



DETERMINATION

Case reference: ADA3196

Objector: Plymouth City Council

Admission Authority: Oreston Community Academy Trust

Date of decision: 23 September 2016

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, I do not uphold the objection to the admission arrangements for September 2017 determined by Oreston Community Academy Trust for Oreston Community Academy, Plymouth.

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 Plymouth City Council, (the objector), about the admission arrangements for September 2017 (the arrangements) for Oreston Community Academy (the school), an academy school for children aged 3 to 11. The objection is to the priority given in the oversubscription criteria to children who attend the school's nursery.

Jurisdiction

2. The terms of the Academy agreement between Oreston Community Academy Trust (the trust) and the Secretary of State for Education require that the admissions policy and arrangements for the academy school are in accordance with admissions law as it applies to maintained schools. These arrangements were determined on 25 January 2016 by the governing body on behalf of the trust, which is the admission authority for the school, on that basis.
3. In September 2013 an adjudicator determined under section 88H of the Act an objection to the admission arrangements for 2014 concerning the priority the school gave to children who attended the school's nursery provision. The 2015 arrangements were also referred in June 2014 to the adjudicator on the same matter. Regulation 22 of the School Admissions (Admission Arrangements and Co-ordination of Arrangements) (England) Regulation 2012 prohibits an objection raising the same or substantially the same issues within two years of the decision of the adjudicator on a

previous objection. The adjudicator however used her power under section 88I of the Act to consider the 2015 arrangements and published her determination on 3 October 2014.

4. While it is less than two years since an adjudicator made a decision on these matters, that determination was made under section 88I of the Act. It is now more than two years since an adjudicator made a determination following an objection to the arrangements under section 88H of the Act.
5. The objector submitted the objection to these determined arrangements on 11 May 2016. 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. I have also used my power under section 88I of the Act to consider the arrangements as a whole.

Procedure

6. In considering this matter I have had regard to all relevant legislation and the School Admissions Code (the Code).
7. The documents I have considered in reaching my decision include:
 - a. the objector's form of objection dated 11 May 2016 and subsequent emails;
 - b. the admission authority's response to the objection and supporting documents together with subsequent emails and its responses to my enquiries;
 - c. maps of the area identifying relevant schools;
 - d. confirmation of when consultation on the arrangements last took place;
 - e. copies of the minutes of the meeting at which the governing body of the school determined the arrangements; and
 - f. a copy of the determined arrangements.

The Objection

8. The objector is Plymouth City Council, the local authority (LA) for the area in which the school is situated. The objection was to the inclusion in the school's oversubscription criteria of a criterion giving priority to children attending the school's nursery. The objector considered that this criterion did not comply with paragraphs 1.39B, 1.9a and 14 of the Code.

Background

9. The school which became an academy in January 2011 is situated to the east of the river Plym; its catchment area is bounded by water to the west and the south and by a main road to the north. The school has a published admission number (PAN) of 56 and has been oversubscribed in recent years.

10. The oversubscription criteria can be summarised as:
1. Looked after and previously looked after children.
 2. Siblings living in the designated area.
 3. Other children living in the designated area.
 4. Siblings from outside the designated area.
 5. Children attending the nursery.
 6. Children of members of staff.
 7. Other children.
11. The arrangements contain detailed notes on the terms used and a map of the designated area which I have taken to be synonymous with the term catchment area used in the Code.
12. The fifth criterion did not appear in the 2016 arrangements. As noted above, the school has set arrangements in previous years which included priority for children who attend its nursery and these have been found in previous adjudications to contravene the Code which was in operation at the time. These determinations required the priority for children attending the nursery to be removed. There have been changes to the Code since the last determination and this determination is independent of all previous decisions by adjudicators.

Consideration of Case

13. In the objection the LA referred to paragraph 1.39B of the Code, this says *“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.”* This paragraph of the Code was introduced in December 2014 and did not appear in the Code when previous determinations were made by adjudicators. The LA said *“If the intent was for this provision to apply to all children, the addition of para 1.39 would be surplus.”*
14. The LA also referred to paragraph 1.9a of the Code which says *“It is for admission authorities to formulate their admission arrangements, but they must not: a) place any conditions on the consideration of any application other than those in the oversubscription criteria published in their admission arrangements”*. The LA considered the criterion *“could be seen to set a condition of entry to children who do not live in the catchment area.”* I will immediately dismiss this part of the objection because attendance at the nursery is within the published oversubscription criteria.

15. The third part of the Code which the LA thought the criterion breached was paragraph 14. This says "*In drawing up their admission arrangements, admission authorities **must** ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective. Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated.*" The LA considered the criterion unfair for four reasons.
16. The first reason was that the criterion limited the number of places available to children not living in the catchment area and not attending the nursery. They noted that the nursery has the capacity to take 80 children while the admission number at the school is 56.
17. The second reason was that parents could feel that their choice of pre-school was constrained if choosing another setting would reduce the chances of admission to the school. The LA also considered that parents who did not wish to place their children in an early years setting may feel pressurised to do so.
18. The final reason was the criterion could prejudice other early years settings within the area and it had received a complaint from a neighbouring provider.
19. In response to the objection the school said "*We do not believe that the School Admissions Code 2014 prohibits priority for children at a nursery.*" It agreed "*that admissions authorities should be very clear in their arrangements to protect the interests of local children and to not preclude other children from making an application for admission with a reasonable prospect of success, where they do not attend the nursery.*" The school then set out what it considered to be local children, those living within its catchment area, and how this may be a narrower view than that of the LA which does not use catchment areas as an oversubscription criterion for its community and voluntary controlled schools. The school pointed out that all catchment area children had a higher priority for places than children attending the nursery but not living in the catchment area. For children living in the catchment area their attendance or not at the nursery does not affect their priority for a place in the reception class.
20. The school went on to argue that there was no difference between the advantage faith schools give to families who attend church and the advantage it gives to children who attend the nursery. It was of the view that when prioritising children who were not local to the school, consideration should be given to any links with the school and cited the benefits of good transition from early-years settings. The school acknowledged that parents choose early-years settings for many reasons and argued that for families living in the catchment area the chance of a place at the school was not prejudiced by their choice of pre-school provision; therefore those families should feel no pressure to attend the nursery.
21. The school said "*We do not give priority for any parent attending the nursery solely for paid-for sessions and do not give additional priority if*

extra sessions are paid-for ... It is for these reasons that we disagree with the LA that priority for children at the nursery amounts to a breach of the Code at 1.9e. That paragraph of the Code says that admission authorities “*must not ... e) give priority to children on the basis of any practical or financial support parents may give to the school or any associated organisation, including any religious authority. The 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*”. The LA did not raise this matter in the objection, and it is clear from the notes in the arrangements that this is the school’s practice. I am satisfied that the arrangements comply with paragraph 1.9e of the Code.

22. The school made the argument that paragraph 1.9e allows priority for children at a nursery where parental payments are made for optional sessions over those funded by the state with no reference to the limits in paragraph 1.39B. As the school said, it is unlikely to be the disadvantaged parents who paid for the additional hours of nursery care. The school then referred to its efforts to clarify the intention of the Code with the local MP and the Department for Education (DfE) quoting an email from a DfE officer “*Schools can lawfully prioritise nursery pupils but, as I have already said, need to be careful that they balance this with the needs of other local pupils.*”
23. The Code does not prohibit schools from using attendance at a nursery from being an oversubscription criterion. It does however, in paragraph 1.39B, specifically permit children eligible for one of the pupil premiums who attend a nursery class which is part of the school or run by the school to be given priority. The Code also refers to the school or school run nursery in paragraph 1.9e in a permissive way. The test for the nursery criterion lies in paragraph 14; it must be “*fair, clear and objective*”.
24. The criterion is clear and objective and the position of the criterion does not affect the priority for children living in the catchment area, or those from outside it who have siblings at the school. The only children it could be unfair to would be those who live outside of the catchment but do not have a sibling at the school.
25. The school provided me with an analysis of the priority which the 47 children who were in the nursery in June 2016, and due to start school in September 2016, would have for places at the school if they all applied. All but nine of these children would meet higher criteria than that for children attending the nursery. The school also provided me with the breakdown of the places actually offered for September 2016; this shows that 12 children from outside the catchment area were offered places on the basis of home to school distance, there was no nursery criterion for that year.
26. I have identified three ways in which the criterion may potentially be unfair to children who do not live within the catchment area. First, the Code does not apply to nursery schools, so if admission to the nursery could be

obtained in a way which would not comply with the Code, then subsequent priority for admission to the school could be considered unfair. Secondly, if a child is refused a place at the nursery they have no statutory right of appeal and so could unfairly be denied the priority for the school which attending the nursery would give. Thirdly, families living outside of the catchment area may consider that their choice of pre-school care for their children is fettered if they have aspirations for their child to attend the school. I will consider each in turn.

27. The nursery admissions policy found on the school's website on 4 August 2016 was for admission in September 2015. In my view these would not have complied with the Code if the Code applied to the admission to nursery school. However, children who would be starting school on the date subject to this determination, September 2017, at the age of four would have been just two years-old in September 2015 and so this policy would not have applied to them as the nursery age range begins at three.
28. In response to my enquiries the school provided me with the nursery admissions policy for September 2016. The oversubscription criteria for the nursery in this policy are in effect the same as those for Year R with the obvious exception of the nursery criterion and would in my view meet the requirements of the Code if it applied to them. However there is one difference which I have to take into account.
29. Children start at the nursery in the term following their third birthday; however they transfer to the reception class in the September after their fourth birthday. Consequently the number of places available to those wishing to join the nursery in the spring term depends on how many children there are in the previous age group. For those starting in the summer term, the number of places is reduced by the number of children who have joined in the spring; however the children who join in the autumn term have an increased number of places available as the previous age group will have moved to reception classes. The number of places available, and therefore the probability of a child being offered a place, therefore depends on the child's date of birth. This might lead to a child being offered a place at the nursery ahead of another child who may have had higher priority if they had been able to apply at the same time.
30. When I raised this matter with the school it provided me with data used to monitor numbers in the nursery and said they manage applications for additional hours above the entitlement to ensure places are available throughout the year. They said "*we have never refused entry due to insufficient space.*"
31. This response from the school suggests that places have been refused for other reasons and as oversubscription criteria only apply if there are no places I asked the school on what grounds places have, or may be refused to children in the relevant year group. In its response, the school assured me that it had never refused a place in the nursery due to insufficient space or any other reason and that in future would only refuse places if oversubscribed and then in accordance with the oversubscription criteria.

32. If I accept that children can only gain priority for a place at the school via admission to the nursery on grounds that would be compliant with the Code, it remains possible that a child could incorrectly be refused a place in the nursery through administrative error. For admission to reception class a parent who thought a place had been refused because error had been made would have the right to appeal to an independent panel with the power to place the child in the school. The school has told me that a parent who is refused a place in the nursery could follow the school's complaints policy. This does not provide the independent scrutiny of an appeal panel, but if a parent remained dissatisfied they would have recourse to referring the matter to the Education Funding Agency.
33. My final consideration is the extent to which the nursery criterion fetters the choice of pre-school provision for parents who live outside of the catchment area and where there is no older sibling at the school. A parent in this position who had aspirations for their child to attend the school would be unlikely to choose other pre-school provision or no pre-school provision at all, if doing so prejudiced their chance of obtaining a place at the school. However, throughout the country parents choose to worship at particular churches in order to enhance the probability of their child being offered a place at a particular school; their choice of place of worship is based on aspirations for a school place.
34. I am satisfied that children admitted to the nursery are admitted on grounds that would comply with the Code if it applied to nursery admissions and so no priority for the school is gained through attendance at the nursery on grounds which would not comply with the Code. I am also satisfied that there is a mechanism available for parents to appeal against the refusal of a place.
35. While some children's dates of birth affect when they start at the nursery, and thereby the number of places which might be available to them, in practice sufficient places are available at all points of entry to meet demand. If changes in demand affected this situation, this issue would need to be reviewed, but as all children due to start school in September 2017 will now have been offered a place at the nursery if they wanted one I see no unfairness arising for the year in question.
36. Parents are free to make many choices, such as where they live or if and where they worship, that affect the chance of their child being offered a place at a particular school. The inclusion of priority in oversubscription criteria for children attending the school's nursery provides another factor for parents who live outside the catchment area to consider when choosing pre-school provision. I do not find this unfair.
37. The Code expressly permits in two places attendance at a school's nursery as an oversubscription criterion with conditions, if the Code had intended to prohibit attendance at a nursery in all other circumstances it could have done so. I am satisfied that in the circumstances of this case the priority given in the oversubscription criteria to children attending the school's nursery complies with the Code and I do not uphold the objection.

Summary of Findings

38. The Code does not prohibit using attendance at the school's nursery as an oversubscription criterion. The position of the criterion below those for children who live in the catchment area and those who already have siblings at the school means any possible unfairness arising from the criterion would be to children who live outside of the catchment area with no older sibling at the school. I have considered how unfairness to these children could arise and having regard to the admissions process to the nursery I find there to be none. I therefore do not uphold this objection.

Determination

39. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I do not uphold the objection to the admission arrangements for September 2017 determined by Oreston Community Academy Trust for Oreston Community Academy, Plymouth.

Dated: 23 September 2016

Signed:

Schools Adjudicator: Phil Whiffing