



Office of
the Schools
Adjudicator

DETERMINATION

Case reference: ADA2887

Referrer: Central Bedfordshire Council

Admission Authority: The Academy Trust of Ardley Hill Academy, Dunstable

Date of decision: 24 July 2015

Determination

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

I have also considered the arrangements in accordance with section 88I(5). I determine that they 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 within two months.

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 Central Bedfordshire Council, the local authority (the LA) for the area, in an email dated 5 June 2015, concerning the admission arrangements for September 2016 (the arrangements) for Ardley Hill Academy (the school), a primary school in Dunstable. The objection is to the oversubscription criterion which gives priority to children who have attended the school's pre-school provision when allocating places in the reception class.

Jurisdiction

2. The terms of the academy agreement between the academy trust of Ardley Hill Academy and the Secretary of State for Education require that the admission policy and arrangements for an academy school are in accordance with admissions law as it applies to maintained

schools. The 2016 arrangements were determined on 19 March 2015 by the governing body which, representing the academy trust, is the admission authority for the school.

3. The LA submitted the objection to these determined arrangements on 5 June 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

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 objection, dated 5 June 2015;
 - b. admissions data supplied by the LA in emails dated 18 and 29 June and 9 July 2015;
 - c. the school's response to the objection, and a reply to my further enquiries, both dated 23 June 2015;
 - d. the school's admission policy for 2016, determined at a meeting of the governing body on 19 March 2015;
 - e. minutes of the meetings of the school's governing body held on 19 March 2015;
 - f. information concerning primary school admissions on the LA's website; and
 - g. the school's website.

The Objection

6. The LA has objected to the inclusion of an oversubscription criterion in the school's arrangements that gives priority, when allocating places in the reception class, to children who have attended the school's pre-school. The LA contends that this contravenes paragraph 14 of the Code, which states that "*admission authorities must ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective ...*" The LA further contends that this criterion is non-compliant with paragraph 1.9e) in the Code, which states that admission authorities "*must not [prioritise applications] on the basis of any practical or financial support parents may give to the school or any associated organisation*" except where optional fees are paid for additional nursery hours; the LA submits that this exception would apply only to those children in receipt of the early years pupil premium (EYPP), the pupil premium (PP) or the service premium (SP). Finally, with

reference to the previous point, the LA contends that the criterion is non-compliant with paragraph 1.39B in the Code, which allows priority in a school's oversubscription criteria to children who are in a school, or school established and school run, nursery or pre-school only if they qualify for the EYPP, PP or SP.

Other matters

7. In the course of considering the objection I reviewed the arrangements as a whole and brought to the school's attention other matters in which they appeared not to meet the requirements of the Code. There is no effective tie-breaker, as required by paragraph 1.8, that would enable a final place to be allocated where two or more applications cannot otherwise be separated. In the section headed "Waiting Lists", the detail required by paragraph 2.14 is not given. The arrangements provide no information about the admission of children outside their normal age group, as required by paragraph 2.17. I noted also that although the arrangements state that any pupil with a statement of special educational needs that names the school will be admitted, the Code requires this reference to include also children with an Education, Health and Care (EHC) Plan. The criterion that refers to "all other children", while listed under the "In-Year Admissions" section of the arrangements, is not included in the main list of oversubscription criteria for admission in September 2016.

Background

8. The school is a primary academy school for pupils between the ages of two and eleven; it became an academy in June 2012 and, until September 2014, had been in a tripartite system within the LA, providing education for pupils up to the age of nine. The school has a capacity of 420 and there are now over 300 pupils on roll. The governing body is the admission authority under the articles of the academy trust.
9. The arrangements for 2016 were determined by the governing body on 19 March 2015, using as their basis a common policy determined by the LA for allocating places in its community and voluntary controlled primary schools.
10. The school has a planned admission number (PAN) of 60. The arrangements provide that children with a statement of special educational needs in which the school is named, and children identified for admission through the Fair Access Protocol, will be admitted even if the school is full. Oversubscription criteria are then, in summary:
 1. All looked after or previously looked after children
 2. Pupils living in the catchment area with siblings at the academy
 3. Other pupils living in the catchment area
 4. Pupils with siblings at the academy

5. Children attending Ardley Hill Pre-School
6. "Very exceptional" medical grounds

Although not in the list of oversubscription criteria, it is clear from data supplied, and from a later section in the arrangements, that there is a seventh category, "any other children".

11. A note explains that *"the tie break will be the distance the pupil lives from the Academy, measured in a straight line, using the Local Authority's computerised measuring system, with those living closer to the Academy receiving the higher priority."* Definitions of "looked after" and "previously looked after" children are provided, and of "siblings". Guidance is offered concerning the procedure to be followed if an application is made on "very exceptional" medical grounds. There is additional information concerning: the definition of an applicant's home address; waiting lists; in-year admissions; and appeals.
12. The school was oversubscribed for admissions in 2015, although not heavily; typically, around three-quarters of applications are from outside the immediate area of the school, including a number from the neighbouring local authority of Luton Borough Council and some from Hertfordshire local authority area. In the admissions round for entry to the reception class in September 2015, 58 first preference, ten second preference and two third preference applications were received. None of the second or third preference applications qualified for consideration under the six oversubscription criteria listed above; nine of the first preference applications came into the unlisted "any other children" category. All applications that met the six listed oversubscription criteria were therefore successful, together with the nine first preference applications that were in the "any other children" category and two third preference "any other children" applications. No places were allocated under criteria 1 or 6. For admissions in 2014, there were 58 first and two second preference applications, which were all allocated places; these applications included one each under criteria 1 and 6. However, an indication that the pressure on places is increasing, and that the pre-school criterion may become more significant in future allocations, is that in 2014 the final place allocated was to an "other child" living some 6,865 metres from the school, whereas in 2015 the final place allocated was to an "other child" living only 1,402 metres from the school.

Consideration of Factors

13. As background to its objection, the LA refers to the annual reports of the Office of the Schools Adjudicator (OSA) published in November 2013 and December 2014, both of which draw attention to successful objections to oversubscription criteria that had prioritised applications on behalf of children in named nursery provision. The LA explains that it made this objection following comments in these reports, highlighting *"the unfairness this creates to those parents who choose not to send their child to a school nursery or pre-school for a variety*

of reasons.” The admissions manager for the LA wrote to the head teachers and governing bodies of foundation, trust, voluntary aided schools and academies on 28 November 2014 concerning this issue in the context of the LA’s consultation on its own 2016 admission arrangements for community and voluntary controlled schools. The LA was proposing to remove a nursery and pre-school criterion from its arrangements and advised own admission authority schools that *“we would recommend you do the same in order to ensure your admission arrangements are fair to all parents and are compliant with the Code.”* Responses to the LA’s consultation were *“both supportive and unsupportive of the removal of this criterion”* but it was the LA’s view that the criterion should be removed, and this was done in its determined arrangements for maintained schools. In a subsequent letter dated 22 May 2015, sent to three schools that had not followed the LA’s advice in this matter, the LA noted that their determined arrangements for 2016 included a priority for any child who had attended the pre-school provision. This second letter referred again to the OSA annual reports and stated that *“Although I appreciate your rationale for the inclusion of this criteria [sic] is to ensure continuity for parents ... The Local Authority has a statutory duty to refer determined admission arrangements that they view or suspect as unlawful to the Schools Adjudicator.”*

14. I have set out the reasons given by the LA for the objection and factors relevant to nursery (or pre-school) attendance in relation to oversubscription criteria used in allocating places in reception classes. I shall now consider the case presented by the school in defending the retention of criterion 5 in the 2016 arrangements despite the advice of the LA that it should be removed.
15. The school’s response to the objection begins with a statement by the head teacher that he is *“not in any way contesting”* parental choice in the matter of pre-school education. It continues by emphasising the importance of continuity at this stage of children’s education in stating that the development of the pre-school provision is seen as significant in *“be[ing] able to further the continuity within the academy and to begin to build those important relationships with children and families as early as possible.”* The school then suggests that *“The order of our admissions ensures that if you are a local parent and you wish to wait until your child is of statutory age before sending them to school you will still be higher on the list than someone from Luton who has placed their child in our preschool.”* The response then details the school’s concern that removing the pre-school criterion might result in parents opting for different provision for two- and three-year-olds, which would have *“a huge impact on our revenue causing redundancies and an inevitable scaling back on non-essential areas which provide the extra support our community has rightly come to expect.”*

16. The minutes of the meeting of the governing body held on 19 March 2015 at which these arrangements were formally adopted record a wide ranging discussion of the oversubscription criteria, including the criterion which I am considering here. Some governors were concerned that removing the pre-school criterion *“may mean turning away children who had been all through the preschool”* but the view was also recorded that the criterion *“forces parents to use the preschool to secure a 4+ place which removes parental choice. Parents within catchment who do not use the preschool would be penalised.”* These minutes record a statement that to remove criteria relating to nursery or pre-school attendance was *“a national decision”*. This is not quite correct as it is a change that gives specific permitted exceptions, as laid out in the Code.
17. I note also that the general letter sent by the LA to own admission authority schools on 28 November 2014, while stating *“we would recommend you [remove the nursery/pre-school criterion] in order to ensure your admission arrangements are fair to all parents and are compliant with the Code”* does not make specific reference to relevant sections of the Code and its mandatory requirements. A *“recommendation”* to remove the criterion is insufficiently strong where compliance is the issue. Nevertheless, as its own admission authority, the governing body of the school, and not the LA, is responsible for ensuring that its determined and published arrangements are compliant with the Code in all respects and the LA has explained to me that it did not consider it had the power to direct an own admission authority in this matter.
18. While I understand the school’s pedagogical and financial arguments in defending its retention of the pre-school criterion as detailed above, the Code is nevertheless clear in defining what is allowed and what is not where attendance at a named nursery or pre-school forms any part of arrangements. Paragraph 1.39B, cited in the objection, states that
- “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.*
19. Paragraph 1.9e) in the Code, to which the objection also refers, states that *“admission arrangements ... **must not** ... give priority to children on the basis of any practical or financial support parents may give to the school ... 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”.

20. It is clear to me, therefore, that the school’s arrangements do not comply with the requirements of the two paragraphs in the Code quoted above. The criterion to which the LA objects is an unrestricted criterion, in that it gives priority to any child in any circumstances who may have attended the pre-school. In so doing, it disregards the restriction imposed by the Code, that is, that priority for children attending named nursery or pre-school provision may be given only to those children in receipt of the EYPP, the PP or the SP. The exception granted in paragraph 1.9e) in my view applies to payments for additional hours made on behalf only of those children given priority by the permission granted in paragraph 1.39B, that is, those in receipt of the EYPP, PP or SP; it is not a blanket permission that the school may invoke in defending its criterion as applicable to all children who have attended the pre-school.
21. With regard to paragraph 14, also quoted in the objection, which requires admission authorities to “*ensure that the practices and the criteria used to decide the allocation of school places are fair, clear, and objective*” I have above all to consider “fairness” and “objectivity”, since the clarity of the arrangements is hardly in doubt. Criterion 5 in the school’s arrangements is unfair because parents are under no obligation to secure nursery or pre-school education for their children. They may wish not to send their child to a nursery or pre-school at all, or they may prefer different provision from that offered by a particular setting, for a variety of legitimate personal reasons. In my view it would fail a fairness test to say that attendance at one nursery or pre-school rather than any other, or indeed at any nursery or pre-school at all, should secure priority in the allocation of places for a reception class. I have shown above that this view was among those expressed at the meeting of the school’s governing body on 22 March 2015. Moreover, it is possible that a parent might have been unsuccessful in gaining a place for their child in the school’s pre-school, or unable to accept an allocated place through a change in family circumstances, which would impose a double penalty if that subsequently became the reason for their also not being allocated a place for the child in the school’s reception class.
22. As regards “objectivity”, while an argument might be advanced that in offering priority to all children who have attended the pre-school, all are given an equal (and thus “objective”) opportunity of access to reception class places, paragraph 1.39B in the Code is clear that the permission granted is only for children in receipt of support through one of the three named premium payments.
23. I determine, therefore, that the school’s oversubscription criterion 5 as drafted, giving priority to all children who have attended Ardley Hill Pre-School, does not comply with paragraphs 1.39B, 1.9e) and 14 in the Code.

24. I turn now to the other matters mentioned above. There is no effective tie-breaker, as required by paragraph 1.8 in the Code, that would enable a final place to be allocated where two or more applications cannot otherwise be separated. The distance measurement alone, as proposed in the arrangements, would not be able to separate applications from two homes equidistant from the school, or from families in a multi-occupancy residence such as a block of flats. In the section headed "Waiting Lists", no information is given, as required by paragraph 2.14 in the Code, about how long the list will be maintained, nor is it made clear that each time a child is added to the list it will be ranked again according to the oversubscription criteria. The arrangements provide no information about the admission of children outside their normal age group, as required by paragraph 2.17 in the Code. Although the arrangements rightly state that children with a statement of special educational needs that names the school will be admitted, this statement should be amended to include also those children with an EHC plan, as set out in paragraph 1.6 in the Code.

25. In considering this determination, I brought these other matters to the school's attention but the reply in an email merely stated that "*school admissions at Central Bedfordshire determines the distance and maintains our waiting lists as part of a package we buy into.*" This is an incomplete and inadequate response. The school is entitled to use whatever external services it likes in administering its arrangements but, as its own admission authority, is responsible for determining and publishing arrangements that comply fully with the requirements of the Code. The arrangements must be amended accordingly.

Conclusion

26. The objection draws attention to what the LA believes is a non-compliant and unfair oversubscription criterion in the school's arrangements, giving priority to all children who have attended the pre-school that is run by the school. I found that the criterion does not comply with paragraphs 1.39B or 1.9e) in the Code. In relation to paragraph 14, it is unfair to parents who might wish to make other arrangements for their children of pre-compulsory school age. To enrol children for a nursery or pre-school of their choice, or for none at all, is a decision parents are entitled to make and for which it would be unfair to penalise them, in effect, if the application of the oversubscription criterion here under scrutiny denied their child a reception place. The permission in the Code regarding priority for children who have attended a named nursery or pre-school applies only to those in receipt of the EYPP, the PP or the SP. The criterion in the school's arrangements takes no account of this limitation; I therefore uphold the objection.

27. In considering the arrangements as a whole, I found that they do not include an effective final tie-breaker. Insufficient information is given concerning the operation of a waiting list; nor is there any guidance for parents who might wish to request admission for their child outside the normal age group. In order to comply with the Code, the arrangements should also state that priority admission will be given to those children with an EHC plan that names the school, as well as those with a statement of special educational needs. When brought to the school's attention, its response neither addressed all of these issues, nor did it acknowledge the academy trust's responsibility, as its own admission authority, to determine and publish arrangements that meet fully the requirements of the Code. It is also clear from admissions data supplied to me that there is a final oversubscription criterion of "any other children" (which is in fact listed on page 5 under the heading "In-Year Admissions") it would make the arrangements more clear and easy to understand for applicants if this category were included in the main list of oversubscription criteria under the heading "Admissions Criteria for September 2016".
28. It is for these reasons that I conclude that the arrangements are not compliant with the Code and must be revised within two months.

Determination

29. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements for Ardley Hill Academy determined by the Ardley Hill Academy Trust.
30. I have also considered the arrangements in accordance with section 88I(5). I determine that they do not conform with the requirements relating to admission arrangements.
31. 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.

Dated: 24 July 2015

Signed:

Schools Adjudicator: Andrew Bennett