



Office of
the Schools
Adjudicator

DETERMINATION

Case reference: ADA2888

Referrer: Central Bedfordshire Council

Admission Authority: The Academy Trust of Eaton Bray Academy, Dunstable

Date of decision: 21 July 2015

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, I partially uphold the objection to the admission arrangements for Eaton Bray Academy determined by the Eaton Bray 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 Eaton Bray 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 Eaton Bray 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 27 February 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, in a letter dated 1 July 2015;
 - d. the school's admission policy for 2016, determined at a meeting of the governing body on 27 February 2015;
 - e. general information concerning primary school admissions on the LA's website; and
 - f. 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; priority is given within this criterion to those children eligible for the early years pupil premium (EYPP) or service premium (SP). The LA submits that this contravenes paragraph 14 of the Code, which states that "*admission authorities **must** ensure that the practices and criteria used to decide the allocation of school places are fair, clear and objective ...*" The LA further contends that this criterion contravenes paragraph 1.39B in the Code; while this paragraph allows arrangements to give priority to those children eligible for the EYPP, pupil premium (PP) or SP who have attended a school run pre-school, it does not allow priority to be given to all children within a pre-school, that is, those not eligible 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 two other matters in which the arrangements appeared not to meet the requirements of the Code. First, 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. Second, although there is reference to a waiting list in the section of the arrangements headed "Admission Appeals", no information is given, as required by paragraph 2.14 in the Code, about how long the list will be maintained, or that it will be re-ordered each time a name is added.

Background

8. The school is a primary academy school for pupils between the ages of two and eleven; it became an academy in April 2011 and, until September 2013, was part of a tripartite system within the LA, providing education for pupils up to the age of nine. The school has a capacity of 210 and there are now about 180 pupils on roll. The governing body is the admission authority under the articles of the academy trust.
9. Despite requests, the school did not submit minutes of the governing body meeting at which the arrangements for 2016 were formally determined. In order to complete this determination without further delay, I have therefore taken the date of 27 February 2015, as the final entry in the "Amendment History" prefacing the arrangements, to be an indication that determination took place at that time. The arrangements use 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 30. The arrangements provide that children with a statement of special educational needs and/or an Education, Health and Care (EHC) plan 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 school
 3. Other pupils living in the catchment area
 4. "Very exceptional" medical grounds
 5. Other siblings
 6. Children attending Eaton Bray Pre-School, with priority given to those children who are eligible for Service Premium or Early Years Premium
 7. 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 given 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; delayed admission for summer-born children; and appeals.

12. The school is not generally oversubscribed. In the admissions round for entry to the reception class in September 2015, 30 first preference applications were received, all of which were successful. No second or third preference applications were received by the closing date, but there was one late third preference application, which was unsuccessful. No places were allocated under criteria 1 or 4. In 2014, two applications (out of six) on behalf of children who had attended the school’s pre-school were unsuccessful, as were two applications under category 7 (“other children”). In 2013, there were 27 applications in total for the 30 available places.

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 prioritise applications on behalf of children in named nursery or pre-school provision. The LA explains that it made the 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 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 the determined arrangements for 2016 included a priority for those children who had attended the nursery or pre-school. 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 note 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 at 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.

15. The Code is clear in defining what is allowed and what is not where attendance at a named nursery or pre-school forms part of any 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.*

16. The school did not present a detailed argument for having disregarded the LA’s advice in this matter but made a reference to paragraph 1.9e) in the Code, commenting that “*The fact there is an exception to a clause, based on the possibility that children in the school-run nursery are given priority for admissions, does suggest that such a priority can indeed exist.*” Paragraph 1.9e), however, is relevant only in the context of paragraph 1.39B; that is, it gives permission for priority to be given in arrangements to the admission of children who have attended a school-run nursery or pre-school and are in receipt of the EYPP, PP or SP even if their parent pays optional “top up” fees. The paragraph cited by the school does not give a general permission to prioritise all children who have attended a nursery or pre-school and then, within that, to prioritise additionally those children in receipt of one of the premium payments.

17. It is clear to me, therefore, that the school’s arrangements do not comply with paragraph 1.39B in the Code. The criterion in the school’s arrangements 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 provision. In doing so, 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, PP or SP. This is not a priority for children in receipt of one of the premium payments

within the context of a general permission for all children attending a named nursery or pre-school, but is a specific permission that applies only to those children in receipt of the EYPP, PP or SP.

18. 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 6 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 the school, for a variety of legitimate personal reasons. In my view it would fail a fairness test to say that attendance at one nursery rather than any number of others, or indeed at any nursery at all, should secure priority in the allocation of places for a reception class. Moreover, it is possible that parents 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 then became the reason for their subsequently not being allocated a place for the child in the school's reception class.
19. 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 one of the three named premium payments.
20. I determine, therefore, that the school's oversubscription criterion 6 as currently drafted, giving priority to children who attend Eaton Bray Pre-School, with an additional priority for those children eligible for the service premium or the early years pupil premium, does not comply with paragraph 1.39B in the Code and that it does not satisfy fairness as set out in paragraph 14.
21. I turn now to the other matters mentioned above. First, 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. Second, in the section headed "Admission Appeals", no information is given, as required by paragraph 2.14 in the Code, about how long the list will be maintained, if at all, beyond 31 December; nor is it made clear that each time a name is added to the list it will be ranked again according to the oversubscription criteria.

22. In considering this objection, I brought these other matters to the school's attention but received no comments on them.

Conclusion

23. 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. Within this criterion, the arrangements give additional priority for children eligible for the EYPP or the SP. I found that the criterion does not meet the requirements of the Code at paragraph 1.39B, which allows priority through such a criterion only to those children eligible for one of the premium payments; the criterion in the school's arrangements takes no account of this limitation. Moreover, in the context of paragraph 14 in the Code, the criterion 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 then denied their child a reception place. Priority can only be retained for the children specified in the Code. I therefore partially uphold the objection.

24. In considering the arrangements as a whole, I found that they do not include an effective final tie-breaker and that insufficient information is given concerning the operation of a waiting list. The school did not respond to my enquiries about these matters despite emails requesting a reply.

25. 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

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

27. 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.

28. 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: 21 July 2015

Signed:

Schools Adjudicator: Andrew Bennett