



## **DETERMINATION**

<b>Case reference:</b>	<b>ADA2931/2932</b>
<b>Referrers:</b>	<b>The Governing Body of St Andrew's Church of England Infant School, Farnham; and the Director of Education for the Diocese of Guildford</b>
<b>Admission Authority:</b>	<b>The Academy Trust of South Farnham Educational Trust</b>
<b>Date of decision:</b>	<b>22 September 2015</b>

### **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 South Farnham School determined by the academy trust.**

**I have also considered the admission arrangements in accordance with section 88I(5). I determine that the arrangements conform with the requirements relating to admission arrangements.**

### **The referrals**

1. The admission arrangements (the arrangements) for September 2016 for South Farnham School (the school), a primary academy school for pupils aged 4 to 11 in Surrey, which is the local authority (the LA), have been brought to the attention of the Schools Adjudicator. Two objections to the school's arrangements for September 2016 were made, on 28 June and 29 June 2015 respectively, by the governing body of St Andrew's Church of England (voluntary controlled) Infant School (St Andrew's), the first referrer and the Director of Education for the Diocese of Guildford (the diocese), the second referrer. Both referrers contend that the naming of a gate at either of the two school sites as the point to be used in measuring home to school distance when applying oversubscription criteria for applications to either Reception or year 3 (the "dual gate" policy) contravenes the requirements of paragraph 1.8 in the School Admissions Code (the Code), in that it is not reasonable or fair. Both referrers draw attention also to changes, actual and proposed, in the school's published admission numbers (PAN) for entry to Reception and year 3. The second referrer questions the compliance with paragraph 1.39 in the Code and with

equalities legislation of the oversubscription criterion that prioritises applications on behalf of the children of full-time members of the school's senior leadership team.

## **Jurisdiction**

2. The terms of the academy agreement between the academy trust and the Secretary of State for Education require that the admissions policy and the arrangements for the academy school are in accordance with admissions law as it applies to maintained schools. These arrangements were determined by the governing body of the school, as the delegated committee of the trust's board of trustees, on that basis.
3. The admission arrangements for the school have been subject to previous objections and determinations in 2012, 2013 and 2014; some aspects of previous objections to the 2014 and 2015 arrangements concern the "dual gate" policy. Paragraph 3.3e) in the Code says, "*Objections to arrangements which raise the same or substantially the same matters as the adjudicator has decided on for that school in the last 2 years may not be brought.*" As these matters have come to my attention and the subject of the referral indicates that the arrangements may not comply with the Code I am using my power under section 88I(5) of the School Standards and Framework Act (the Act) to consider them. I am satisfied that in accordance with section 88I of the Act it is within my jurisdiction to consider them.
4. The second referrer's objection to the oversubscription criterion that prioritises applications on behalf of the children of full-time members of the school's senior leadership team has not been the subject of any previous objection. The objection was made on 29 June 2015. With regard to section 88H of the Act, I am satisfied that the objection has been properly referred to me and it is within my jurisdiction.
5. Both referrers put forward other matters that are not within my jurisdiction. Paragraph 3.3b) in the Code prohibits objections to an own admission authority's decision to raise a published admission number (PAN) and so I cannot accept the referral of the school's increase in its PAN for year R; its proposal to reduce the PAN for year 3 in 2018 does not concern admissions in 2016, to which my jurisdiction is limited in this determination. The catchment area for St Andrew's, about which the first referrer also raises concerns, was determined by the LA as the admission authority.

## **Procedure**

6. In considering these matters I have had regard to all relevant legislation and to the Code.
7. The documents I have considered in reaching my decision include:
  - a. the referrers' emails, dated 28 and 29 June 2015;

- b. the school's determined admission arrangements for 2016/17;
- c. the school's response to the objections and accompanying papers, dated 10 July 2015, including minutes of the meeting of the school's governing body held on 10 March 2015 at which the 2016/17 arrangements were determined;
- d. the school's response to my further enquiries, dated 18 August 2015;
- e. the LA's response to the objections, dated 8 July 2015 and further comments on the school's response to the objection, dated 20 July 2015;
- f. the first referrer's comments on the school's response to the objections, dated 16 July 2015;
- g. the second referrer's comments on the school's responses to the objections and to my further enquiries, dated 15 July and 23 August 2015;
- h. maps of the area, identifying infant, junior and primary schools;
- i. the LA's website;
- j. the school's website; and
- k. the determinations of 2013 and 2014.

### **The matters of concern**

8. The first referral, made on behalf of the governing body of St Andrew's, cites paragraph 1.8 in the Code, which states that "*Oversubscription criteria **must** be reasonable, clear, objective, procedurally fair, and comply with all relevant legislation, including equalities legislation.*" The referrer contends that the school's designation of the main gate at either of its sites as the measurement point from an applicant's home when applying oversubscription criteria for entry to either the Reception class (year R) or year 3 is unnecessary and unreasonable in that it might "*disadvantage children who currently attend St Andrew's Infant School, a feeder to South Farnham, who live in the town centre, by threatening their right of access to their nearest junior school, South Farnham Primary School (junior site).*"
9. The second referrer raises the same issue concerning the reintroduction in the 2016 arrangements of the "*dual gate policy*", and makes reference to previous objections to the Office of the Schools Adjudicator (OSA) in 2013 and 2014 concerning this matter.

### **The objection**

10. The second referrer also objects to the priority given in the oversubscription criteria in the 2016 arrangements to "*children of full-*

*time members of the senior leadership team”, questioning the fairness and objectivity of the restrictions applied in respect of paragraph 1.39 in the Code and questioning whether the criterion “may have implications under the Equality Act 2010.”*

## **Background**

11. In May 2011, following the closure of The Bourne Community Infant School, South Farnham School (which was until then a junior school) extended the age range of pupils for whom it provided education and became a primary school for pupils aged 4 to 11. The Bourne site remains in use for teaching pupils in the infant phase, while the former junior school, the Menin Way site, is used for teaching the junior age pupils. The two sites are almost 2 kilometres, or one and a quarter miles, apart. The school became an academy school in July 2011 and, on 1 February 2015, the South Farnham Educational trust was incorporated; this is a multi academy trust that comprises the school and the former Pilgrims Way Primary School, now known as Highfield, South Farnham.
12. A previous objection in 2013 to the arrangements for 2014, when the planned admission number (PAN) for year R was 60, included reference to the “dual gate” policy. The objection was upheld; the determination noted that raising the PAN for year R to 90 was under discussion by the governing body of the school at the time, but had not been implemented. There were two further determinations in 2014 concerning the arrangements for 2015, the second of which also involved, in part, an objection to the “dual gate” policy; this aspect of the objection was partially upheld, in respect only of its fairness to young children living near the Bourne site, who might have been disadvantaged by the policy when applying for places in year R. At the time this determination was made, the PAN for year R was still 60 but before places were allocated for September 2015 this PAN was raised to 90.
13. The arrangements for 2016 were determined at a meeting of the governing body on 10 March 2015, following a period of consultation and procedures that complied with the requirements in paragraphs 1.42-1.45 of the Code. The school now has a PAN for admissions to year R of 90, and of 76 for admissions to year 3.
14. The arrangements for 2016 state that children applying for a place in either year R or year 3 whose statement of special educational needs (SEN) or Education, Health and Care (EHC) plan names the school will be admitted. Oversubscription criteria are then, in summary for entry to year R:
  1. Looked after or previously looked after children
  2. Exceptional (i.e. medical or social) arrangements
  3. Children of full-time members of the senior leadership team who have been employed at the school for two or more years and for new staff employed to a difficult to recruit position

4. Siblings
5. All other applicants

For entry to year 3, the oversubscription criteria are:

1. Looked after or previously looked after children
2. Exceptional (i.e. medical or social) arrangements
3. Children of full-time members of the senior leadership team who have been employed at the school for two or more years and for new staff employed to a difficult to recruit position
4. Siblings
5. Children attending a named feeder school
6. All other applicants

15. There are four named feeder schools referenced for entry to year 3 (criterion 5), including St Andrew's. The arrangements include clear, detailed explanations of looked after and previously looked after children (criterion 1); of "exceptional arrangements" (criterion 2); and of siblings (criterion 4). The arrangements include a supplementary information form (SIF) for use only for applications on behalf of children of staff (criterion 3). The tie-breaker is "nearness to school measured in a straight line from the address point of the pupil's house ... to the nominated gate at either site" with random allocation used where two applicants cannot be separated by the distance measurement. Applicants are made aware of different permitted patterns for starting school, and of the process for seeking a place outside a child's chronological year group. The operation of waiting lists is fully explained and information concerning late applications and appeals processes is provided.

16. The school has been oversubscribed in recent years. For admissions to year R, the table following shows the number of applications and the places allocated against each oversubscription criterion.

	2013	2014	2015
Total applications	192	220	205
First preferences	97	90	97
SEN/EHC	0	0	0
1. Looked after	0	0	1
2. Exceptional arrangements	2	0	1
3. Children of staff	0	0	0
4. Siblings	38	31	33

5. Other children	20	29	55
Total allocations	60	60	90

17. For admissions to year 3 in September 2015, 180 applications were made of which 103 were first preferences. Of the 77 places allocated, two each were against criteria 2 and 3; 32 against criterion 4; and 41 against criterion 5, with the furthest distance being at 4.119 kilometres.
18. South Farnham School is the only local school with a year 3 PAN easily accessible to children who live close to, and have attended, St Andrew's for their infant education. Other nearby primary schools, in the northern part of Farnham, have only casual vacancies in year 3; the other three infant schools named as feeder schools for South Farnham School at year 3 have access to an alternative junior school located close by, to the south of Farnham, for which they comprise three of its six named feeder schools.

### Consideration of Factors

19. The matter of concern raised by both referrers is that the "dual gate" policy does not meet the requirements of paragraph 1.8 in the Code, that is, that "*Oversubscription criteria **must** be reasonable, clear, objective, procedurally fair, and comply with all relevant legislation, including equalities legislation.*" The school's 2016 arrangements allow the measurement from an applicant's home to be made to the main gate at either the Bourne site, or the Menin Way site, whichever is closer, irrespective of whether the application is for a place in year R or year 3, in the event of the distance tie-breaker being invoked within an oversubscription criterion. The first referrer concentrates on the "reasonableness" aspect of the policy; the second referrer also questions the "fairness" of this policy and claims that it was deemed not to meet these requirements in previous OSA determinations issued in August 2013 and October 2014. The second of these determinations, however, was only partially upheld regarding the policy's impact on applicants to year R from one specific area, as mentioned above. Although removed from the 2015 arrangements, which reverted to a measurement distance from the applicant's home to the infant school gate for applications to year R, and from the applicant's home to the junior school gate for applications to year 3, the "dual gate" measurement has been reintroduced to the 2016 arrangements.
20. The first referrer contends that the previous year's increase in the school's PAN for year R has had the effect of parents applying to South Farnham School for entry to year R, rather than to St Andrew's, in order to avoid any potential difficulty in obtaining a year 3 place for their child at the end of their infant education. The second referrer supports this point, contending that the increase in the

school's PAN for year R *"has already impacted adversely on admissions to YR at St Andrew's ... through creating an over provision of YR places."* Paragraph 1.3 of the Code allows an admission authority to increase its PAN without consultation and as I have explained above, paragraph 3.3b) prohibits objections to such increases. I must emphasise again that this is not a matter over which I have jurisdiction in this determination. I may only consider the fairness and reasonableness of the issue in the school's policy cited by the referrers, that is, the "dual gate" measurement, considering those factors that, in my view, make it fair and reasonable, or not.

21. The school's response to this was to state that the policy, taken together with increase in PAN for year R, *"has been made in response to previous adjudicator comments in order to offset any potential disadvantage to children living close to the infant site."* This explanation refers to children applying for places who might live some way from the junior (Menin Way) site (near to which parents of St Andrew's applicants are likely to live, given this school's catchment area) and also less close to the infant (Bourne) site than the St Andrew's children are to the Menin Way site, given the less populous and geographically broader areas in which the "Bourne" children mostly live. The rationale, as I understand it, for measuring home-school distance by using either school main gate irrespective of whether the application is for year R or year 3, is to minimise difficulties for applicants for either phase who live closer to the "wrong" site but at a distance less than that for applicants who live closer to the "correct" site. The intention of the policy is thus to bolster the chances of being allocated a place at the school, at Year R or, if transferring from a feeder infant school, at year 3, for any applicant living within what might be seen as the broad community of the school (there being no formal catchment area).
22. The LA cited the previous determination by the OSA that ruled against the "dual gate" policy and stated that it *"considered this determination when the school proposed the two gate policy again for 2016, but as the school had also proposed to increase its Reception PAN from 60 to 90, we initially took the view that this increase might offset any potential disadvantage to children living close to the infant site."* However, the LA then went on to say that it had reconsidered its position in the light of the referral and that *"it believes the use of the two gate policy is not fair or reasonable"*; it therefore supports the position of the two referrers, that is, of the policy being non-compliant with paragraphs 14 and 1.8 in the Code. The reasons given for this changed view are first that if the school were oversubscribed with applications to year 3, *"St Andrew's children may be displaced because there are likely to be other children attending one of the other feeder schools but who live closer to the South Farnham infant site. In many cases children at St Andrew's will live closer to the junior site than other children who are attending the other feeder schools and ... St Andrew's has no other linked school."* I am not

convinced by this argument, however. As I have indicated above, the catchment of St Andrew's, which is a new factor since the previous determination, means that children attending that school are likely to live close to the gate at the junior site (Menin Way) and, as a previous determination pointed out (a reason given by the school for increasing its year R PAN) it was the comparatively greater distance measurements from applicants' homes to the Bourne site that was potentially disadvantaging young children in that area.

23. The second aspect of the LA's changed view echoes the referrers' fear that *"the very likelihood of this scenario arising is likely to cause parents who would otherwise have applied and been happy with St Andrew's, to apply for a place in Reception at South Farnham School."* This second point is a more general concern, is not specifically linked to any suggested contravention of the Code, and is not a matter on which I can express a view or make a ruling.
24. The LA raises a further point in contending that parents who might otherwise have applied for a place in year R at St Andrew's but have been able to secure a place at the school as a result of its increased PAN and the proximity of their homes to the junior site, may *"displace children who live closer to the infant site who would have to travel further to get to an alternative school than the families who live close to St Andrew's."* I have indicated above that the increase in the school's PAN for year R is not a matter within the jurisdiction of this or any other determination; nevertheless, its impact is a factor of which I must take account when considering the "fairness" and "reasonableness" of the "dual gate" policy.
25. Applicants will have different (and private) reasons for expressing a preference for one school rather than another; and the situation may well change from year to year depending on the numbers of applicants living in different areas with children of a particular age at any given time. The LA's comment is speculative; to me, it seems clear from the table above that the school's increased PAN was justifiable at least in terms of the number of first preferences expressed for entry to the school in year R, whatever the motivation for those applications may have been. The constant number of first preferences over recent years, and of the proportion of those first preferences to the total number of applications (to which can be added the previous number of 88 first preferences out of 186 total applications in 2012) does not suggest to me a sudden change in the pattern of applications brought about by the increase in the school's PAN in 2015. In other words, I interpret the data as indicating that the school's increased PAN for entry to year R is responding to and meeting demand rather than creating it.
26. Moreover, LA data show that although the furthest distance between a home and the infant site for a child allocated a year R place without a sibling connection had almost halved between 2012 and 2014 from 1.06 kilometres to 0.54 kilometres, in 2015 (with the increased PAN)



the distance was 1.839 kilometres, which to me suggests greater access to places for children living in the south of the area, that is, those who it was previously thought might have been disadvantaged. I note that the school has to manage admissions on two sites almost two kilometres apart, for children seeking places at two points of entry, in year R and year 3, with a different PAN for each year group and with four feeder infant schools, three to the south of the area close to one site and one to the north, close to the other site. Given the challenges posed by this combination of factors and the school's efforts to modify arrangements to minimise disadvantage, in the overall context of the school, I find the policy is reasonable and fair and that the arrangements, in this respect, are transparent and objective. I do not consider that the "dual gate" policy contravenes the Code.

27. I now consider the objection raised by the second referrer, that is, the priority given to children *"of full time members of the senior leadership team"*. The referrer states, *"While acknowledging that priority to 'children of staff' is permitted in the Code at 1.39a) and b) we would question the fairness and objectivity (paras 14 and 1.8 of the Code) of awarding such priority to children of 'the Senior Leadership Team' and apparently withholding it from children of full-time teachers who have been employed at the school for two or more years but who are not members of the Senior Leadership Team (nor are 'new staff employed to a difficult to recruit position'). We believe that the Senior Leadership team is comprised of all female members of staff (apart from Headteacher ...) and what could appear to be a somewhat 'restrictive' priority may have implications under the Equality Act 2010."* There are two aspects to this matter: first, the scope of the oversubscription criterion; and second, whether it may be in breach of legislation.
28. Regarding the first aspect, the Code permits an oversubscription criterion that prioritises the children of staff in either or both of these circumstances: first, where the member of staff has been employed at the school for two or more years at the time an application for admission is made; and/or second, where the member of staff has been recruited to fill a vacant post for which there is a demonstrable skill shortage. The Code does not require admission authorities to include such a criterion, nor does it explicitly permit or prohibit restrictions within either category if the criterion is used. In my view, the priority may therefore be offered to the children of all staff or to none or to the children of a specified group of staff within either or both of the categories provided the Code's explicit requirements, such as length of service, are satisfied. To limit the priority to members of the senior leadership team is within the remit of the admission authority.
29. The second aspect of this objection raises several issues. In its response to this objection, the LA states its support *"but would wish it noted that this point has not been previously raised with the school."*

It then questions whether any restriction imposed by the school in its use of this criterion would comply with paragraph 1.9f) of the Code, which states that *“admission authorities ... **must not** ... give priority to children according to the occupational, marital, financial or educational status of parents applying”* and whether the priority afforded according to the number of days or hours worked *“could be construed as giving priority according to an occupational status.”* I am not convinced by either point: an occupational status, in my view, derives from the nature of the post and not from the number of hours or days during which it is carried out, and paragraph 1.39 explicitly permits the occupation of being employed as a teacher at a school to secure priority in its arrangements if so determined. The LA then refers to paragraph 14 in the Code, contending that to restrict the priority to full time members of the senior leadership team *“would be unfair as it does not take account of a need or reason for part time employment and may disadvantage single parents or working mothers from qualifying. This in turn could be construed as being discriminatory under Equalities legislation and therefore not compliant with paragraphs 13, 1.1 and 1.8 of the Code.”*

30. The diocese responded that the LA had made a similar case to a voluntary aided school that had wanted to set a minimum number of hours worked by staff in order for their children to be prioritised in arrangements and that the school *“then amended the criterion to give priority to children of all staff, however many hours they worked.”* When reminded of this, the LA confirmed that *“last year we identified several schools which restricted eligibility ... to staff members who either worked full time or over a certain number of hours”* and that *“in all cases where this has been raised, the schools have changed their admission arrangements and removed the restriction that was applied”*, whilst reiterating that this issue had never previously been raised with South Farnham School. The LA and diocese thereby argue that there are precedents in which admission authorities have agreed to amend their arrangements when the question of equalities legislation has been raised with them.
31. The school’s response to this objection was that the wording of the criterion is unchanged from previous years; it confirmed that the LA had not previously challenged it, and stated that neither had the issue been raised during the period of consultation on the 2016 arrangements. The school also argued that *“the issue of discrimination against a person with a protected characteristic does not currently arise and therefore we cannot find evidence to support a claim on the basis of discrimination.”* The school also cites a recent determination by the OSA in which, in relation to a criterion concerning the staff of a school, the adjudicator stated the need for the school to make clear whether the criterion *“refers to all staff, or only to some and whether it relates to full- and part-time staff or not.”* The determination, however, does not suggest to what extent any such definition might, or might not, satisfy the Code or other relevant legislation if challenged.

32. In respect of fairness and transparency it would be questionable, in my view, to impose a “full-time” restriction on members of the senior leadership team but not on the other category of teachers to which this criterion applies, that is, those recruited to fill a vacant post for which there is a demonstrable skill shortage. Arguably, the “full-time” restriction should be applied to all staff or to none if this criterion is used. On the other hand, although the objection argues that the criterion may amount to indirect discrimination under equalities legislation, in that females are statistically more likely to work part-time and that “gender” is a protected characteristic, I am not persuaded that the restriction of this priority to part-time staff directly or indirectly contravenes the Equality Act 2010, or the requirements of the Public Sector Equality Duty. The restriction imposed by the criterion would apply to part-time male staff as well as to female staff, irrespective of the likelihood of their holding a post in the senior leadership team, and so I do not consider a challenge in the context of “gender” as a protected characteristic as relevant or proper.
33. Paragraph 1.1 of the Code requires admission authorities to “*act in accordance with ... relevant human rights and equalities legislation*”. If employment law is counted as among “*relevant human rights ... legislation*”, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 permit an employer to treat part-time workers differently from full-time workers only if the employer is able to show a good reason for doing so; this is known as “objective justification” and must show that the less favourable treatment afforded a part-time worker is in order (1) to achieve a legitimate objective, (2) is necessary to achieve that objective, and (3) is an appropriate way to achieve that objective. I cannot see that “objective justification” could be made with reference to the duties of a part-time member of the senior leadership team in the school, should one be appointed. A part-time member of the senior leadership team would have the right not to be treated less favourably than a comparable full-time member if the different treatment were merely on the grounds that the member was a part-time worker which, as the oversubscription criterion stands, would undoubtedly be the case.
34. The school states that there are currently no part-time members of the senior leadership team, but that is not to say this situation could not arise in the future; if so, to deny the priority admission of a child of such an employee might, in my view, contravene the employment regulations quoted above. I do not uphold the objection with respect to requirements set out in the Code, but note that the admission authority might consider taking advice, including from the LA, on the lawfulness of including the phrase “*full-time*” in this criterion.

## **Conclusion**

35. Only one of the matters raised was allowable as an objection, that of the priority for admission of children of full-time members of the

senior leadership team. The concern raised by both referrers was to the fairness and reasonableness of the “dual gate” policy in the arrangements. I found that the joint effect of the “dual gate” policy together with the increased PAN for year R was fair and reasonable and does not contravene the Code. The increase in PAN for admission to year R is one of the matters that is prohibited by the Code from being considered as an objection. The objection, raised by the second referrer, was to the oversubscription criterion that gives priority to the children of full-time members of the school’s senior leadership team. While accepting that the admission authority may limit the application of such a criterion to a specified group of staff, I found that to restrict the priority to full-time staff in the senior leadership team might contravene employment law and therefore the Code, as it requires arrangements to comply with relevant legislation. However, I am mindful that this may be a decision not within the jurisdiction of an adjudicator and therefore recorded the advisability of the school’s seeking appropriate advice on this point.

36. It is for these reasons, and bearing in mind the rider expressed in the previous sentence, that I conclude that the school’s arrangements for 2016 are compliant with the Code.

#### **Determination**

37. 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 South Farnham School determined by the academy trust.

38. I have also considered the arrangements in accordance with section 88I(5). I determine that they conform with the requirements relating to admission arrangements.

Dated: 22 September 2015

Signed:

Schools Adjudicator: Andrew Bennett