

## DETERMINATION

**Case reference:** ADA/002251

**Objector:** Calderdale Metropolitan Borough Council

**Admission Authority:** The Governing Body of St Mary's Catholic Primary School, Halifax

**Date of decision:** 31 July 2012

### **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 St Mary's Catholic Primary School for admissions in September 2013.**

**I have also considered the arrangements in accordance with section 88I (5). I determine that the consultation carried out by the Governors of the school does not conform with the requirements of the School Admissions Code.**

**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 Calderdale Metropolitan Borough Council (the council), about the admission arrangements (the arrangements) for St Mary's Catholic Primary School, Halifax (the school), a Voluntary Aided Primary School, for September 2013.
2. The objection is to the decision of the school to reduce its published admission number (PAN) from 40 to 30

### **Jurisdiction**

3. These arrangements were determined under section 88C of the Act by the school's governing body, which is the admission authority for the school. The council submitted its objection to these determined arrangements on 4 May

2012. I am satisfied the objection has been properly referred to me in accordance with section 88H of the Act and that it is within my jurisdiction.

### **Procedure**

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

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

- a. the council's email of objection dated 4 May 2012 and supporting documents supplied on 22 May 2012;
- b. the school's response to the objection dated 24 May 2012 and supporting documents;
- c. the council's composite prospectus for parents seeking admission to schools in the area in September 2012;
- d. maps of the area identifying relevant schools;
- e. confirmation of when consultation on the arrangements last took place;
- f. copies of the minutes of meetings of the governing body;
- g. a calculation of the net capacity of the school's premises;
- h. articles of Canon Law of the Roman Catholic Church;
- i. a copy of the school's Instrument of Government;
- j. projections of the need for school places in the area;
- k. information about the socio-economic and ethnic make up of the locality in which the school is situated;
- l. the minutes of the Calderdale Admissions Forum dated 17 May 2012, and
- m. a copy of the determined arrangements.

6. I have also taken account of information received during a meeting I convened on at the school on 18 June 2012, attended by representatives of the council, the school and the Diocese of Leeds (the Diocese), and of subsequent correspondence from the parties.

### **The Objection**

7. The council has objected to the decision of the governors to reduce the school's intake by making a change in its PAN to reduce from 40 to 30 the places available at the school for admissions in September 2013. The school has available accommodation and is oversubscribed.

8. The council says that in spite of its own efforts to provide more school places in the area, including making an increase in admission numbers at other schools, there is an existing and worsening shortfall in primary school places. The majority of applications for places at the school come from an area of significant deprivation, and a reduction in the admission number of the school will deprive children from that area of access to a local primary school place.

## **Background**

### **a. Consultation**

9. Minutes of the meetings of the school's governing body going back to December 2009 which have been supplied to me show that it has been discussing what its appropriate admission number should be for some time. Initially these discussions had arisen in the context of a deficit in the school's delegated budget, and had included the possibility of increasing the then admission number of 40 to 45 or 60. In previous years, a PAN of 45 had applied, and older age-groups in the school have that number of children in them.

10. However, a factor also taken into the governors' consideration was the falling number of Catholic children in the area, and a decision was taken in June 2010, when the school had been admitting about 30 Catholic children out of 40 admissions in total for some years, to consult on a reduction in the school's admission number to 30 for admissions in September 2012.

11. Consultation was commenced in November 2010 with that end in view, but was brought to an end because the school believed their process was flawed. However, the process recommenced in the autumn of 2011, and I am told by the school that it ran from 9 December 2011 to 29 February 2012. The school and the council dispute whether the council raised an objection at that point. I have seen the correspondence in question and while the words "the council objects" were not used, there can have been no doubt that the council was opposed to the proposal, since it informed the Headteacher by e-mail on 15 December 2011 of its intention to make an objection to the Adjudicator if the proposals were pursued.

12. When the consultation was reported by the Headteacher to the governing body at its extraordinary meeting on 31 January 2011 which had been called to discuss the admission arrangements for September 2013 (there being no other items on the agenda), the minutes show that it was stated that he had received no replies to the consultation. He also stated that when he had contacted the council he had been told (by the council) that they had not received any information (about the consultation). This is surprising given the response which it had by then already sent, as far as I can see. The governors agreed to give the council seven further days to respond, something that was unlikely, since in its view it had already done so, and something which is a surprise since the consultation was apparently still open, and they did not need to give extra time. If the consultation had closed prior to the Governing body meeting, as they seem to have understood, it did not last for the period of 8 weeks laid down in the Code, paragraph 1.43. Letters sent

to consultees and the notice published in the local press give the date of 10 February 2012 as the last date for replies to the consultation.

b. the need for places

13. The school is oversubscribed. First choice preferences have exceeded the number of Year R places in 2010, 2011 and 2012. The council has explained to me, and I have seen for myself, that the topography of central Halifax is such that distances on a map can be very deceptive, with walking or travelling routes being significantly different where hills or vales require negotiating. As a result, it makes pupil place projections by grouping schools around population centres. Pupil projections for the 15 primary schools which are in the population centre area which the council uses for planning purposes show that a 1 per cent surplus of places in 2011/12 is expected to become a 9 per cent (or 400 place) shortfall by 2014/15 .

14. The council has made its objection on the grounds not only of the overall need for places but also because it says that if there are fewer places at the school then the children who will be most affected will be those from a socially deprived ward, many of whom are members of ethnic minority groups. In figures presented to a meeting of the Calderdale School Admissions Forum on 17 May 2012, it stated that of the preferences submitted for the school for places in September 2012, 50 per cent were from residents of a Ward in which seven out of ten areas are in the most deprived 10 per cent nationally on the Index of Multiple Deprivation.

c. Catholicity of intake

15. In its response to the council's objection, the school has said that it has been conscious of the falling number of Catholic children in central Halifax for some time. When the present school buildings were provided in the mid-1960's there was a need for 60 places in each year group. In spite of having reduced the admission number at stages in the past, the current proportion of the school that were Catholics stood at 65 per cent, and in Key Stage 1 it had fallen to 59 per cent. The school is of the view that there comes a point in a Catholic school where having too few Catholic children makes it excessively difficult to maintain the Catholic life of the school. This point was made by representatives of the school and the Diocese who attended the meeting of the Calderdale Schools Forum on 17 May 2012, and in the meeting which I held with the parties at the school.

16. At that meeting, the representative of the Diocese made the point that the reason for the establishment of Catholic schools had been generally different to that for Anglican schools. In his letter of response to the council's objection, the school's Chair of Governors, who is a member of the Priesthood, states that "It is a matter of Canon Law that Catholic Schools are established to support parents in raising their children in the faith." At the meeting between the Governors and representatives of the council on 12 March 2012, this was expressed as a responsibility, "not....to provide places for the authority".

17. At the meeting which I convened on 18 June 2012, I asked to be given a copy of the school's Trust Deed and was told that the Instrument of

Government, a copy of which was provided, contained the same wording as the Trust Deed concerning the purpose of the school. The relevant wording is:

*“ The school was founded by and is part of the Catholic Church. The school is to be conducted as a Catholic school in accordance with canon law and teachings of the Roman Catholic Church and in accordance with the Trust Deed of the Diocese of Leeds and in particular:*

*(a)religious education is to be in accordance with the teachings, doctrines, disciplines and general and particular norms of the Catholic Church;*

*(b)Religious Worship is to be in accordance with the rite, practices, disciplines and liturgical norms of the Catholic Church;*

*and at all times the school is to serve as a witness to the Catholic faith in Our Lord Jesus Christ.”*

18. At the meeting of the Schools Forum, representatives of the Diocese stated that the school could not be maintained if the proportion of non-Catholics rose, and that if this were to happen, the school would be closed. It submitted to me on 2 July 2012 a statement that any review undertaken by the Diocese would be “on the basis of Catholic need”, and provided baptismal figures for the two parishes served by the school which indicate that there are a maximum of 28 baptised Catholic children likely to need a school place in September 2013, and 27 the following year. In other words, in the view of the Diocese, these figures indicated a need for provision at the level of one form of entry, or 30 places.

### **Consideration of Factors**

19. In coming to a view about the merits of the objection, I have needed to consider two different views concerning the obligations faced by the governors of a Voluntary Aided Roman Catholic school when faced with a diminishing number of Catholic children living in its vicinity.

20. The council has invited me to accept its view that the school has a responsibility to maintain the number of school places which it provides, even when these are not needed for Catholic children.

21. The school’s contrasting view is that its purpose is to meet the need for Catholic education within the local Catholic community, and that it has the right to alter the size of the school accordingly.

22. Canon law has been invoked by the school to defend its argument. Canon 798 requires Catholic parents to send their children to “those schools that will provide for their catholic education” or to ensure their “proper catholic education outside the school”. Canon 800 says that the Church has the right to establish schools, and Canon 802 that if “there are no schools in which an education is provided that is imbued with a Christian spirit, the diocesan Bishop has the responsibility of ensuring that such schools are established”.

23. In other words, as I read these Canons, they permit, and in some circumstances require, the establishment of schools by the Church. The

establishment of such schools is clearly for the purpose of ensuring the availability of “education that is imbued with a Christian spirit”, which in this case would be through Catholic schools providing a Catholic education. If the Church gives itself the right to establish such schools it equally gives itself the right to desist from doing so, when it wishes to, it seems to me.

24. In this case, however, the school has invoked Canon Law to support its decision to become smaller - which is not the same thing – and with the specific purpose of maintaining a (high) proportion of Catholic Children in the school. I can find nothing in Canon law that requires a Catholic school, once established, to be of any particular size or to have a particular proportion of practicing (or non-practicing) Catholic children.

25. In any school which has a religious character, collective worship has to accord with the religious traditions of the school, by virtue of section 70 and schedule 20 to the Act. By virtue of section 69 and schedule 19, paragraph 4(2) of the Act, the religious education in a voluntary aided school with a religious character must be in accordance with the Trust Deed relating to the school. These are the matters given emphasis in the school’s Instrument of Government.

26. Parents have the right to withdraw pupils from all or specific acts of collective worship and also from religious education (section 71 of the Act). So, in a Catholic school, non-Catholics may or may not be present for religious education or during acts of collective worship which will be, properly, of a nature determined by the Church. It is therefore not certain what the relationship between the proportion of children admitted to the school who are of the faith to those who are not of the faith and the proportion of “faith” to “not faith” children attending religious education and collective worship will be, since this depends on whether parents from either group exercise their rights of withdrawal.

27. It may be that if withdrawal were commonplace for those not of the faith that such activities would effectively become provision for Catholic children only, even if they were for example a minority in the school. That does not mean that no difficulty would be caused for the operation of the school in such circumstances if parents then exercised their further right to have alternative provision made for their children. I was told by the chair of governors during my visit to the school that there is little or no experience of parents withdrawing from the provision for religious education or collective worship which the school makes. The difficulty which the school feels it experiences is therefore of a different kind and is related, I believe, to the fact that the Catholic vision of education is expected to permeate all aspects of the daily life in a Catholic school and is not restricted to the provision of religious education and collective worship. Taking all this together, I have some sympathy with any faith school that comes to a view that the presence of a high proportion of those of a different faith or of no faith causes a level of difficulty in its day to day operation, and there is nothing to prevent it from so doing, since that judgement can only be made by the school itself.

28. Having formed such a view, however, the issue remains as to whether the school would then be justified in reducing its intake in order to ensure that it

has what it sees as an acceptable proportion of children of the faith. The Code, paragraph 1.36, has the following to say about faith schools:

*“As with other maintained schools, these schools are required to offer every child who applies, whether of the faith, another faith, or no faith, a place at the school if there are spaces available. Schools designated by the Secretary of State as having a religious character (commonly known as faith schools) may use faith-based oversubscription criteria and allocate places by reference to faith where the school is oversubscribed.”*

29. The Code does not provide any protection for a faith school from having a majority, or even all, admissions from those who are not of the faith. It explicitly envisages such a possibility. It allows preference to be given by reference to faith in circumstances when the school is oversubscribed, but provides no assurance as to the proportion of faith admissions that will then be made.

30. The council has informed me of the attempts which it has made to increase the provision of primary schooling in the area, which have been extensive, and which testify to the seriousness which the council accords to the problem. These have included persuading all other local schools to accommodate more pupils where this has been possible, and attempts (so far unsuccessful) to acquire a site for a new primary school, which it has told me could be for two forms of entry. The building at St Mary's, in spite of having currently an indicated admission number of 45, could accommodate two forms of entry, having originally done so. The council has raised with the Diocese the possibility of rationalising provision, including the purchase of the school buildings, but these talks have had no fruition.

31. Faith schools contribute to the overall provision of places, and there is a clear and growing need for places in the area of the school. The council has the responsibility to secure an adequate provision of school places under section 13(1) of the Education Act 1996, and its objection to the reduction in the admission number of the school in the admission arrangements which have been determined for September 2013 can be seen in that light.

32. It therefore seems to me that while a Catholic school might reasonably come to the view that it wishes to reduce its intake, I have needed to give weight to the fact that in this case the school is seeking to do so when there is a clear local need for the school places that will then be removed, and when the local authority has been unable to secure alternative provision, and has asked the school not to make the change. That is, I have considered whether the change which the school is seeking to make renders the admission arrangements unfair.

33. I have asked the council to translate their general concerns concerning this effect into more concrete information about the likely impact on the deprived community to which they refer. In doing so I have been mindful of the large number of primary schools in the area and the likely effect of the council's own oversubscription criteria for community and voluntary controlled primary schools which give priority to siblings but then to those living closest to the school. Such arrangements might normally be expected to result in

children not finding places in their more local schools having difficulty on distance grounds from achieving high priority for a place in other more distant schools when there is a general shortfall of places. The council has confirmed that none of the nine primary schools within one mile of St Mary's has Year R vacancies in September 2012 and that only three in the next radial mile are in that position. Information which I have obtained from the council's website shows that a similar position pertained in September 2011, when a total of 37 Year R places remained available in April 2011 at two of these three schools, both located in north Halifax. As the council has pointed out, the topography between central Halifax and the location of these school places is challenging, with few direct routes available, and no direct public transport. Walking routes are few and difficult. It is therefore likely that pupils failing to secure a place at the school as a result of a reduced intake there would face real difficulties in accessing alternative schooling.

34. In bringing its objection, the council says that by reducing its intake in circumstances in which those children who will not be able to secure a place at the school in future will be those living in a nearby socio-economically deprived area which has a high proportion of ethnic minority families, the school risks offending against the legislation referred to in the Code, and that the admission arrangements would therefore be non-compliant with the Code itself (Introduction, section 5). The Code makes specific mention in an appendix to the relevance of equalities and human rights legislation to school admissions.

35. In its response, the school rejects "any suggestion that the reduction in PAN is to act in a way that is racially discriminatory".

36. There is no doubt that a change in the ethnic and social make-up of the school will be a consequence of the school reducing the size of its intake, and the school does not seek to disguise this fact. The question which I must address is whether that makes the new admission arrangements unfair or discriminatory. Paragraph 1.8 of the Code requires admission authorities to ensure that their arrangements "will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group". Figures provided to me by the council show that St Mary's has the highest proportion of ethnic minority pupils of any of the Catholic primary schools in the borough (38.9 per cent), but the lowest proportion of children entitled to free school meals (12.6 per cent), which is significantly fewer entitled children than the borough average (18.6 per cent). If the school is not as socially inclusive as others currently, it is certainly not racially exclusive. Nevertheless, the historical and present position within the school is not what is at issue. It is, rather, whether the change which the school wishes to make is likely to place some children at an unfair disadvantage. In the new arrangements, there will be fewer remaining places once those who have been given priority as Catholics have been admitted and so fewer places taken up by the group of children referred to in paragraph 14 above, for whom there may be a negative impact of the sort described in paragraph 33. In other words, the reduction in the intake of the school is likely, in my view, to give rise to disadvantage of the sort to which paragraph 1.8 of the Code refers.

37. For the school to have been considered to have acted in a way which



might be considered under the relevant legislation to cause actual discrimination to an individual, as the council has suggested might be the case, it is my understanding that there would have to be evidence of such likely disadvantage, for which there was no justification on the grounds that it was a proportionate means of achieving a legitimate aim. I shall return to this issue below.

38. I now turn finally to the process which has led to the school making a change in its admission number.

39. The manner in which the results of the school's consultation appears to have been reported to the governing body, and in particular the way in which the view of the council was represented to it (see paragraph 12), is highly unfortunate in my opinion. I can only take the view that the governors were not aware of any concern on the part of the council at their meeting on 31 January 2012, and it is clear that the minutes show that the governors agreed on that date to accept the revised admission arrangements, which they were certainly aware included the reduced PAN, since the number to be used was voted on. This date was also apparently before the consultation had closed, even though it seems to me that the governors believed at that point that it had. There was a meeting of the full governing body on 12 March 2012, before the deadline for the determination of admission arrangements on 15 April 2012, to which representatives of the council were invited, and at which they made a presentation. The meeting voted to lower the PAN to 30 for admissions in 2013 and clearly did so in the knowledge of the views of the council. However, it seems to me that the die had been cast on this matter on 31 January 2012, when they equally clearly were not in possession of those views.

40. Given the confusion that has evidently attended the consultation I cannot as a consequence be certain that the school has met all the requirements of it set out in the Code. As set out above, the evidence which I have seen leads me to believe that the Governors understood themselves to be determining the arrangements in the light of the consultation when they met on 31 January 2011. At that meeting they were unaware of the council's strong opposition to their including a reduction in PAN in the determined arrangements. Since that response was of fundamental importance to their consideration, this is not a matter which can be set aside, in my view.

## **Conclusion**

41. For the reasons set out in paragraphs 13 and 14 above, I am persuaded that there is a genuine shortfall in the provision of primary school places in the area, and that this is a worsening situation. Children from the area who are unable to find a school place there are likely to face considerable difficulties in accessing schooling, as set out in paragraph 33 above. I am of the view that to create such difficulty by reducing the school's intake in the circumstances that pertain locally, is to create unfairness for the children concerned. In that sense, the admission arrangements have ceased to be fair because of the reduction in the school's admission number, and so do not comply with the Code. For that reason, I am of the view that the council's objection should be upheld, and that the school's admission number should therefore remain at 40 for admissions in September 2013.

42. I have not found anything in Canon Law which can be used to support the school's view that it must maintain a given proportion of Catholic children (paragraph 24) and my view, set out above in paragraph 29, is that the Code also provides no protection for such a position.

43. There is a strong likelihood that the reduction would lead to unfair disadvantage of the sort referred to in paragraph 1.8 of the Code (see paragraph 36). I think it unlikely, given the inherent unfairness associated with the change in the school's admission number (see above), that the change could be considered as a proportionate one to achieve a legitimate aim. I accept that it has not been the intention of the school to act in a discriminatory way. Nevertheless there is a strong likelihood that the effect of the reduction in the school's PAN could be considered discriminatory, were it to be given effect.

44. I have also considered the effect of the confusion which attended critical aspects of the consultation process carried out by the governors prior to making their decision to alter the admission arrangements by reducing the school's admission number. For the reasons set out in paragraphs 39 and 40 above, I am of the view that the consultation did not meet the requirements of the Code.

45. I believe that it may be possible for the council and the Diocese to continue their discussions about the provision of primary school places in the area.

### **Determination**

46. 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 St Mary's Catholic Primary School for admissions in September 2013.

47. I have also considered the arrangements in accordance with section 88I (5). I determine that the consultation carried out by the Governors of the school does not conform with the requirements of the School Admissions Code.

48. 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: 31 July 2012

Signed:

Schools Adjudicator: Dr Bryan Slater