

## DETERMINATION

**Case reference:** ADA/002428

**Objector:** Northamptonshire County Council

**Admission Authority:** The Academy Trust for Nicholas Hawksmoor Primary School

**Date of decision:** 2 August 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 Academy Trust for Nicholas Hawksmoor Primary School.**

**I have also considered the arrangements in accordance with section 88I(5). I determine that the tie breaker arrangements 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 Schools Standards and Framework Act 1998, (the Act), an objection has been referred to the adjudicator by the school admissions manager on behalf of Northamptonshire County Council, the objector, about the admission arrangements (the arrangements) for Nicholas Hawksmoor Primary School (the school), an academy for pupils age 3 – 11 for September 2014. The objection is to the oversubscription criteria which give, as the third criterion, preference for places in Year R (YR) 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 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 school, on that basis. The objector submitted the objection to these determined arrangements on 3 May 2013.

3. Solicitors acting for the school suggested that the objection was not sufficiently clear and that as it is not a breach of the Code for a school to gain a relative advantage from a lawful oversubscription criterion, the adjudicator might consider that the objection does not fall within her jurisdiction. Section 88H of the Act (subsection (1A)) applies where admission arrangements for an academy have been determined by the proprietor of an academy under the academy arrangements. Subsection (2) provides that where a body or person wishes to make an objection about the admission arrangements that that body or person may refer the objection to the adjudicator. Section 88H(4) requires the adjudicator to decide whether, and (if so) to what extent, the objection should be upheld.
4. 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**

5. In considering this matter I have had regard to all relevant legislation and the Code.
6. The documents I have considered in reaching my decision include:
  - a. the objector's letter and form of objection dated 3 May 2013 and email of 17 May responding to a request from the solicitors acting for the school for clarification of the objection;
  - b. the school's response to the objection and supporting documents, submitted by its solicitors on 5 June and a further paper tabled by the solicitors at the meeting on 11 July 2013;
  - c. Northamptonshire County Council's, the local authority (the LA) composite prospectus for parents seeking admission to schools in the area in September 2013;
  - d. maps of the area identifying relevant schools and the addresses of those who have and have not secured places for September 2013;
  - e. confirmation of when consultation on the arrangements last took place;
  - f. copies of the minutes of the meeting at which the proprietor of the school determined the arrangements;
  - g. a copy of the determined arrangements;
  - h. the adjudicator's determination of 23 October 2009 relating to the inclusion in the school's oversubscription criteria of priority for pupils attending the school's nursery;
  - i. figures provided by the school subsequent to our meeting outlining the numbers of parents applying for nursery places on Registration Day in 2012 and 2013 and thereafter, and

- j. data from the LA giving further details of preferences expressed for the school and the school's comments on that data.
7. I have also taken account of information received during a meeting I convened on 11 July 2013 at the school. This meeting was attended by the school's head teacher and deputy head teacher and the school's solicitors. The LA was invited and accepted the invitation but was then unable to attend.

### **The Objection**

8. The school's published admission arrangements for 2014 list as priority iii within the oversubscription criteria: "children attending the attached Nicholas Hawksmoor Primary School nursery classes".
9. The LA objects to the inclusion of a nursery priority within the school's oversubscription criteria and in response to the question about the reasons for its objection, the LA quotes paragraph 1.8 of the Code in its entirety, together with paragraph 1.9e of the Code. The LA also said in its original objection that schools are not fully aware of the impact of linking nursery provision and that Nicholas Hawksmoor has a direct impact upon the Towcester Primary School numbers. In response to a query of 17 May 2013 by the solicitors acting for the school, the LA said:

"We feel the school may be gaining an advantage and/ or benefit from placing, within the oversubscription criteria, pupils who are in attendance at the nursery.

For this reason we feel that Towcester Primary School may well be at a disadvantage in not having a link to the nursery within their oversubscription both the interest and actual sharing out of the numbers of pupils from within the area around the school.

This may be due to parents who are able to afford, or choose to send their children to the nursery, are taking precedence over families who either are not able to afford, or choose to stay at home looking after their children. We feel this is a distinct disadvantage for both those parents unable to gain places at the nursery, parents choosing to stay at home or those parents who cannot afford nursery fees."

### **Other Matters**

10. In the course of considering the objection, I have also examined the arrangements as a whole and found that the tie breaker appears not to conform to the Code. The admission arrangements include as the tie breaker between two applications in oversubscription criteria i, ii, iii and vi priority for those who live closest to the school and as the tie breaker between those in criterion iv priority for those who live furthest from the nearest alternative school.

## Background

11. Nicholas Hawksmoor is a 3 – 11 school and the nursery classes are part of the school. The school was built in the 1980s as part of a housing development. It has had a nursery since it was established. In the 1990s the school was expanded so that it could help meet demand from some further new housing. The school became an academy in 2011. Prior to this, the school was a foundation school and the governing body was the admission authority. The admission arrangements have included an oversubscription criterion relating to attendance at the nursery since 2010.
12. The oversubscription criteria are summarised below:
  - i Looked after children and previously looked after children
  - ii Children who will have a brother or sister continuing at the school at the time of the admission of the younger child
  - iii Children attending the attached Nicholas Hawksmoor Primary School nursery classes
  - iv Pupils who live closer to the Nicholas Hawksmoor Primary School than any other school
  - v Other children.
13. The oversubscription criteria also include a statement that: “Although Nicholas Hawksmoor Primary School gives priority to children attending their nursery classes, there is no guarantee of a place for such children and you must make a separate application to attend Nicholas Hawksmoor Primary School.”
14. The school is oversubscribed. The expressions of interest in recent years have been: 107 in 2011; 112 in 2012 and 116 in 2013. It has a published admission number (PAN) of 60. The nursery has 52 places with children attending either in the morning or the afternoon each day from the September of the academic year in which they turn four. A further eight places are provided for nursery aged children in the school’s speech and language unit. Their attendance is organised by the local health authority. In terms of admission to YR, these children are treated in the same way as other children who attend the nursery. Some may not move on to YR at the school as they live somewhat distant to the school and may have made such progress that they would be able to thrive in a school closer to their home whereas others may have a statement of special educational needs which names Nicholas Hawksmoor. This all means that there can be up to 60 children in total in the nursery who might seek a place in YR.
15. In 2009, the Northamptonshire Admission Forum objected to the inclusion of a nursery criterion in the school’s oversubscription criteria for 2010. The Code in force at that time gave permission for some priority to nursery pupils provided certain conditions were met. The 2009 objection was not upheld. In his determination, the adjudicator noted that the school

anticipated that “between 15 and 25% places [ie between 9 and 15 places] in Reception would be available to children who had not attended the nursery. “ The adjudicator in his conclusion said: “...the objection should not be supported, though I expect the governors, the LA and the Admission Forum to monitor the situation carefully, so that, if a pattern of disadvantage to local families whose children do not attend the nursery does emerge, amendments are made to address this. This could, of course, include a future reference to the adjudicator.”

16. The school’s solicitors note that the Code that came into force on 1 February 2012 is silent on the matter of “automatic entry from nursery classes” to YR. They argue that the issue is whether the use of a nursery oversubscription criterion does in practice make attending particular nursery provision a condition for gaining a Reception Year place to the extent that it is unreasonable for the purposes of paragraph 1.8 of the Code. In a written submission sent to me before the meeting, the solicitors said that what is reasonable in each case needs to take account of: “The legitimate interests of the pupils in the nursery to enjoy the benefits of educational continuity by progressing into Reception balanced against the extent of the opportunity for children to enter the school without attending the nursery.”
17. At the meeting, the solicitors tabled a further submission which argued that the Code required “sufficient” fairness to be shown to nursery and non-nursery pupils (divided into siblings and non-siblings). They maintained it was fair for an admission authority to allocate a sizeable majority of places through a nursery criterion (citing the importance of continuity) and in respect of other places to prioritise siblings over non-siblings. They recognised that some access needed to be preserved for children who had not attended the nursery and who did not have older siblings at the school.

### **Consideration of Factors**

18. 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. I have also considered the arguments made by the school and taken account of their proposal that some additional priority might be given to children who live nearest to the school.
19. As the school’s solicitors acknowledge, the fact that the Code is silent on nurseries does not mean that nursery criteria are fair or permitted but equally does not mean that they are prohibited. I have accordingly sought to test the particular nursery criterion used by the school against the overall principles behind setting admission arrangements as outlined in paragraph 14 of the code as well as the more detailed provisions of paragraphs 1.8 and 1.9e.
20. The school’s solicitors acknowledge that over recent years the number of places available under criterion iv (children who are not looked after or previously looked after, not siblings and who did not attend the nursery)

has fallen (from three in 2010 to one or none in 2011 and 2012). The school told me at our meeting and has confirmed since that a few more places have become available for September 2013 as families who had been offered places have moved away. These places have now been offered to families on the waiting list under criterion iv. The school contends that the overall trend towards fewer places being available under criterion iv was because more children have been admitted under the sibling criterion and point out that the number admitted under the nursery criterion has reduced from 28 to 25 over the past few years.

21. I am not persuaded by this argument. In the first place, most of the siblings also attended the nursery and if they had not been admitted under criterion ii would have secured places under criterion iii ahead of other children without siblings who had not attended the nursery. Of the 60 children originally offered a place for 2013, one is a looked after child, 57 attended the nursery, one is a sibling who did not attend the nursery and one has been offered a place under criterion iv. The table below illustrates what has happened in the past few years.

Year	2010	2011	2012
Siblings joining YR from nursery	26	26	31
Other nursery pupils joining YR	28	31	25
Total pupil numbers joining YR from nursery	54	57	56

22. Over the past four years, very few children have been offered places under criterion iv. There is little scope for the oldest child of a family to gain a place in YR at Nicholas Hawksmoor unless he or she has attended the nursery. Younger siblings will be able to secure admission under the sibling criterion. Of course, much younger siblings would also need to attend the nursery if their older siblings would have left primary school before the younger children's admission.
23. It is the case that nowhere near the number of places that the school in 2009 thought would be available to children who had not attended the nursery are available. The school pointed out at our meeting that its arrangements are well known locally and that there have been no complaints by parents. They argue that relatively few parents who put Nicholas Hawksmoor as their first preference have failed to secure a place and they provided me with a map which indicated that there were only eight such children in 2013. The LA has confirmed these figures. Moreover, this figure might reduce further as some places have been become available as people have moved away from the area. The children whose parents put Nicholas Hawksmoor as their first preference and did not secure a place appear to live no further from the school than those who secured a place by virtue of nursery links.
24. The school has emphasised that the nursery is an integral part of its wider provision. It has provided me with compelling evidence of the

progress made by children who attend the nursery and move on into YR, including the progress made by looked after children, children with English as an additional language, children on free school meals and children living in social/shared ownership housing and children with special educational needs (SEN). I take full account of the school's points. This is an outstanding school and I have no doubt that those who attend derive significant benefit from their time there. I also have no doubt that the school is motivated by the desire to provide the best possible education it can for its pupils.

25. Because attendance at the nursery has such a strong bearing on whether a child will gain a place in YR, I have thought it appropriate to consider the admission arrangements for the nursery, albeit that the admission arrangements for the nursery do not have to comply with the Code. The admission arrangements for Nicholas Hawksmoor nursery are set out on the school's website and are easy to find. For Nicholas Hawksmoor nursery, there is a statement that children with a statement of SEN which names the school will be admitted and then first priority is given to looked after and previously looked after children and after that to siblings of those in the school; then to children who live within the town boundary of Towcester and those living outside the town boundary. It was not clear to me how this fitted with the other statements on the website that places are awarded on a first come, first served basis based on attendance at one of two registration days - one for parents with siblings already at the school and one for others. The school explained at our meeting that looked after and previously looked after children were given first priority and then priority within each of the other categories (sibling links and where a child lived) was based on first come first served.
26. The school has provided me with the figures from the past two years which show that in 2012 48 applications were made for a place on the registration days and in 2013 41 applications. A further 22 applications were made after registration day for a place in 2012 and 30 in 2013. These are in addition to the places in the Speech and Language Unit. The registration days for September 2014 were in June 2013.
27. The school has explained that the registration days are advertised well in advance including in local papers, on the school's website and on its noticeboards, in the Towcester local e-newsletters and through posters. They explain also that those unable to attend are asked to put their reason in writing which will be considered. They point out that despite the website saying "you will only be allowed to register your own child" a nominated representative can attend on behalf of parents. While the website does not explain this, the school has confirmed that parents can and do register for a place at the nursery after the registration day. The school has confirmed that there is no appeal mechanism if a child does not secure a place at the nursery. Parents who have not secured a place at the nursery are informed by letter with details of the waiting list procedure. Places on the waiting list are offered in the strict numerical order in which they were added to the list.

28. In admission arrangements for a YR (or any other normal year of entry), the admission authority would not know the order in which applications had been received – only that they had been received by the specified date. So long as applications are received by the deadline, there is no scope to take account of when they were made. Paragraph 2.14 of the Code prevents admission authorities from taking into account length of time on a waiting list when deciding who should receive a place outside the normal admission round should one become available. Moreover, applications for Nicholas Hawksmoor's nursery are invited very early. A parent applying for a place at primary school in 2014 will do so in January 2014. Yet parents are expected to apply for a place at the nursery for September 2014 in June 2013. As the school's figures confirm, many have done so. This will disadvantage people who move into the area later as well as those who not so well informed or organised. I asked the school at the meeting why the registration days were set so far ahead of admission to the nursery and the school explained that this was because it was keen to fill its places.
29. The Code allows a junior school to name one or more publicly funded infant schools as feeder schools. The admission arrangements for the infant schools in such cases will themselves be subject to the Code and can be assumed to comply with its requirements with scope for objections if there is concern that they do not. Furthermore, unsuccessful applicants have the right to appeal the decision if refused a place. I think it is inherently unfair for a child's chance of admission to a school which is governed by admissions legislation and the Code to be so heavily affected by whether the child first gained a place at a nursery where the arrangements are not regulated. I consider also that while the Code does not prohibit the inclusion of nursery criteria, the inclusion of criteria which do not reflect the principles and provision of the Code and which are so significant in determining who secures a place in YR at a school also undermines the statutory framework Parliament has put in place.
30. The school made the point that relatively few first preferences were expressed for Nicholas Hawksmoor in respect of children who did not attend the nursery or have a sibling already at the school. It is possible that a parent looking at the pattern of admissions to the school over recent years might reasonably conclude that the only way to have almost any chance of securing a place in YR for their oldest child was first to secure a place in the nursery. In such cases parents whose child had not attended the nursery might decide that there was little point in expressing a preference for the school. Alternatively, parents who would prefer different or no nursery provision may be taking up places at the nursery in order to feel that they will have the chance to secure a place in YR for their oldest child in due course.
31. Should parents fail to secure a place at the nursery (perhaps because they moved into the area after all nursery places had been allocated) and then feel that they will in consequence have little chance of gaining a place in YR, they will arguably have been doubly disadvantaged. Given that, based on the school's figures outlined above, the nursery is oversubscribed, this is a very real possibility.



32. Families make their decisions about what nursery provision they wish their children to attend for different reasons. Parents will be influenced and constrained by the need for provision to be compatible with their work or other responsibilities. The provision made by the school's nursery may not meet the needs of parents in terms of how much provision is available and when it is available. It does not seem fair that parents whose children cannot make use of a place at Nicholas Hawskmoor nursery because the amount of provision available or the times when it is available do not meet their needs should then be denied a reasonable chance of securing a place in YR.
33. Furthermore, parents do not have to send their child to nursery at all. They may prefer to keep their children at home or to use other forms of childcare or for their children to be cared for by grandparents and other relatives. The state funding available is intended to support parents' ability to choose from a range of provision. Compulsory school age does not begin until the beginning of the term after the term in which the child turns five. This is reflected in the provisions of paragraph 2.16 of the Code. I think that admission arrangements which might lead a parent to think that the only way to have a reasonable chance of securing a YR place at a particular school for their child was to send the child to the school's nursery undermine the provision in 2.16 of the Code and the parent's wider legal entitlement not to send his or her child to school earlier than compulsory school age.
34. The school's solicitors have argued that there are still admissions purely on distance and therefore a real opportunity for a pupil to be admitted who is neither a nursery pupil nor a sibling. As I have noted, this is a very small opportunity.
35. The school has suggested that if I do not consider this opportunity sufficiently reasonable for the purpose of paragraph 1.8 of the Code, it would propose the variation of its admission arrangements to allow for 10% of its admissions to take place under criterion iv (ie distance alone) in order to increase the opportunity for pupils outside the sibling and nursery group. My jurisdiction is limited to the determined arrangements only. I cannot prejudge what an adjudicator might determine in relation to any future objection to any possible different arrangements. It is for the admission authority to test any proposals it might make against the admissions law and the Code.
36. I now turn to the specific points made by the objector. The objector argued that parents "who are able to afford, or choose to send their children to the nursery, are taking precedence over families who either are not able to afford, or choose to stay at home looking after their children. We feel this is a distinct disadvantage for both those parents unable to gain places at the nursery, parents choosing to stay at home or those parents who cannot afford nursery fees."
37. I will deal first the question of affordability. The objector drew attention to paragraph 1.9 e of the Code (set out above) and suggested that including nursery attendance in oversubscription criteria may breach this provision.

38. I have considered carefully whether giving priority to pupils in YR on the basis of attendance at the school's nursery breaches the prohibition in 1.9e on giving priority on the basis of "financial support." The school's nursery offers for each pupil the 15 hours per week publicly funded provision together with the option to attend a lunch club which (at the cost of £4 per day) can extend that provision by one or one and a quarter hours. Some children attend the lunch club and others do not. Whether the child will attend the lunch club is not a factor in the decision about whether to offer a particular child a place in the nursery. The school has told me that the lunch club breaks even. Other than the lunch club, the school is not offering additional provision for which parents would pay.
39. The school's solicitors have provided detailed argumentation as to why they consider that 1.9e is not breached. It has been a principle of school funding since 1990 that "money should follow pupils" and that each school's budget should be determined in large part by the number (and ages) of its pupils. The same principle applies to nursery education and parents are entitled to a certain amount of free provision whether they choose to send their children to a nursery which is part of a school, attached to a school or separate from a school. The institution will then receive the funding. The question arises as to whether this is any different from the parent opting for a particular school at YR and knowing that the school will receive funding based on this decision.
40. In the case of Nicholas Hawksmoor, I think that there is little if any difference given that the school offers only the 15 hours free (to parents) provision each week with the optional lunch club. I can see that in cases where parents could pay for more provision at a nursery which then afforded priority for admission to a school, this could more easily be considered to fall foul of the spirit and indeed the letter of 1.9e. Although the level of optional additional provision is low, it might be argued that this amounts to financial support. However, I have considered other matters in this determination concerning fairness of the arrangements and I have concluded that the arrangements are unfair for other reasons, and therefore paragraph 1.9e is not determinative in this case.
41. The LA in its objection has focused on the impact on Towcester CE Primary School of Nicholas Hawksmoor's giving priority to children who have attended its nursery. These two primary schools serve the central part of the town of Towcester. They are 0.7 miles apart.
42. There seems little doubt that of the two schools, Nicholas Hawksmoor is currently the more popular. It is consistently oversubscribed. At its last full inspection in July 2007, it was judged outstanding. Towcester CE was formed in 2008 when two predecessor schools (a separate infant and junior school) closed. It was not oversubscribed in 2012. It was inspected in November 2012 and found to require improvement.
43. It does not seem to me to be likely to be the case that affording priority to pupils who attend the nursery is the sole or main reason for Nicholas

Hawksmoor's popularity overall or, indeed, its relative popularity compared to Towcester. It has been consistently judged to be a very good school indeed and this will have made it popular with parents. Moreover, the purpose of admission arrangements is to be fair to parents and pupils and not to share out pupils between schools. My determination is not, accordingly, based on this argument by the objector.

### **Other matters**

44. I have considered the tie breaker arrangements. I am conscious that this approach is common in Northamptonshire. However, as the tie breaker would not be able to separate two applicants who lived the same distance from the school or the same distance from the nearest alternative school, it does not meet the requirements of paragraph 1.8 of the Code. A final way of separating such applicants, for example, by random allocation must be included.

### **Conclusion**

45. Nicholas Hawksmoor has consistently been found to be an outstanding school which strives to do the best for its pupils. I appreciate and accept the arguments it makes for the benefits of continuity. However, its admission arrangements must be fair and, for the reasons given above, I do not consider that the current arrangements are fair as required by paragraphs 14 and 1.8 of the Code.
46. It is not fair that gaining a place at provision which is not compulsory and the arrangements for admission to which could not be used for admission to YR can affect to such a very large degree a child's chance of gaining a place in YR at an outstanding and popular school. Parents should not feel that they have to take a place at the nursery in order to have a reasonable chance of gaining a place at YR in the school and that if they cannot or do not choose to do so that they will have very little chance indeed of gaining a place. This is compounded by the fact that the registration days for the nursery are so far in advance of admission to the nursery.
47. The tiebreaker arrangements do not comply with the requirements of the Code. The school has already agreed to amend these.

### **Determination**

48. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the Academy Trust for Nicholas Hawksmoor Primary School.
49. I have also considered the arrangements in accordance with section 88I(5). I determine that the tie breaker arrangements do not conform with the requirements relating to admission arrangements.

50. 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: 2 August 2013

Signed:

Schools Adjudicator: Ms Shan Scott