Office of the Schools Adjudicator

DETERMINATION

Case reference: **ADA3366**

Objector: **An individual**

Admission Authority: **The academy trust for Herschel Grammar School, Slough**

Date of decision: **14 December 2018**

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 2019 determined by the academy trust for Herschel Grammar School, Slough.

I have also considered the arrangements in accordance with section 88I(5) and find there are other matters which do not conform with the requirements relating to admission arrangements in the ways set out in this determination.

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 2019.

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 an individual (the objector), about the admission arrangements (the arrangements) for Herschel Grammar School, Slough (the school), a mixed selective secondary academy school for children aged 11 to 18 for September 2019.

2. The local authority for the area in which the school is located is Slough Borough Council. The local authority is a party to this objection. Other parties to the objection are the school and the objector.

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 academy school are in accordance with admissions law as it applies to maintained schools. These arrangements were determined on 6 November 2017 by the board of trustees of the Schelwood Trust which is the admission authority for the school, on that basis. The objector submitted his objection to these determined arrangements on 23 March 2018. I am satisfied the objection has been properly referred to me in accordance with section 88H of the Act and it is within my jurisdiction. I have also used my power under section 88I of the Act to consider the arrangements as a whole.

Procedure

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 objector's form of objection dated 23 March 2018 and supporting paper, together with subsequent correspondence;

   b. the admission authority's response to the objection;

   c. the comments of the local authority on the objection;

   d. confirmation of when consultation on the arrangements last took place;

   e. copies of the minutes of the meeting at which the board of trustees of the Schelwood Trust determined the arrangements; and

   f. a copy of the determined arrangements;

   g. the determination in the case of ADA3349, Alcester Grammar School.

The Objection

6. The objector raised the following points in his objection:

   a. whether the use of the same test of ability for later additional sittings of the school's selection test is compliant with paragraph 1.31 of the Code;

   b. whether the provisions relating to an applicant's permanent residency are compliant with the Code. The objector did not specify which provision of the Code he considered engaged, but I informed the parties that paragraph 14 may be relevant;

c. whether the provisions relating to admissions to Year 12 are clear and whether those relating to the date of testing are reasonable. The objector did not specify which provision he considered engaged, but I informed the parties that paragraph 14 may be relevant in each case.

7. I have informed the parties that each of these matters is within my jurisdiction. I also informed them that a number of other matters raised by the objector are not within my jurisdiction, as they do not concern the question of whether or not the determined arrangements conform with the requirements relating to admissions:

i. complaints that test material is available on other websites and that no action is taken against those sites while action is taken against 11plus.eu, a website registered to the objector;

ii. complaints about racially motivated actions, or some personal vendetta against the objector by third party organisations (that is, organisations which are not the admission authority for the school); and

iii. matters relating to the objector's disputes with a number of other parties.

Other Matters

8. When I reviewed the arrangements, I was concerned that they may not conform with aspects of the Code and statute. I therefore informed the parties that I had decided to use my power under section 88I of the Act to consider the arrangements as a whole. The matter of concern to me was whether the provisions relating to the admission of children with an Education, Health and Care Plan or a Statement of Special Educational Need conform with the requirements of paragraph 1.6 of the Code.

Background

9. The school converted to academy status on 1 February 2012. By virtue of its former designation as a grammar school and section 6(3) of the Academies Act 2010, it is permitted to continue to select all of its intake on the basis of high academic ability.

10. Under the school's arrangements for September 2019, there are 150 places available for admissions to Year 7 (Y7). The academic ability of pupils is assessed using an entrance examination set and administered by the Slough consortium of grammar schools. This consists of two tests provided by the Centre for Evaluation and Monitoring (CEM) at the University of Durham. Parents can register to take the test with any of the four grammar schools concerned and the results are shared between them, with the child taking the test only once.

11. The arrangements for the school define a standardised score of

111 or above in the entrance examination as conveying eligibility for consideration for admission. They also state that children with an Education, Health and Care Plan or Statement of Special Educational Need which names the school will be admitted, subject to the availability of evidence of suitable ability and aptitude, such as a score of 111 on the entrance examination.

12. Should there be more qualified applicants than the number of available places, oversubscription criteria are used to decide which children are offered a place. First priority is given to looked after and previously looked after children, followed by those living within the school's catchment area, which is defined as any address within four miles of the school. Distance between the home and the school is used if necessary to decide between children in this group, with those living nearer the school being given priority. Up to ten places are then available for children eligible to receive the Pupil Premium who live within ten miles of the school, again using distance where necessary, followed by children of permanent staff of the school. Any remaining places are offered in descending order of performance in the entrance examination, with distance again used if necessary.

13. A child's place of permanent residence is therefore relevant to the application of more than one of the oversubscription criteria used in the arrangements. A footnote has the following to say:

> *"In applying these admission arrangements, your permanent address will be defined as the permanent place of residence of the parent with whom the applicant spends the majority of his/her time. The home address must be the address where the applicant is living at the time of application and before the closing date for applications (31 October). ……If the main address has changed temporarily, for example where a family is renting a property on a Short Term Tenancy Agreement (12 months or under) then the parental address remains that at which the parent was resident before the period of temporary residence began unless it can be shown that all ties to the previous address have been relinquished, or that the move is not easily reversible. The Governors may refuse to base an allocation on an address which might be considered only a temporary address."*

14. For admissions to the school's sixth form, the arrangements say that the number admitted from outside the school will be *"50-60"* and that such candidates are required to provide *"a supportive reference from the current school attended."*

Consideration of Case

15. I shall consider first those matters that were raised by the objector, in the order in which I set them out above, starting with the objection concerning the use of the same test for later additional sittings of the school's selection test.

16. In making his objection, the objector cited paragraph 1.31 of the Code, which has the following to say:

> *"Tests for all forms of selection **must** be clear, objective and give an accurate reflection of the child's ability or aptitude, irrespective of sex, race or disability."*

17. He put his objection in the following terms:

> *"This is not possible if the same test is repeatedly used as children remember content and can and do pass it on to others. Just one extra mark will substantially elevate a child in the rankings."*

He then referred to the question of the number of candidates likely to be at the borderline of having a standardised score of 111. I understand that in his view such candidates would potentially be materially affected by small inaccuracies in the testing regime, although he did not state this. He went on to say that in his view *"Of course there are a large number of candidates at the borderline …. The same test is used more than once, so this has a risk of being unfair and the results are not an accurate reflection of the child's ability. Solution: Ban reuse of the same test and use a different test. CEM must be able to provide a different test."* Further, he said, *"The OSA has already ruled, in other adjudications, different tests can be compared and children ranked for a waiting list. There is no reason why a different test should not be used. Cost is irrelevant."*

18. A letter dated 4 May 2018 was sent to the objector and the other parties by the Office of the Schools Adjudicator (OSA) explaining the process which I proposed to follow in this case. The letter explained that a particular procedure has been developed by the OSA to handle multiple objections which raise many similar points, and that eleven objections had been made to the arrangements of other selective schools raising a number of similar points to those made in the objection to the arrangements for Herschel Grammar School. It went on to inform the parties that one of the other schools subject to an objection was Alcester Grammar School in Warwickshire, and that the objection to its arrangements would be the first to be considered. Those relating to the other schools, including Herschel Grammar School, would be considered once the objection concerning Alcester Grammar School (ADA3349) had been determined. The arguments and points set out in that determination of the same matters could be applied, if appropriate and subject to the submissions of the parties to those cases, to matters raised in other objections.

19. A letter dated 3 August informed all the parties that the determination in ADA3349 had been published on 27 July 2018 and explained how the objections to the admission arrangements of Herschel Grammar School would be considered. The letter stated that, concerning the use of the same test for selection by ability for later additional sittings:

> *"…the adjudicator notes that the same or substantially the same*

issue has been considered and determined in ADA3349, dated 27 July 2018, a copy of which is attached. The whole determination should be considered but paragraphs 18 to 48 specifically address this point. On initial consideration it appears to the adjudicator that the conclusions and the reasons given in ADA3349 apply equally to this issue as raised in the current objection."

The letter invited recipients to make representations as to why in the current objection this issue ought to be considered or determined differently. The local authority and the school both declined to comment.

20. The objector responded to the letter dated 3 August 2018 on 21 August 2018. This response comprised a document headed "Forensic Analysis", and three attachments. This document sets out reasons why the objector disagrees with the consideration and conclusions in the determination of his objection regarding Alcester Grammar School (ADA3349). It is clear that the objector considers that ADA3349 was wrongly decided on the issue of late testing: his submissions do not touch on any of the other issues identified.

21. ADA3349 was published on the OSA website on 27 July 2018. Decisions of the adjudicator are binding on the admission authority in question and any other person or body. There is no provision in the statutory framework for an appeal from an adjudicator's determination. A person who considers that the decision is defective may apply to the High Court for leave to bring proceedings for judicial review and if leave is granted may bring such proceedings. No application to bring proceedings for judicial review had been made at the time of completing this determination. Consequently ADA3349 stands as published.

22. ADA3349 does not constitute a precedent and I am required to consider this objection on its own merits. I have considered all of the points raised by the objector in relation to ADA3349. In particular, I have considered whether any point raised would cause me to consider that the issues identified as being the same or substantially the same issue in the present case should be looked at differently from the way they were looked at in ADA3349.

23. I find that the points raised by the objector regarding ADA3349 do not lead me to consider that any point in ADA3349 was wrongly decided. A number of the points made in the "Forensic Analysis" are based on the assertion, also made as part of the objection in this case, that the injunction proceedings brought against the objector by Warwickshire County Council showed that there was a real risk of the test process being compromised if children could remember information from the tests. In fact, as the adjudicator explained at paragraphs 37 and 38 of ADA3349, that was not the finding of the Court. The objector's further criticisms of the evidence given to the Court that were referred to in ADA3349 do not persuade me that any of the factual conclusions reached in that case were wrong.

24. I note that the objector does not consider that the work of Gathercole and Alloway referred to in paragraphs 25 and following of ADA3349 supports the conclusion that there is only a minimal risk of recall of specific content. I have no reason to form a different view than that that work confirms that children have a more restricted working memory than adults. There is no evidence that the types of question that are commonly asked in the 11+ now are more likely to be recalled than those that were in use at the time of publication of that work, and for those reasons together with the other evidence referred to at paragraphs 28 and 29 of ADA3349 I am satisfied that in normal circumstances the risk of specific recall would be minimal.

25. The objector has made some new factual points. He says that he did not, as the adjudicator in ADA3349 had understood, ask his nephew questions soon after the test had finished but after he had returned home. He believes that "much later in the day" is the optimum time to ask questions. In his arguments, the objector says he disagrees that "straight" after the test is the optimum time and I note that the adjudicator in ADA3349 referred to "soon" after the test which is somewhat different. I have no reason to form a different view than that recall is likely to be best soon after the test, or that in normal circumstances children are not questioned at this point, so this does not lead me to form a different view from that reached by the adjudicator on this point in ADA3349.

26. I further note the objector's assertion that some families are not aware that the same test is reused. Assuming that to be correct, it does not detract from the fact pointed to by the adjudicator in ADA3349 that competition will be an inhibiting factor in cases where they are aware. Nor does it have any impact on the amount of content that a child can remember. The objector says that the adjudicator cannot know what is going on "under the radar", referring again to the claim made in the objection that test content is being published on various websites or passed on in other ways. Neither the adjudicator in ADA3349, nor I in considering this case, can take this into account if – as the objector says is the case – he is not able to tell me.

27. The objector states that *"major publishers sell authentic CEM 11+ mocks".* The word "authentic" is his choice of word. There are no "mock" papers produced or authorised by CEM; however CEM does produce familiarisation papers for use by prospective candidates. Otherwise the point the objector makes relates to his understanding of the injunction proceedings, and is dealt with in paragraph 23 above.

28. The objector also disagrees with a number of the conclusions which were reached in ADA3349 about the likelihood of information being passed on, the likely impact of a child knowing in advance what one or more of the questions would be, the difficulties of ranking where different tests are used and the level of accuracy that is achievable in tests of ability. I have considered the points made by the objector, but I disagree with him for the reasons that were set out in ADA3349.

29. The objector has not given any reason or reasons why the facts in the present case mean that it should be considered differently to ADA3349. Insofar as the issue decided in ADA3349 is the same or substantially the same as that arising in the present case I will, as set out below, adopt it in my consideration of this matter. A copy of ADA3349 is attached as Appendix 1 to this determination and is available on the OSA website via this link. I will refer to the relevant paragraphs below.

30. The objector's complaint that the use of the same test for selection by ability for later additional sittings is not compliant with paragraph 1.31 of the Code is made in identical terms to those of ADA3349. In deciding this issue, I adopt the reasons and conclusions set out in paragraphs 18 to 48 of ADA3349. It is not necessary to repeat those paragraphs here. I do not uphold this part of the objection.

31. The objector says that the definition of a parent's permanent address used in the arrangements is unreasonable, but he does not say why. He says that the Inland Revenue (which I note is in fact now Her Majesty's Revenue and Customs) uses a different definition of permanent residence, but does not say what this is.

32. The objector refers to the fact that applications for school places are made by completion of the local authority Common Application Form (CAF) and states that the address provided on this form should be the only one relevant to the consideration of an application, since it is the address used in the coordination process operated by the local authority. He points out that the arrangements use the terms "permanent address", "home address", "main address" and "parental address" and says that this is confusing. He says that the stipulations in the arrangements concerning the occupancy of a temporary address by a parent are *"no business of the school"* and that it is irrelevant to an application where a child lived 12 months before making an application for a place at the school (since the implication of the arrangements concerning those living in rented accommodation is that this, potentially previous, address would be deemed by the school to be a child's permanent address).

33. The school's arrangements for selection testing are those of the Slough consortium of grammar schools, which includes three other local selective schools as well as the school. These procedures are set out in a document on the school's website. It was a requirement for admission in September 2019 that parents register their child for the selection test no later than 19 June 2018. Testing took place on 15 September 2018, and parents were informed of the outcome on 31 October 2018. This document, appropriately, explains that the sole purpose of registration is to enable a child to take the selection test. It also states that applications for places at particular schools are made via the local authority CAF and that the address provided by a parent when completing the CAF was required to have been their permanent address on 31 October 2018. It also explains how those living outside Slough could apply for a place at a school there using their own local authority CAF, and says that changes of address (including therefore any change after the selection process has

been completed) should be notified to the relevant local authority and to the consortium.

34. The school is evidently concerned about parents who attempt to "game the system" by acquiring an address which conveys an advantage to their child in obtaining a place there. It is entirely understandable that it should seek to ensure that children do in fact live where their parents say they do when they apply for a place. A false address, or a temporary address which is not a child's true permanent place of residence, if used in this way would directly interfere with the interests of those with a legitimate residential qualification. What the school needs to do therefore is to act in a way that is relevant to ensuring that addresses are not false, and that they are not "second homes" or "temporary homes", and it is required to act reasonably in doing so.

35. The arrangements make requirements and set out definitions which attempt to do this. Although it has been given the opportunity to do so, the school has not provided me with its rationale for any aspect of these requirements. For those with a current permanent address, the requirement is that, for the purpose of applying the school's oversubscription criteria, this is the permanent address as defined in the arrangements. So it is the address at the point of application for a place – that is, the address provided when the CAF is completed. The CAF can be completed at any point in October following the availability of selection test results. The arrangements also say that proof of this address may be sought. Neither of these requirements seem to me to be unreasonable since, firstly, there is no need for permanent residence to have been for any lengthy period of time, and it is of course reasonable that proof of an address may be sought.

36. For those living in accommodation which is rented, the requirement is that the parent must be able to show that *"all ties to the previous address have been relinquished, or that the move is not easily reversible."* In the absence of any explanation from the school, I am left with my own understanding of this provision, which is that its purpose is to discourage parents from obtaining a temporary address which is in addition to their true permanent address. The objector explained his objection to this part of the arrangements by saying that:

> *"Relinquishing all ties is unlawful interference with family life and contravenes the Human Rights Act – right to a family life and enjoyment of property. This implies a sale. The family may wish to keep the property and rent it out as an investment."*

37. He continues by saying:

> *"Every parent has the right to move in to the catchment area for the sole purpose of gaining entry in to the school. This may be with the intention of moving for 7 years whilst the child attends the school. This could be on the basis of purchase or rent."*

This latter statement is of course true, and the school's arrangements in no way penalise parents for moving into the school's catchment area - provided this is to a permanent address, whether owned or rented. I have already said that I consider it reasonable for a school to do this in order to protect the legitimate interests of those with a bona fide permanent address which confers advantage in securing a place there. The arrangements do not address directly how a rented property, which by definition could be seen as temporary, is to be viewed, but only the situation which may be created by a recent move into accommodation which may be rented. This is unfortunate in terms of the overall clarity of the arrangements, as is the use of different terminology which the objector refers to. However, it also means that the objector's view concerning the reasonableness or otherwise of the way in which permanent residence is dealt with turns in my view solely on whether the school has done no more in practice than is necessary to protect those with legitimate interests to which I have already referred. My view is that this is the case and that the arrangements do not fail to be reasonable. I do not uphold this part of the objection.

38. The objector made the following complaints concerning the clarity of the admission arrangements for Year 12 (Y12):

(i) that the number of places is not clear. No PAN is stated;

(ii) that it is not clear how places are awarded or what the position of a student is if their actual grades at GCSE do not match their predicted grades.

39. The arrangements say that:

> *"The maximum number of places in the sixth form is 300"* and that the *"intended number of students admitted from outside the school is 50-60"*.

Paragraph 1.2 of the Code states that *"all admission authorities **must** set an admission number for each 'relevant age group'"* and the footnote to this paragraph makes it clear that Y12 constitutes a relevant age group if external candidates are admitted to a school's sixth form. The statement in the arrangements does not provide a clear admission number, and so fails to comply with this requirement. I uphold this part of the objection.

40. The arrangements go on to say that:

> *"There are a variety of A level courses on offer, each with different entry criteria. Full details of the Sixth Form admission requirements (both general and the subject specific) are published annually in the Sixth Form Course Information Booklet which is available on the school's website. Conditional offers of Sixth Form places will be based on whether an applicant's predicted grades meet these requirements."*

Paragraph 2.6 of the Code says that: *"Admission authorities can…set academic entry criteria for their sixth forms…".* The arrangements make it clear that the school does this, and that predicted grades are used against these criteria, which are published, to make conditional offers to candidates. While the arrangements do not make an explicit statement that it is actual grades that result in final offers of sixth form places, it is in my view clear from the use of the phrases "admission requirements" and "conditional offers" concerning the use of predicted grades, that this is the case. I do not uphold this part of the objection. However, I note in passing that the arrangements refer to a *"supportive reference"* from their previous school being necessary for external candidates and that paragraph 1.9g) of the Code says that admission authorities **must not** *"take account of reports from previous schools*".

41. Finally, the objector complained about the statement in the arrangements that *"circumstances such as a clash with another 11+ entrance examination to a different selective school, religious observance etc must be advised to the Consortium by noon on Wednesday 20 June 2018."* He said that this was unreasonable, since *"many children do not know when they will be tested. Eg Warwickshire deliberately changed testing dates for many candidates in 2017 with almost 20% sitting late. They were not informed on (sic) their date until August 2017. If this is repeated by any area one cannot comply with the 20th June deadline."*

42. Under the consortium's procedures, registration to take the entrance test took place between 1 May 2018 and midnight on 19 June 2018, and no registration after this deadline was allowed. I note in passing that while it may be reasonable, particularly where testing covers several schools, that the deadline for registration is some time before the date on which testing takes place, the absence of any flexibility to allow, for example, parents moving into the area after this date to register, may be less so.

43. However, the objector has not complained about this aspect of the arrangements, but rather that the school required a parent to notify the consortium of any clash of the sort referred to above when it did. I observe that this separate deadline to that for registration to take the test seems to be unnecessary in the case of anyone for whom religious observance would interfere with taking the consortium's test on a Saturday. Such parents would certainly have known that this clash would be inevitable when they registered to take the test. Nevertheless, the arrangements also refer to the possibility of a clash with the testing arrangements of another selective schools, and it is in this context that the objector has complained about the deadline for notification. While it is of course open to a school to make provision to help parents avoid such a clash, it would not in my view be necessary for it to do so in order for the arrangements to be compliant with the Code. It cannot therefore be the case that arrangements are made unreasonable by stipulating a cut-off date by which it must be notified of the clash when a school does make such provision. I do not uphold this part of the objection.

44. Paragraph 1.6 of the Code says that:

> *"All children whose statement of special educational need (SEN) or Education, Health and Care (EHC) plan names the school **must** be admitted."*

This statement applies to all schools and is unequivocal, allowing admission authorities no scope for imposing conditions on such an admission. As I have set out above, the school's arrangements do this. A footnote to the arrangements states by way of justification that the Children and Families Act 2014 says that a school should not be named if unsuitable for the special needs of the child or if the admission would be incompatible with the provision of efficient education for others, or with the efficient use of resources. Nevertheless, these are matters for the local authority to consider when deciding whether to name a school. An academy school may appeal to the Secretary of State against the intention of a local authority to name it in an SEN or EHC plan, but if that appeal fails and the naming of the school stands, the child must be admitted. The placing of conditions on such admissions by the school within its arrangements is incompatible with these provisions, and is a breach of paragraph 1.6 of the Code.

Summary of Findings

45. I have set out in the foregoing paragraphs the reasons why I have not upheld those parts of the objection concerning:

a. the use of the same test for later sittings of the school's selection test;

b. the reasonableness of the school's definition of a child's permanent address,

c. the clarity of the use of academic entry requirements to the school's sixth form, and

d. the reasonableness of the arrangements concerning the last date for notification of a clash of dates with the testing arrangements of another selective school.

46. I have also explained my reasons for upholding that part of the objection concerning:

a. the absence of a clear statement of the PAN for admissions to Y12.

47. I have given my reasons for coming to the view that the arrangements cause a further breach of the requirements of the Code by placing a condition on the admission of children whose statement of special educational need or Education, Health and Care Plan names the school.

Determination

48. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I partially uphold the objection to the admission arrangements determined by the academy trust for Herschel Grammar School, Slough.

49. I have also considered the arrangements in accordance with section 88I(5) and find there are other matters which do not conform with the requirements relating to admission arrangements in the ways set out in this determination.

50. 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 2019.

Dated: 14 December 2018

Signed:

Schools Adjudicator: Dr Bryan Slater