transfer to the school if it became vacant it would not be used by a new tenant that was incompatible with the school or would provide a security risk to the children at the school.

Conclusion

33. The school and the LA did not agree whether the disputed land should be excluded from the transfer of the school land and in these circumstances the school referred the decision to the Adjudicator for determination.

34. The land comprising the behaviour support unit was not held by the LA for purposes of the school and has not been used for the purposes of the school since the school was established. I have concluded that the LA has the need for a continuing interest in the land in order to be able to continue to run the behaviour unit. In continuing with the ownership of the site, the LA has a responsibility to protect the school's interests and in doing this must negotiate a written agreement as described above that ensures that the security of the site is maintained; that the school does not carry the risk for

unpaid utilities or for unpaid provision of caretaking and cleaning services and that the behaviour unit's use of the car park and other school facilities are recognised and where incurred, costs are covered. A key concern for both the school and the LA is what happens if the unit closes. The two parties have legal advisers who can assist them in agreeing a form of words that can be included in a document that sets out what would happen in the event of the behaviour unit closing and which ensures that the school's interests are protected. This determination requires the LA to take the lead in drawing up an agreement that ensures that the LA and the school interests are protected as I have set out above.

Direction

35. Under the powers conferred on me by regulation 7 of, and paragraph 17 of Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby direct that the transfer of land at Cobblers Lane Primary School from Wakefield Metropolitan District Council to Pontefract Education Trust consequent upon the school becoming a foundation school, shall not include the land held for the purpose of a behaviour support unit and that Wakefield Metropolitan District Council must negotiate a written agreement with the Pontefract Education Trust that protects the interests of both parties and includes:

- agreement on the shared use of the car park and administration facilities;
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- agreement about who manages, funds and ensures the maintenance and repair of the unit and its site to ensure that they remain in keeping with the existing school buildings; and
- agreement about the future of the land in the event of the behaviour support centre ceasing to operate.

Dated: 29 June 2016

Signed:

Schools Adjudicator: David Lennard Jones