Office of the Schools Adjudicator

DETERMINATION

Case reference: **ADA3278**

Objector: **A member of the public**

Admission Authority: **The Academy Trust for Chelmsford County High School for Girls**

Date of decision: **21 September 2017**

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 September 2018 determined by the governing body on behalf of the Academy Trust for Chelmsford County High School for Girls Essex.

By virtue of section 88K(2) the adjudicator's decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements within two months of the date of the determination unless an alternative timescale is specified by the adjudicator. In this case I determine that the arrangements must be revised by 28 February 2018.

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 a member of the public, (the objector), about the admission arrangements for September 2018 (the arrangements) for Chelmsford County High School for Girls (the school), a selective academy for girls aged 11 to 18 in Essex. The objection is to the fact that the priority given to looked after and previously looked after children and applicants in receipt of pupil premium is restricted to those resident within a 12.5 mile catchment radius of the school. It is claimed that this is both unlawful and unfair in relation to looked after and previously looked after children.

2. The local authority for the area in which the school is located is Essex County Council. The local authority, the academy trust for the school, the school's governing body and the objector are the parties to this objection.

Jurisdiction

3. The terms of the academy agreement between the academy trust and the Secretary of State for Education require that the admissions policy

and arrangements for the school are in accordance with admissions law as it applies to maintained schools. These arrangements were determined by the governing body on behalf of the trust, which is the admission authority for the school, on that basis. The objector submitted her objection to these determined arrangements on 20 April 2017. The objector has asked to have her identity kept from the other parties and has met the requirement of regulation 24 of the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012 by providing details of her name and address to me.

4. The objector has made an objection in relation to both the 2017 and 2018 admission arrangements. The parties have been advised that the adjudicator only has jurisdiction to determine an objection to the arrangements for September 2018, and not for any previous admission round.

5. I am satisfied that the objection to the arrangements for admission to the school in September 2018 has been properly referred to me in accordance with section 88H of the Act, and that these arrangements are within my jurisdiction.

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 20 April 2017, and subsequent correspondence;
   b. the school's response to the objection, supporting documents and further correspondence;
   c. a map of the local area identifying relevant schools;
   d. confirmation of when consultation on the arrangements last took place;
   e. a copy of the minutes of the meeting at which the governing body of the school determined the arrangements;
   f. a copy of the determined arrangements;
   g. the school's funding agreement;
   h. previous determinations for the school ADA2272, ADA2280 and ADA2330 (the previous determinations); and
   i. other determinations referred to me by the objector, namely ADA2311 (Latymer School) (the Latymer determination) and ADA2562 (Langley Grammar School) (the Langley determination).

The Objection

8. The objector considers that the arrangements "*conflict directly"* with paragraph 1.20 of the Code. This paragraph states that "*where admission arrangements are not based solely on highest scores in a selection test, the admission authority must give priority in its*

oversubscription criteria to all looked after children and previously looked after children who meet the pre-set standards of the ability test." The school offers 80 per cent of its places on the basis of scores in its selection test and distance, therefore paragraph 1.7 of the Admissions Code applies and requires that the highest priority must be given to all looked after and previously looked after children who meet the pre-set standards of the ability test.

9. The objector seeks to rely upon the Langley determination in which it was stated: "*Paragraph 1.7 of the Code does not allow any qualification based upon geography, and paragraph 1.20 states explicitly that a Grammar school such as Langley Grammar School which does not use highest scores to prioritise all admissions must give priority to looked after and previously looked after children who meet the standards of the school's selection test."* The objector asserts the Langley determination as authority for the objection on the basis that the arrangements for Chelmsford County High School for Girls also fail to include priority for applicants who meet the criteria of being looked after or previously looked after but are not resident within a catchment area. If the rationale for the Langley determination is correct, the objector asserts that the arrangements for Chelmsford County High School for Girls must also be unlawful.

10. The objector states that "*further, and in the alternative*", to only give priority to looked after and previously looked after children who live within the 12.5 mile circular radius is arbitrary and discriminatory, and contravenes the overall principles behind setting admission arrangements in "*Part 11 of the Code*" – namely that the criteria used for the allocation of school places must be "*fair, clear and objective.".* I have taken the objector's reference to mean paragraph 14 of the Code.

Background

11. The school converted to academy status on 1 April 2011. It is a designated grammar school with a published admission number (PAN) of 150. It is a single sex girls' school which has in the past selected applicants solely on the basis of ability measured by an entrance test and admitted them in rank order up to the school's published admission number. These arrangements were changed with effect from September 2013 to introduce a 12.5 mile "*circular priority area"* (the priority area). Eighty per cent of places were to be allocated to applicants who resided within this priority area in ranked order. The remaining 20 per cent of places were to be allocated in ranked order regardless of where the applicant resided.

12. The arrangements are relatively complex, but are described clearly in the available documentation. I requested additional information from the school in relation to the procedure followed in allocating places, and the rationale for the adoption of the arrangements.

13. A summary of the operation of the arrangements is as follows:

    a. A list of all the applicants who have undertaken the tests is compiled in ranked order of score;
    b. Looked after and previously looked after children residing within the priority area who have achieved a cut-off mark in the selection test are offered a place;
    c. Up to 10 places are then offered to applicants residing within the priority area who are in receipt of pupil premium and who have achieved the cut-off mark;
    d. The balance of places remaining out of 120 (which is 80 per cent of the PAN) are offered to applicants residing within the priority area in rank order. If any applicant refuses a place, it is offered to the applicant who has achieved the next highest score;
    e. The remaining 30 places are then offered in rank order to applicants remaining on the list once the first 120 applicants living in the priority area have been offered places. If an applicant refuses a place, it is offered to the applicant who has achieved the next highest score.

    The cut-off mark will be determined as the score 2 per cent lower than the last score offered on National Offer Day in the preceding year of entry of those permanently residing within the priority area. The cut-off mark has been created solely for the purpose of affording a degree of priority to applicants who are looked after and previously looked after children and those in receipt of pupil premium.

14. The school is regularly over-subscribed. The figures provided indicate that in 2013, 553 applicants named the school as a preference; in 2014, the number was 647; in 2015, the number was 590, in 2016, the number was 702, and in 2017, the number was 646.

15. The school's arrangements for the 2013 admission year were the subject of objections in the previous determinations. At that time, 80 per cent of places were allocated in ranked order to the highest scoring applicants resident within a 12.5 mile priority area, and 20 per cent of places were then allocated to the highest scoring applicants regardless of where they resided. The previous determinations considered, amongst other things, whether the 12.5 mile priority area was reasonable, clearly described, objective and procedurally fair. The conclusions were that the arrangements were compliant with paragraphs 1.8 and 14 of the Code. The determinations did not consider the requirement to give priority to looked after and previously looked after children under paragraph 1.7 of the Code if the arrangements were not based solely in the scores in the selection test.

Consideration of Case

16. The objector raised three points in her objection:

(i) The arrangements fail to give priority to all looked after and previously looked after children who apply for admission.

(ii) Following the Langley determination, the admission arrangements for Chelmsford County High School must be unlawful because this determination concludes that paragraph 1.7 of the Code does not allow for any qualification based upon geography, and paragraph 1.20 of the Code states explicitly that a grammar school which does not use the highest scores to prioritise all admissions must give priority to all looked after and previously looked after children who meet the standards of the school's selection test.

(iii) Failure to give priority to looked after children who reside outside the catchment area is arbitrary and discriminatory.

17. I have considered parts (i) and (ii) of the objection together, as they essentially raise the same point, which is that the arrangements fail to give priority to all looked after and previously looked after children who apply for admission.

<u>Parts (i) and (ii): The requirement to give priority to looked after and previously looked after children</u>

18. The relevant paragraphs of the Code are set out below:

*"The purpose of the Code is to ensure that all school places for maintained schools…and Academies are allocated and offered in an open and fair way. The Code has the force of law, and where the words '**must**' and '**must not**' are used, these represent a mandatory requirement." (paragraph 12).*

*"All schools **must** have oversubscription criteria for each 'relevant age group' and the highest priority **must** be given, unless otherwise provided in this Code, to looked after children and all previously looked after children. Previously looked after children are children who were looked after, but ceased to be so because they were adopted (or became subject to a child arrangements order or special guardianship order)." (paragraph 1.7).*

"Only designated Grammar schools are permitted to select their entire intake on the basis of high academic ability. They do not have to fill all of their places if applicants have not reached the required standard." (paragraph 1.18).

"Where arrangements for pupils are wholly based on selection by reference to ability and provide for only those pupils who score highest in any selection test to be admitted, no priority needs to be given to looked after children or previously looked after children." (paragraph 1.19).

*"Where admission arrangements are not based solely on highest scores in a selection test, the admission authority **must** give priority in*

its oversubscription criteria to all looked after children and previously looked after children who meet the pre-set standards of the ability test." (paragraph 1.20).

19. The provisions at paragraphs 1.7 and 1.19-1.20 of the Code reflect and to some extent expand on regulations 7 and 8 of the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012 (the 2012 Regulations), which provide that first priority in oversubscription criteria must be given to looked after children (but do not refer to previously looked after children), except for certain specified exceptions:

    "No priority need be given to a relevant looked after child where the arrangements for the admission of pupils are wholly based on selection by reference to ability and provide for only those pupils who achieve the highest ranked results in any selection test to be admitted." (regulation 8(2)).

    "Where paragraph (2) does not apply, the admission authority must give first priority in their oversubscription criteria to all relevant looked after children who meet the pre-set standards of the school." (regulation 8(3)).

20. In support of the objection, the objector refers to the Latymer determination in which it was stated that *"All schools must give priority to looked after and previously looked after children unless a grammar school uses solely the highest scores in a relevant test".*

21. The school's representations in response to the objection are set out in a letter dated 27 April 2017, which states that "*The admissions policy for entry in September 2017 and 2018 is solely based upon selection based by reference to ability (Section 1.17 of the Admissions Code 2014) in that only students attaining the highest scores in the entrance test are admitted in descending order. The geographic priority area is solely used for allocation purposes as described in the Policy".* The school considers that "*the Admission Policy complies with paragraph 1.19 of the Code, and therefore paragraph 1.20 is not applicable."*

22. The school stated that the concept of geographic and percentage division was "*accepted by the OSA as being fair in ADA2272, 2280 and 2330*." The version of the Code that was in place at the time of the previous determinations also had a requirement to prioritise looked after children. The school is therefore of the view that the adjudicator who considered the admission arrangements in 2012 "*would have considered the arrangements against all of the requirements in the Code, and would have raised the issue of looked after children if there had been a relevant breach of Code*."

23. The school also considers that the change to the policy for admission to the school in September 2018, in giving priority to looked after and previously looked after children and applicants in receipt of pupil premium, is in keeping with the recommendations of the Department

for Education to consider ways of being able to assist local disadvantaged students. This change, the school say, is also in keeping with the school's obligations under section 1A(1)(d) of the Academies Act 2010 to provide "*education for pupils who are wholly or mainly drawn from the area in which it is situated*".

24. In considering the first part of the objection, the key question is whether the arrangements, or any part of them, can be said to be "*wholly based on selection by reference to ability and provide for only those pupils who score highest in any selection test to be admitted*". If not, the admission authority is required to give priority in the over-subscription criteria to all looked after and previously looked after children meeting a pre-set standard in the entrance test, and not only to those living within 12.5 miles of the school.

25. On their face, the arrangements are not based solely on selection by ability: they provide for applicants to be admitted with lower scores if they live within the priority area than if they live outside it.

26. I have considered whether it might be argued that the purpose of paragraphs 1.19 and 1.20 of the Code is to draw a distinction between arrangements where oversubscription criteria based on factors other than ability are used to distinguish between applicants who have achieved a cut-off mark, such as those considered in the two determinations referred to by the objector, (namely the Langley and Latymer determinations), and arrangements such as those used by Chelmsford County High School for Girls where the higher an applicant's score the more likely they are to be offered a place, whatever other factors are used to allocate places. Whilst this purposive interpretation, if sustainable, might enable me to uphold the school's arrangements, my view is that it does not accord with the language used in the legislation and the Code.

27. Both paragraph 1.19 of the Code and regulation 8(2) of the 2012 Regulations refer to arrangements that are based wholly on selection by ability and provide only for those applicants who score highest in any test to be admitted. Arrangements that provide for the children who score highest to be admitted, but are based in other ways on selection other than by ability (for example, by distance from school) will not fall within these provisions.

28. I accept that the school has sought to provide a degree of priority for places to local looked after and previously looked after children and to some applicants in receipt of pupil premium. The school is mindful of its obligations under section 1A(1)(d) of the Academies Act 2010, and appears to be seeking to balance the objectives of giving priority to some disadvantaged children, and giving priority to local children whilst continuing to select pupils of the very highest academic ability. In doing so, however, it must comply with the mandatory provisions of the Code.

29. In summary, having considered the wording of the relevant provisions in the Code and the 2012 Regulations, I have concluded that it is not possible to read them in a way that enables the admission authority to give priority to applicants within a set distance of the school, or to those entitled to pupil premium, but not to all looked after children and previously looked after children whether living within 12.5 miles of the school or not. I therefore uphold the first part of the objection.

30. The second part of the objection refers to the Langley determination. This determination refers to a set of admission arrangements for a grammar school which were not wholly based upon selection by reference to ability. The arrangements gave priority to looked after and previously looked after children provided they lived in the admission area. The conclusion reached in that determination was that the arrangements did not meet the requirements in paragraph 1.7 of the Code.

31. The arrangements which were the subject of the Langley determination were similar to the arrangements for Chelmsford County High School for Girls for September 2018 in that priority for looked after and previously looked after children was limited to those residing within a catchment area. Adjudicator determinations are not case law and do not form binding precedents. I have however reached the conclusion that the arrangements in this case are unlawful for essentially the same reasons as the arrangements in the Langley determination were found to be unlawful. This does not add anything to my conclusion under the first part of the objection at paragraph 29 above.

Part (iii) The lack of priority for "*out of catchment looked after children and previously looked after children*" is arbitrary and discriminatory and in contravention of the overall principles behind setting admission arrangements

32. The objector has argued that "*further, and in the alternative*" only giving priority to looked after and previously looked after children living within the 12.5 mile priority area rendered the arrangements arbitrary and discriminatory and in contravention of the core principles that arrangements must be fair, clear and objective. The wording used by the objector suggests that this is posited as an argument to be advanced should the adjudicator find no breach of the specific provisions of the Code and Regulations relating to looked after and previously looked after children.

33. The objector has provided no evidence that the arrangements are not clear or objective and I consider that they are both clear and objective. This leaves the question of fairness. I have determined that the arrangements do not conform with the requirements relating to admissions as they are not in accordance with paragraphs 1.7 and 1.20 of the Code and with the relevant provisions of the Regulations. Thus the arrangements are at odds with a mandatory provision of the Code

and with the Regulations and cannot stand. The question of whether or not I would consider them to be fair in the absence of those provisions does not arise: it is not open to me to determine whether failure to offer places to all looked after and previously looked after children who achieve the cut-off score is fair, as it is simply not permitted. I am bound to determine, and have determined, that the arrangements are unlawful. Therefore, I do not uphold the third part of the objection.

34. Paragraph 3.1 of the Code provides that the admission authority "***must**, where necessary, revise their admission arrangements to give effect to the Adjudicator's determination within two months of the decision… unless an alternative timescale is specified by the Adjudicator."* I have considered carefully what timescale to specify in this case and I have decided to specify the date of 28 February 2018. The reason for specifying this date is that the standard period of two months would expire after the date on which applications for admission in September 2018 have to be made (that is 31 October 2017). In the circumstances of this case, where the school has a difficult balancing exercise to conduct, I do not think it would be fair or realistic to require the arrangements to be revised within a shorter period. It is possible that the school may wish to consult on any amendments to the arrangements.

35. It is therefore too late for the arrangements to be amended for entry in September 2018 as parents would not know at the time of application what arrangements were to be applied, leading to uncertainty and potential unfairness. It is also the case that the deadline for online registration for the selection tests closed on 30 June 2017 and arrangements have been made to notify parents of the test arrangements for their daughters. Moreover, parents will have made their decisions about whether to register girls for the tests on the basis of the arrangements as they were determined and published. A change to the process at this stage would be likely to lead to confusion and unnecessary uncertainty during the test period.

Summary of Findings

36. I find that the admission arrangements for Chelmsford County High School for Girls as determined for entry in September 2018 are unlawful because they fail to give priority to <u>all</u> looked after and previously looked after children applying for a place at the school. Since this is in breach of regulation 8(3) of the 2012 Regulations and paragraph 1.7 of the Code, I uphold the first part of the objection.

37. I find that the second part of the objection does not constitute a valid ground of objection, therefore I do not uphold the second part of the objection. I find that the third part of the objection does not fall to be considered by me because I am bound to uphold an objection where a set of arrangements are unlawful. Where this is the case, it is not for me to consider whether those arrangements are fair. Therefore, I do not uphold the third part of the objection.

38. For the reasons given above I partially uphold the objection.

Determination

39. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I partially uphold the objection to the admission arrangements for September 2018 determined by the governing body on behalf of the Academy Trust for Chelmsford County High School for Girls, Essex.

40. 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 the admission arrangements within two months of the date of the determination unless an alternative timescale is specified by the adjudicator. In this case I determine that the arrangements must be revised by 28 February 2018 which is also the deadline for determining arrangements for admission in September 2019.

Dated: 21 September 2017

Signed:

Schools Adjudicator: Dr Marisa Vallely