

DETERMINATION

Case reference: ADA/002407

Objector: Thurrock Council

Admission Authority: The Governing Body of Woodside Academy

Date of decision: 20 May 2013

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the Governing Body of Woodside Academy.

I have also considered the arrangements in accordance with section 88I(5). I determine that the published arrangements do not contain all the information required and, as such, do not conform with the requirements relating to admission arrangements.

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 as quickly as possible.

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 the admissions manager of Thurrock Council, the objector, about the admission arrangements (the arrangements) for Woodside Academy (the school), a primary school for pupils age 4-11 years for September 2014. The objection is to the oversubscription criteria which give as the third criterion, preference for reception places in Year R for children attending the school's nursery classes.

Jurisdiction

2. The terms of the academy agreement between the proprietor and the Secretary of State for Education require that the admissions policy and arrangements for the academy school are in accordance with admissions law as it applies to maintained schools. These arrangements were determined by the proprietor, which is the admission authority for the academy school, on that basis. The objector submitted the objection to these determined arrangements on 22 March 2013. I am satisfied the objection has been properly referred to me in accordance with section 88H

of the Act and it is within my jurisdiction.

Procedure

3. In considering this matter I have had regard to all relevant legislation and the School Admissions Code (the Code).
4. The documents I have considered in reaching my decision include:
 - a. the objector's letter of objection dated 22 March 2013;
 - b. the school's response to the objection, supporting documents and information on the school's website;
 - c. Thurrock Council's, the local authority (the LA), composite prospectus for parents seeking admission to schools in the area in September 2013;
 - d. confirmation of when consultation on the arrangements last took place, which was available on the school's website;
 - e. copies of the minutes of the meeting at which the proprietor of the school determined the arrangements; and
 - f. a copy of the determined arrangements.

The Objection

5. The school's published admission arrangements for September 2014 list as point 3 of the oversubscription criteria; "Children who already attend Woodside nursery class which is named as a feeder school."
6. The LA argues that the Code expressly prohibits taking into account any previous school other than a named feeder school and refers to paragraph 1.9b) of the Code "...but they **must not**: take into account any previous schools attended, unless it is a named feeder school;". It is also of the view that the nursery class cannot be named as a feeder school as it is not a school, but rather a constituent part of Woodside Academy.
7. It further argues that attendance at a nursery class should not confer priority in the allocation of reception places because it is unreasonable and outside the spirit of the Code, paragraph 1.9. The objector says;

- 1 *"it may be seen as coercing parents to take up optional nursery provision in order to position themselves favourably in the competition for school places*
- 2 *it confers an unfair advantage on children whose parents are able to take advantage of a nursery place at the school in comparison to those whose parents are not so able*
- 3 *it may allow the nursery to attract funds that it would otherwise not be entitled to so that the proposed arrangements may result in an unfair financial advantage to the nursery and the school."*

Background

8. The school became an academy school on 1 December 2012. It carried out a consultation on admission arrangements for 2014. This consultation closed on 1 March 2013. The consultation included a proposal to adopt a criterion in the oversubscription criteria which would give priority to children attending the school's nursery classes.

9. The LA responded to the consultation on 16 January 2013 expressing concern about that proposal with reference to the Code. The school's website indicates there were nine responses to the consultation. These consultees expressed views both for and against the use of the criterion but more were against than in favour of its adoption.

10. The school's governing body considered the result of the consultation on 13 March 2013. The minutes of the meeting show that the governing body considered the response from the LA and noted that legal advice had been received which was "there was nothing wrong with the proposed criteria, so long as the nursery is named as a feeder school, and the school would be unable to deny a place in reception based on the fact a pupil didn't attend nursery."

11. Those minutes also show, following a discussion, that the admission arrangements were determined as consulted, but reworded such that criterion 3 names the nursery class as a feeder school. At this same meeting the decision was taken to allow the school to exceed its published admission number (PAN) of 60 for September 2013 accepting all 77 applications to reception and also to increase the nursery to 60 places. The proposal to increase the Year R PAN for 2014 to 90 was not implemented and the determined PAN for 2014 is published as 60.

12. The admission arrangements for admission to Year R were subsequently published with the following oversubscription criteria which are summarised below:

1. A 'looked after child' or a child who was previously looked after. A looked after child is a child who is in the care of the local authority.
2. Children with a sibling attending the school at the time of application.
3. Children who already attend Woodside nursery class which is named as a feeder school.
4. Children of staff in either or both of the following circumstances:
 - a. Where the member of staff has been employed at the school for two or more years at the time at which the application for admission to the school is made, and/or
 - b. The member of staff is recruited to fill a vacant post for which there is a demonstrable skill shortage.

5. Other children by distance from the home where the child normally lives to the main gate of the academy , with priority for admission given to the child who lives nearest to the school as measured by a digital mapping system.

Consideration of Factors

I have considered the reasons given by the LA for the objection and sought to examine the factors relevant to the position of nursery classes. The factors I have considered include the following:

Feeder Schools

13. The school responded to the LA's comment at consultation by changing its proposal from "Children who already attend Woodside nursery class" to "Children who already attend Woodside nursery class which is named as a feeder school." The school's position is that they have taken independent legal advice and that there is nothing in the Code to prevent the naming of the nursery class as a feeder school.

14. The LA is of the view that the nursery class cannot be named as a feeder school as it is not a school; it is rather a constituent part of Woodside Academy.

15. The school then further argues that if the LA asserts the nursery is a constituent part of the school then it "begs the question as to why nursery children should be refused a place at all, as, by that argument , they are already pupils on roll who should have the right to remain".

16. There are two parts of the Code that make reference to feeder schools that are relevant here.

Paragraph 1.9 " It is for admission authorities to formulate their admission arrangements, but they **must not**: b) take into account any previous schools attended, unless it is a named feeder school;" and

Paragraph 1.15 "Admission authorities may wish to name a primary or middle school as a feeder school. The selection of a feeder school or schools as an oversubscription criterion **must** be transparent and made on reasonable grounds."

17. I have spent some time researching the definition of a school to see if the nursery classes might be viewed as such. The legal definition of a school for the purposes of education legislation can be found in section 4 of the Education Act 1996: it has to be an "educational institution which is outside the further education sector and the higher education sector and is an institution for providing—

- (a) primary education,
- (b) secondary education, or

(c) both primary and secondary education,”. Also “an institution which provides only early years provision ..., and is not a maintained nursery school, is not a school”. My view is that the nursery classes are not in any sense a school; they are managed by, staffed by and resourced by the academy and are clearly part of the school. Indeed the letter from the school to the Office of Schools Adjudicator refers to “our” nursery children and that they “want to stay with us”. The school has provided no evidence that these nursery classes are independent of the school and themselves constitute a school. In any event, as the nursery classes are not “maintained”, they cannot be categorised as a school for the purposes of this definition.

18. My judgement is that simply describing or naming the nursery classes as a school does not turn the classes into a feeder school and make the arrangements compliant.

Financial Advantage

19. The LA argues that by prioritizing nursery attendees it may allow the nursery “to *attract funds that it would otherwise not be entitled to so that the proposed arrangements may result in an unfair financial advantage to the nursery and the School.*” While no money passes directly from a parent to the school, there is clearly a financial benefit to the school from a parent choosing the nursery as the school can claim funds for 15 hours for each child aged three and four years who attends the nursery. A parent, as part of the consultation response remarks on this as follows “*it would be deemed as encouraging parents to place their children in a school nursery which would then ensure the school is eligible for the nursery funding for that child. Admission criteria should ensure no monetary gain is made by the school in relation to the way it admits children.*” The School does not resist this point.

20. I accept that the school will be motivated to fill its nursery so as to gain maximum funding, but I do not think that is the primary reason the school included this criterion. I accept what the school says that it is motivated by the educational advantage it sees for pupils to be in the nursery and enter reception classes and the distress it causes parents who, having obtained a nursery place fail to gain a reception place. One parent supported this in the consultation responses: “*Giving a greater priority to Woodside nursery children will help to eliminate doubt around school places and ensure the hard work from nursery is carried over to the reception year. My daughter did not attend the nursery class as we did not feel it would have an impact on her education, but with these changes the message being sent out is the nursery class is important.*”

21. The Code, however, in paragraph 1.9 (e), is clear that; “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 question then is whether the funding that follows the parents’ choice of child care constitutes “financial support”? Although the support is not directly given, a parent may choose where they “spend” this funding. The consequence of a parent taking up a nursery place means that the school receives financial support, albeit indirectly, from the parent. In my view, this may breach the spirit, if not the letter, of paragraph 1.9(e) of the Code.

However, my view about this paragraph is not the determinative issue in this case.

In the following paragraphs I consider whether the school's admission arrangements are "fair", as required by paragraph 14 of the Code: "admission authorities **must ensure** that the practices and the criteria used to decide the allocation of school places are fair, clear and objective".

Capacity

22. The school is oversubscribed. It argues that it plans to increase the number of reception places so there will be room for other children after the nursery class pupils have a place. Paragraph 14 of the Code says "Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated." Parents will make choices for a reception place in September 2014 taking into account the determined PAN for September 2014 and not on possible expansion and a different PAN at some future date.

23. The governors increased the reception intake to 90 places for September 2013. However, the decision was to review in one year, therefore, for September 2014 the PAN is 60 and there will be 60 places in the nursery classes from September 2013, an increase from the current 52. Given the priority afforded to children in oversubscription criteria 1 to 4, the parent of a child who will not gain priority through these but is in priority 5 may conclude they have no chance of gaining a place in the reception class. The arrangements as published mean that it is unlikely that a child will get a reception place unless he/she has attended the nursery, and I consider this to be unfair. The fact that the school is considering increasing the capacity is no answer to the objection made. I cannot assume, for the purposes of this determination, that the school will indeed decide to admit all those who apply for a reception place.

Use of Nursery Provision

24. The LA argues that this criterion confers an unfair advantage on children whose parents take advantage of a nursery place at the school in comparison to those whose parents are not willing or able to do so. The school's response is that it understands the implications and makes suggestions for addressing these, for example, using a child minder who can also collect or deliver the child for the additional time. The school also contends that "even if our arrangements are perceived as disadvantaging working parents we would point out that there is nothing regarding such a group in the code". The Code advocates principles of fairness and transparency; it does not have to identify every group that might be disadvantaged in some way in order to support this. My role is to look at the admission arrangements as a whole and consider whether they are fair; not just to consider fairness from the point of view of the particular groups identified in the Code.

25. Attending nursery is not obligatory and parents may make choices about attendance. The provision offered by the school offers is a daily 3-hour session

(morning or afternoon). Part-time provision may be too difficult to organise for some who seek more than the 15 hours per week available during school terms, for example working or studying parents. Some parents may prefer to keep their child at home or with a family member. One response to the consultation commented was; *“I strongly disagree that nursery children should have priority 3. This discriminates against working parents in the area, who would have to give up their employment to send their child to the nursery. In return, it also goes against the government agenda to get parents back into work. If this goes ahead you would end up with a culture of non working parents’ children going to the school and children would see this as the norm, I doubt this is the type of society we want to build.”*

26. For these reasons also I consider that it is unfair for the chances of admission to the school at the compulsory school age to be largely dependent on gaining a place in the nursery class.

Parental Perception

27. When considering the oversubscription criteria, a parent of a three- or four-year old, living in the local community, will see that they will be in the fifth priority category when oversubscription criteria are applied to their application, they will be behind looked after children; siblings; children already in the nursery; and children of staff. I think that such parents may well think they should, or even must, send their child to nursery in order to have any realistic likelihood of obtaining a place at the school. The question I ask myself then is, should that be the case, is it compliant with the Code?

28. The Code is silent on the matter of automatic entry from nursery classes. Silence does not necessarily mean that it is fair or permitted.

29. The Code says at paragraph 2.16

“Admission of children below compulsory school age and deferred entry to school - 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:**

- a) parents can request that the date their child is admitted to school is deferred until later in the academic year or until the term in which the child reaches compulsory school age, and
- b) parents can request that their child takes up the place part-time until the child reaches compulsory school age.”

30. I take this to mean that parents do not have to send their child to school, whether full or part time, until the term in which the child is five years old. It is reasonable to infer then they should not have to attend a particular nursery class, when three or four years old, to have any realistic chance of gaining a place at their preferred school when the child reaches compulsory school age. Parents have an absolute right to wait until their child is of statutory school age before school admission. Therefore, I think if there is any part of the admission arrangements which results in a parent feeling under pressure to send their child

to the school earlier than they wish and before they are legally obliged to do so, then this seems to me to go against the assumption behind this paragraph of the Code, and I consider it to be unfair.

Statutory Framework

31. I have considered also whether it is unfair, again with reference to paragraph 14 of the Code, to determine admissions into the school (for which admissions arrangements are regulated by statute) by reference to attendance at the nursery class (admission to which is not regulated). The Code specifically allows for a secondary school to name a primary school (but not a fee-paying independent school) as a feeder school, for example, because admission to the primary school will itself have been governed by admission arrangements which were subject to the Code. So it can be assumed that the primary school's arrangements are fair, clear and objective. The requirements on admission authorities for arrangements do not apply to nursery places, however, including the opportunity to appeal. In this case then, a parent may well believe that their child needs a place in the nursery class for the application for a reception place to have any realistic chance of success; if however refused a nursery place, for whatever reason, the parent has no right of appeal. I think that making admission to the school largely dependent on attendance at the unregulated provision, that is the nursery classes, is unfair and undermines the statutory framework Parliament has put in place.

Publication

32. I have also considered the arrangements in accordance with section 88(5) and looked at the arrangements overall. The admission arrangements do not make clear how an application should be made for a place and, particularly relevant to the objection made, that a separate application must be made for any transfer from nursery to primary school. I quote paragraph 15a) and d) below;

“a) All schools **must** have admission arrangements that clearly set out how children will be admitted, including the criteria that will be applied if there are more applications than places at the school.”

“d) In the normal admissions round parents apply to the local authority in which they live for places at their preferred schools. Parents are able to express a preference for at least three schools. The application can include schools outside the local authority where the child lives: a parent can apply for a place for their child at any state-funded school in any area. If a school is undersubscribed, any parent that applies **must** be offered a place. When oversubscribed, a school's admission authority **must** rank applications in order against its published oversubscription criteria and send that list back to the local authority. Published admission arrangements **must** make clear to parents that a separate application must be made for any transfer from nursery to primary school and from infant to junior school.”

33. In addition, in the admission arrangements sent to me, there is no explanation of the arrangements for 'in year' applications; no definition of "staff" for criterion 4 and no tie breaker arrangements for criteria other than 4.

As this information is not shown, I consider these arrangements do not comply with paragraph 15 a) and d) of the introduction to the Code.

Conclusion

34. The school, for what are, I accept, mainly educational reasons, has sought to give those pupils already in the nursery classes a priority for entry to reception classes. While it offers advantage to those children, it disadvantages those whose parents decide not to, or cannot, make use of the nursery provision, or need different provision, or would like to use the school's nursery provision but do not gain a place. For the reasons given above, I consider this to be unfair, so contrary to the Code.

35. The school has sought to make this link with the nursery classes by naming them as a "feeder school". It has offered no evidence to show how they may be lawfully designated as a school; for the reasons above I consider the classes not to be a feeder school and therefore the provision is not expressly authorised by the Code.

36. The school further argues that there is capacity for pupils after the admission of nursery pupils. Over subscription criteria are only used when there are more applicants than places. In 2014, based on the determined PAN of 60 and 60 places in the nursery classes, this is likely to be the case, and the fact that the school increased the capacity of this year's reception intake does not justify retaining arrangements that, as published, are unfair.

37. A further consideration for me is that parents may feel pressurised into taking up a nursery place to increase the likelihood, or even to have any realistic chance, of obtaining a reception place. The Code expressly forbids requiring parents to take up their school place until the term in which the child reaches compulsory school age, so I consider this to be unfair.

38. I also consider it is unfair to determine admissions into the school where the admissions arrangements are regulated by statute, largely by reference to attendance at the nursery class where admission arrangements are not regulated.

39. My judgement therefore is that taking all these considerations together these arrangements giving priority for attending the nursery class are not compliant with the Code. There are other matters as described above that do not conform to the Code.

Determination

40. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the Governing Body of Woodside Academy.

41. I have also considered the arrangements in accordance with section 88I(5). I determine that the published arrangements do not contain all the information required and, as such, do not conform with the requirements relating to

admission arrangements.

42. 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 as quickly as possible.

Dated: 20 May 2013

Signed: 

Schools Adjudicator: Miss Jill Pullen