



## **DETERMINATION**

**Case reference:** ADA 2845

**Objector:** Lincolnshire County Council

**Admission Authority:** The Academy Trust for Malcolm Sargent Primary School, Stamford

**Date of decision:** 7 May 2015

### **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 of the Malcolm Sargent Primary School.**

**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 within two months of this decision.**

### **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 Lincolnshire County Council (the objector), the local authority (the LA), in an email dated 31 March 2015, concerning the admission arrangements for September 2016 (the arrangements) determined by the academy trust of the Malcolm Sargent Primary School (the school), an academy in Stamford for pupils aged 4 – 11. The objection concerns a priority in the oversubscription criteria given to children attending the nursery that is on the school's site.

### **Jurisdiction**

2. The terms of the academy agreement between the academy trust of the Malcolm Sargent Primary School and the Secretary of State for Education require that the admissions policy and arrangements for an academy school are in accordance with admissions law as it applies to maintained schools. The arrangements were determined on 24 March 2015 by the governing body which, as the academy trust, is the admission authority for

the school. The objector submitted the objection to these determined arrangements on 31 March 2015. I am satisfied that the objection has been properly referred to me in accordance with section 88H of the Act and it is within my jurisdiction. I have also used my power under section 88I of the Act to consider the arrangements as a whole.

### **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 objection and accompanying letter, dated 31 March 2015;
  - b. the school's response to the objection, and accompanying documents, dated 19 April 2015;
  - c. the school's admission arrangements for 2016/17;
  - d. additional data and information supplied by the school in response to my enquiries in letters and emails with dates up to and including 6 May 2015;
  - e. letters sent by the LA in September 2013 and September 2014 to the head teachers of all own admission authority schools in its area;
  - f. emails exchanged in October and November 2014 between the school and the LA concerning the school's arrangements for 2016/17;
  - g. additional information supplied by the LA in emails dated up to and including 21 April 2015;
  - h. the Admissions and Charging Policy for the Acorn Childcare Centre, July 2013;
  - i. maps of the local area showing the location of primary schools ;
  - j. the LA's composite prospectus, *Going to Primary School in Lincolnshire 2015* and *Lincolnshire School Admissions Guide 2015*;
  - k. the LA's *School Organisation Plan Summary and Update 2009-2014*;
  - l. the Ofsted report on the school following an inspection visit on 8-9 October 2014;
  - m. the Ofsted report on the Acorn Childcare Centre following an inspection visit on 3 April 2014;

- n. the Department for Education's advice for school admission authorities and local authorities, *Using the Pupil Premium, Service Premium or Early Years Pupil Premium in admission arrangements*, issued in December 2014; and
- o. the school's website.

### **The Objection**

5. The objection is to the inclusion in the school's arrangements of an oversubscription criterion that gives priority to children who have attended, for at least a year, the nursery which is located on the school's site. The objector cites paragraph 14 of the Code, commenting that, in relation to this paragraph, *"it is arguably unfair to take account in oversubscription criteria of the preference of parents for nursery provision ..."*. The objector submits that *"parents should be able to consider their preference for nursery provision separately without having to put a child into particular provision with a view to gaining a Reception place at a particular school."* The objector further contends that local patterns of parental preference might lead to a situation, in a year when the school is oversubscribed, where *"attendance at the nursery could in effect become a condition contrary to section 1.9(a) of the Code."* Moreover the requirement, in the nursery related oversubscription criterion, for children to have attended the nursery for a year, is seen as *"likely to have a disproportionate effect on serving members of HM Forces, whom the Code and the Military Covenant aim to support, and children of Travellers, a protected group under Equalities Legislation."* The objector then draws attention to paragraph 1.9(e) in the Code, which grants an exception for priority admission to Reception class for children whose parents *"pay optional nursery fees to the school or school-run nursery, for additional hours on top of their 15-hour funded early education ..."*, stating that *"Acorn Childcare is operated under a separate management structure from the school."* Finally, the objector refers to paragraphs 1.39A and 1.39B in the Code, contending that the arrangements are non-compliant as *"the priority is extended to all children attending the nursery, rather than those eligible for Pupil Premium ..."*.

### **Other matters**

6. In the course of considering the objection I reviewed the arrangements as a whole and noted that details about the length of time for which a waiting list is maintained were vague and so might not comply fully with paragraph 2.14 in the Code. The reference to brothers and sisters, and half brothers and half sisters, lacked clarity as did the use of the word *"siblings"* and the reference to a *"cohort"*; these parts of the arrangements therefore did not meet the requirements of paragraphs 14 and 1.8 in the Code to be *"clear"*. The explanation of arrangements for admitting the children of service personnel did not meet fully the requirements of paragraph 2.18 in the Code and, in respect of paragraph 14, was not easy for applicants to understand.

## Background

7. The school is a primary academy for pupils aged 4-11; it converted to academy status in December 2011. It is much larger than the average primary school, with a planned capacity of 589 pupils; the current roll is about 550. When inspected by Ofsted in October 2014, the school was judged good in all aspects; it was not outstanding because achievement in reading and writing lagged behind that in mathematics, and there was some variability in the quality of teaching, in not consistently stretching the more-able pupils.
8. The governors are trustees of The Malcolm Sargent Primary School and are also directors of the charitable company which is the academy trust. The arrangements for 2016/17 were determined by governors on 24 March 2015.
9. The arrangements for 2016/17 were unchanged in substance from those determined for 2015/16 but additional explanatory notes were added concerning changes to the LA's application process, the measurement of distance between home and school, the definition of a pupil's home address, and arrangements for admitting the children of service personnel. This last addition was made following advice from the LA in a letter of September 2013 to all own admission authority schools. Both the LA and the school placed the arrangements on their websites on 1 January 2015 with an invitation for comments to be made within the required eight-week period; a notice concerning this consultation was placed on the school noticeboard and was the subject of a letter sent to all local nurseries, also on 1 January 2015; consultation requirements laid out in the Code were thus fully met. No comments were received, and so no changes were made to the proposed arrangements before determination.
10. The school has a published admission number (PAN) of 90. In the admissions round of September 2013, 88 first preferences were expressed for the school and 90 offers of places were made. Eighty pupils were admitted in the previous year, and the school is far from full in years 3-6, so that the current roll of about 550 is below its capacity, set at 589 in the funding agreement. In the last two years, the school has been oversubscribed, but not heavily. Although the school, in common with many in the LA, has surplus places, the demographic trend in the county is for significant population growth, particularly in urban areas and a recent rise in the number of primary age pupils, the first for many years, is described as "*pronounced*" in the LA's *School Organisation Plan Summary and Update 2009-2014*. This trend, together with the recent increase in first preferences for the school, suggests that the oversubscription criteria may have increasing significance in allocating places in future admission rounds.

11. The arrangements for 2016/17 provide, as required, that children with a statement of special educational need or an education, health and care plan that names the school will be admitted first. Oversubscription criteria are then, in summary:
- 1) Looked after or previously looked after children
  - 2) Where the child will have a sibling still attending the school at the time of her/his admission
  - 3) Children who have attended the nursery on the school site for a year prior to application
  - 4) Children of staff who have been employed for two years or more or who have been recruited to fill a shortage post
  - 5) Driving distance from home to school with priority for those living nearest the school
12. In each category the tiebreak, if necessary, is the measurement of home to school driving distance, with an independent random lottery where a distinction cannot otherwise be made between more than one applicant for a final place.
13. The arrangements provide suitable information about the measurement of distance in the event of applying either criterion 5) or the tie-break, and about how a home address is defined if a child lives with more than one parent and/or at different addresses for varying periods of time. There is a statement concerning the admission of children of service personnel, and an explanation of how siblings from a multiple birth, or siblings in the same cohort, might be admitted, or not, above PAN regarding regulations concerning class size limits.
14. The nursery referenced in the oversubscription criteria is within the Acorn Childcare Centre (the centre), set within the grounds of the school. It is described as a subsidiary trading arm of the school, but is owned and managed by a separate limited company incorporated in April 2013. The centre opened in September 2013 in purpose-built premises; on conversion to academy status, the school used allocated unrestricted funds to establish this facility, which replaced a former Montessori nursery that had used a classroom within the school itself. The centre operates under a management structure separate from the school; three directors were appointed by the school's governing body, and the governing body monitors its investment, as the centre intends to repay the initial expenditure and its continued running costs to the school, over an estimated six-year period.
15. The nursery provides options from which parents may choose that children attend morning, afternoon or all day sessions; half day sessions are each of five-and-a-quarter hours' duration. Lunch may be purchased and sessions are available with or without using the Early Years Entitlement (EYE) funding. The centre's admissions policy lists "the

*following factors [which] will be taken into consideration in allocating places:*

- *The age of the child.*
- *Where 3 & 4 year old places are available, hours will be prioritised for children who are eligible to access their Early Years Entitlement (EYE).*
- *Length of time on waiting list,*
- *Siblings already attending the setting.*
- *The vicinity of the home to the setting.*

*EYE places will be offered in accordance with the Code of Practice for Local Authorities on Delivery of Free Early Years Provision for 3 & 4 year olds (September 2010) and the local conditions identified within the Early Years Provider Agreement.*

The document gives no detail about if, or how, the above ‘factors’ are ranked, or of what the application process consists, beyond completing a registration form that is provided as part of the admissions policy.

16. In October 2014, the school consulted the LA by email about the inclusion of the nursery criterion in its arrangements and received the advice that *“it is probable that any school operating in this way is on [sic] breach of the code and I will have to argue for a referral to the adjudicator ... “*. Following a further exchange of emails, the school confirmed that *“We would like to go ahead and have the adjudicator review the ... policy.”* Although an objection was lodged with the Office of the School Adjudicator at this time, no further action was taken since the arrangements for September 2016 had not been formally determined by the governing body but had merely been put out for consultation. Following this period of consultation the arrangements, unchanged, were formally determined as noted above and the LA submitted this objection to the Office of the School Adjudicator (OSA).

### **Consideration of Factors**

17. I will first consider the issue of fairness in relation to the requirements of paragraph 14 in the Code. Parents do not have to send their child to a nursery; they may prefer to keep the child at home or to access other forms of childcare until the child reaches compulsory school age at the beginning of the term after the term in which the child turns five. State funding is provided to allow parents to choose from a range of provision, should they so wish, which might include any number of nursery settings or none at all. In my view, it would thus be unfair for a set of arrangements to lead parents to believe, albeit in error, that to send their child to a nursery, let alone a specific named setting, was the only way – or in any way a factor – in securing a Reception place at a particular school.

18. I understand the case presented by the school in arguing that the centre meets local demand by providing wrap-around care and that, linked to the school's provision, it offers continuity and ensures *"a smooth transition to school ... an important factor for the child's social and emotional development and the education advantages that the children gain by being able to integrate with school staff and primary aged children prior to attending school."* Furthermore, the school states that *"When setting up the nursery, the governors were very clear that all children should have availability to access the provision. The majority of places taken up in the preschool room 3-5 year olds, fall under the EYE funding provided by the government."* I do not dispute the force of – or the good intentions behind – these arguments, but repeat that not all parents necessarily wish to avail themselves of such provision, that they are under no compulsion to do so, and should not be unfairly disadvantaged by any choice they make regarding pre-school education when applying for Reception places at a school.
19. The school has supplied me with details of September admissions over the last three years, from which it is clear that the number of places allocated under the nursery criterion alone (criterion 3) has not accounted for a significant proportion of the total number of available places. A greater proportion has been allocated under criterion 2 (siblings); for the 2013 and 2014 admissions, at least one-third of successful applicants were admitted under this criterion, with a few additional places allocated under the nursery criterion (fewer than 10 children in each of these years). For 2015 admissions, of the 90 places offered, only seven were to children who met the nursery criterion (criterion 3), together with eight nursery attendees who also had siblings at the school and so were allocated places according to this higher criterion. Of the places offered to siblings (criterion 2), the final five were to children living at distances between just over 4.6 and up to 9.7 miles from the school; otherwise, the last and furthest place allocated under criterion 5 (driving distance) was at 1.355 miles from the school. Twelve applications, from homes at between 1.379 and 5.362 miles from the school, were unsuccessful.
20. Between them, therefore, criteria 2 and 3 have accounted for about a half of the total number of places offered in the last three years. Very few places have been offered under criterion 4 (children of staff); about half of the available places have thus been allocated under criterion 5, that is, on the basis of the household's proximity to the school, places being available generally to applicants living within a distance of up to about a mile and a third from the school in the last two years. All but one of the children admitted from the nursery lived within this cut-off distance. As shown above, a sibling link could gain a place for an applicant living much further away.
21. Without access to such detailed data, a parent would not be aware that the impact of attendance at the nursery has been relatively limited in the application of the oversubscription criteria; but this is not to say that the situation could not change in the future if the number of applications to the school should increase. In terms of paragraph 14, the arrangements do not in my view enable parents to *"understand easily how places for [the]*

*school will be allocated*” since the arrangements published on the school’s website give no information about numbers previously admitted under each criterion and the nursery criterion might be seen to assume a greater significance than has been true up to the present time.

22. The school believes it has acted fairly in stating that *“a child must have been at the nursery for one year prior to application so that parents cannot just put their child in the setting when making the application in order to guarantee a place.”* I do not accept that this argument is fair, however. It means, for example, that a parent living at some distance from the school but with the means to access the nursery would have priority in their application for a Reception place over someone living more locally but who had chosen not to use, or was unable to use, the nursery provision at all, or for only part of the year preceding the child’s entry to school. For September 2015, the first unsuccessful applicant ranked against criterion 5 alone, that is, distance from the school, might have needed to reside less than a mile and a half from the school to miss out on the last available place, which seems to me unfair if an applicant living at a (perhaps significantly) greater distance from the school but with the means to access the nursery, gained that place by virtue of having had a child in the nursery for the whole of the previous year. As it happens, the seven successful applicants for September 2015 allocated places under the nursery criterion alone would also have been allocated places under criterion 5, distance; but, as I have suggested above, this situation might change in the future with additional pressure on Reception places.
23. Moreover, as pointed out by the objector, the attendance requirement might penalise applicants – such as, but not exclusively, members of the armed forces or of the traveller community – who would not have been able to meet this condition for a variety of good reasons, such as health, family circumstances, moving house, etc. The condition is also potentially a double bind: the admission criteria for the nursery, listed above, although unranked and somewhat vague, include *“length of time on waiting list”* and so, at any time when there was pressure on places in the nursery, a child gaining delayed entry there through lack of available places, or not able to gain a place at all, might be penalised again by not having met the school’s nursery attendance requirement when applying for a Reception place.
24. I now move to the objector’s reference to paragraph 1.9(a), which states that admission authorities *“must not ... place any conditions on the consideration of any application other than those in the oversubscription criteria published in their admission arrangements”*. This may be seen as a concern that is not relevant at this time: during its most recent Ofsted inspection, in April 2014, there was a total of 77 children in the centre, not all of whom were in the pre-school group. At present, there is thus a considerable difference between the number of children ready to move from the nursery into Reception and the PAN of the school, meaning that places are currently allocated across all the oversubscription criteria as detailed above, without the nursery criterion having great impact. As I have argued above, however, this situation could change; because of the priority given to children who have attended the nursery, parents choosing



a different (or no) early years provider might in future be unable to access a place at the school, so that attendance at the nursery would become, in effect, a condition for admission to the school. Thus the basic question of fairness, raised above, remains: how are parents to know what the effect of the nursery criterion will be on their application, quite apart from the legitimacy of the criterion itself?

25. The revised Code published in December 2014, that is, after the arrangements were drawn up by the governing body but before they were formally determined and with which they must therefore comply, introduced a new permission into paragraph 1.9(e). Previously, this paragraph had not allowed admission authorities to “*give priority to children on the basis of any practical or financial support parents may give to the school or any associated organisation ...* “. In my view, the Acorn Childcare Centre is clearly an “*associated organisation*” and its financial success is of considerable interest to the academy trust of the school as previously noted. The revised Code added to paragraph 1.9(e) the sentence “*The exception to this is where parents pay optional nursery fees to the school or school-run nursery, for additional hours on top of their 15-hour funded early education, where children from the school nursery class or school-run nursery are given priority for admission to Reception.*”

26. A further addition to the revised Code is paragraphs 1.39A and 1.39B, which state:

*1.39A Admission authorities may give priority in their oversubscription criteria to children eligible for the early years pupil premium, the pupil premium and also children eligible for the service premium. Admission authorities should clearly define in the arrangements the categories of eligible premium recipients to be prioritised.*

*1.39B Admission authorities may give priority in their oversubscription criteria to children eligible for the early years pupil premium, the pupil premium or the service premium who:*

*a) are in a nursery class which is part of the school; or*

*b) attend a nursery that is established and run by the school. The nursery **must** be named in the admission arrangements and its selection must be transparent and made on reasonable grounds.*

27. In the light of this revision to the Code, I have to consider whether the Acorn Centre, which clearly is not a “*school nursery class*”, might be regarded as a “*school-run nursery*” and thus might fall within the permission apparently granted by paragraph 1.9(e) in the revised Code. The company secretary of the academy trust, and clerk to the governing body of the school, has informed me that “*The centre is a subsidiary trading arm of Malcolm Sargent Primary School. Acorn Childcare is operated under a separate management structure from the school.*” The school and the centre are listed at Companies House as separate private limited companies, the latter with share capital and the former without. As

noted above, the governing body of the school has appointed three directors to the Centre *“to manage and oversee the staffing, financial profitability and the standards of care within the centre.”* A significant statement by the clerk to the governing body is that *“The childcare centre intends to pay back the initial expenditure and continued running costs to Malcolm Sargent School, it is estimated over the next six years.”*

28. It is my opinion that the last sentence quoted above shows that the intention in setting up the Acorn Childcare Centre was for it to become an independent financial institution and that the school’s initial investment was essentially of a ‘pump-priming’ nature, given that it expected the funds allocated for that purpose, and subsequent costs, to be repaid. Staffing of the school and the childcare centre are quite separate, and the governors of the school, to employ the words used in the clerk’s letter to me, merely *“monitor their investment in the project”*, having delegated any further involvement to the directors previously mentioned. The day-to-day running of the centre is entirely in the hands of its own staff. I therefore believe that the Acorn Childcare Centre, as a *“subsidiary trading arm”* of the school is essentially a separate financial entity; I am sure that the centre was funded with good educational reasons and the interests of the community uppermost. None the less, I cannot see the centre in any financial, managerial or educational sense as a *“school-run nursery”*. At best, it could be seen as an *“associated organisation”* but that would also rule out its being referenced in an oversubscription criterion, according to paragraph 1.9(e) in the Code.
29. The other matter I must consider here concerns the permission granted in paragraphs 1.39A and 1.39B of the Code, to which the objector refers, in stating that *“the [nursery] criterion may not comply with the Code as the priority is extended to all children attending the nursery, rather than those eligible for Pupil Premium ...”*. Not only is this true, but paragraph 1.9(e) in the revised Code clearly, in my view, in referring to *“children from the school nursery class or school-run nursery [who] are given priority for admission to Reception”* grants permission to prioritise applications from those parents who receive the early years pupil premium and choose to pay for additional hours, but not to any parent who pays optional top-up fees. The school is therefore wrong to suggest that the Code permits it to prioritise applicants on the basis of those who pay for additional hours for children in the nursery.
30. As the objector contends, the school’s arrangements make no reference to the early years pupil premium. Moreover, in responding to this aspect of the objection and as a consequence of the argument I have made above concerning the status of the Acorn Childcare Centre in relation to the school, I should again make clear that I do not believe the permission granted in paragraphs 1.39A and 1.39B would apply to the school even if the school’s criterion were amended to refer only to those children in the centre in receipt of the early years pupil premium. Although there is no doubt that the centre was *“established”* by the school, I do not accept that it is *“run”* by the school in any reasonable sense of the word. This being so, neither can the apparent permission in paragraph 1.9(e) apply.

31. I have thus considered the nursery criterion in the school's arrangements against the overall principles behind setting admission arrangements as outlined in paragraph 14 of the Code as well as some of the more detailed provisions in paragraphs 1.9(a), 1.9(e), 1.39A and 1.39B. For the reasons explained above, I uphold the objection, as I do not consider that criterion 3 in the school's arrangements is fair as required by paragraph 14 of the Code; moreover, the criterion runs the risk of contravening the prohibition concerning conditionality in paragraph 1.9(a) and is not compliant with paragraph 1.9(e), as it does not meet the requirement of the dispensation given in that paragraph, which is dependent on the conditions set out in paragraphs 1.39A and 1.39B, which the centre does not fulfil. Criterion 3 must be removed from the school's admission arrangements within two months, as required by paragraph 3.1 in the Code. Furthermore, the admission authority might wish to consider, in the interests of clarity and transparency, including a statement in the appropriate place(s) on its website to the effect that attendance at the Acorn Childcare Centre has no relevance to the allocation of Reception places. I make this suggestion since there is information about the centre on the school's website, which might lead some applicants to make incorrect inferences about its significance in allocating places, even when criterion 3 has been removed from the arrangements.

### **Other matters**

32. I turn now to the other matters mentioned above. In the arrangements as provided when this objection was made, details about the length of time that a waiting list (or "reserve" list as the school calls it) is maintained lacked precision in stating that *"the school will keep the reserve list until the end of the autumn term and possibly longer"*. While meeting the minimum requirement set out in paragraph 2.14 of the Code, the indeterminate time for which the list might or might not be kept open did not satisfy the requirement of paragraph 14 that *"Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated"*. The definition of siblings and the reference to a cohort did not meet the requirements of paragraphs 14 and 1.8 in the Code to be *"clear"*. The explanation of arrangements for admitting the children of service personnel did not meet fully the requirements of paragraph 2.18 in the Code and, in respect of paragraph 14, was not easy for applicants to understand. While these aspects of the arrangements did not directly contravene the Code, the way in which they were written was at best confusing and at worst potentially misleading for applicants.

33. The explanation of arrangements for admitting the children of service personnel did not address fully the requirements of paragraph 2.18 in the Code and, contrary again to the requirements of paragraph 14, lacked clarity. While I accept that the admission authority acted properly on the advice of the LA in adding this section to the arrangements, the procedures were not well explained and the meaning was not at all clear.

34. When these matters were brought to the attention of the school, the relevant passages in the arrangements were promptly redrafted and in each case the meaning is now clear, so no further action is needed.

## **Conclusion**

35. The objection is to the naming of an on-site nursery in the oversubscription criteria of the school's admission arrangements. I have argued that the inclusion of this criterion does not comply with various requirements, prohibitions and permissions in the Code as regards fairness, clarity, the relationship of the school to a financially associated organisation and children in receipt of the early years pupil premium. It is not easy for applicants to understand the significance of the criterion; it is potentially discriminatory in impact; and the childcare centre is, for all practical purposes, independent of the school. I therefore uphold the objection.
36. It is for these reasons that I conclude that the arrangements are not compliant with the Code and must be revised within two months of this decision.
37. In first considering the arrangements as a whole, I found that they did not include sufficiently precise information about the length of time during which a waiting list for admissions would be kept open and that there was a lack of clarity in references to the admission of siblings and cohorts. Arrangements for applications on behalf of the children of service personnel also lacked clarity. These matters were promptly put right when brought to the attention of the admission authority.

## **Determination**

38. 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 of the Malcolm Sargent Primary School.
39. 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 within two months of this decision.

Dated: 7 May 2015

Signed:

Schools Adjudicator: Andrew Bennett