



Office of
the Schools
Adjudicator

Determination

Case reference: VAR1937

Admission authority: The governing board for London Nautical School, Lambeth

Date of decision: 6 November 2020

Determination

In accordance with section 88E of the School Standards and Framework Act 1998, I approve the proposed variation to the admission arrangements determined by the governing board for London Nautical School for September 2021.

I determine that priority for places at the school will be given on the basis of the four oversubscription criteria in the order they are stated in the arrangements and that the details of the banding process are deleted from the arrangements.

I have also considered the arrangements under section 88I(5) of the Act and find that they do not comply with 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.

The referral

- 1. The board of governors of London Nautical School (the school) has referred a proposal for a variation to the admission arrangements for September 2021 for the school to the Office of the Schools Adjudicator. The school is a foundation school for boys aged 11 to 18 in the London Borough of Lambeth (the local authority).**
- 2. The proposed variation is made in the context of the Covid-19 pandemic. The proposed variation is to remove the banding arrangements. That is not to administer any test or place applicants into any ability bands, but to prioritise all pupils who apply for the**

school solely on the basis of the existing oversubscription criteria which are currently used within bands.

Jurisdiction

3. The referral was made to me in accordance with section 88E of the School Standards and Framework Act 1998 (the Act) which states that:

“where an admission authority (a) have in accordance with section 88C determined the admission arrangements which are to apply for a particular school year, but (b) at any time before the end of that year consider that the arrangements should be varied in view of a major change in circumstances occurring since they were so determined, the authority must [except in a case where the authority’s proposed variations fall within any description of variations prescribed for the purposes of this section] (a) refer their proposed variations to the adjudicator, and (b) notify the appropriate bodies of the proposed variations”.

4. Paragraph 3.6 of the Code also requires that the appropriate bodies in the relevant area are notified of a proposed variation. The school did not provide me with a copy of its notification on the proposed variation and the list of schools and other bodies to which it was sent. However, the local authority told me that it notified some of the appropriate bodies on behalf of the school and that it is satisfied that the other parties were notified. In response to my enquiries on this matter, the school said that it was relying on the notification undertaken by the local authority. Given the need to make a determination on this matter before the planned date of the test, I have not investigated this issue further and will accept the local authority’s opinion.

5. I am satisfied that the proposed variation is within my jurisdiction.

6. I am also satisfied that it is within my jurisdiction to consider the determined arrangements in accordance with my power under section 88I of the Act as they have come to my attention and determine whether or not they conform with the requirements relating to admissions and if not in what ways they do not so conform.

Procedure

7. In considering this matter I have had regard to all relevant legislation, and the School Admissions Code (the Code).

8. The documents I have considered in reaching my decision include:

- a. the referral from the board of governors dated 5 October 2020, supporting documents and its response of 4 November to the enquiries I made on 15 October;

- b. the determined arrangements for 2021 and the proposed variation to those arrangements; and
- c. details of the notification to the appropriate bodies about the proposed variation provided by the local authority; and

9. The school and the local authority have been informed that I am considering the arrangements as a whole and have had the opportunity to comment on the matters of concern to me.

Consideration of the arrangements

10. Paragraph 14 of the Code says:

“In drawing up their admission arrangements, admission authorities must ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective. Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated.”

11. When I received a copy of these arrangements, I was concerned that the arrangements may not be clear and that they did not, or may not, conform with many requirements of the Code. I consider it necessary to address these issues before considering the proposed variation because many of them concern the banding process which is the subject of the proposed variation.

12. My initial concern was that the arrangements sent to me were dated for admission in September 2020, when the variation was requested for September 2021. However, the minutes of the meeting of the governing board held on 11 December 2019 approving the admission arrangements for 2021 stated that they would be unchanged. I have, therefore, taken the arrangements I have been sent to be those for 2021 and I note that they are the same as those on the school’s website. I will address the issues which I have identified in the order they appear in the arrangements.

13. The arrangements set a published admission number (PAN) of 120 for the school. There are four oversubscription criteria set out after stating the PAN, these can be summarised as follows:

- Looked after and previously looked after children
- Brothers of boys at the school
- Boys with medical or social reasons for attending the school
- All other pupils.

The oversubscription criteria are not numbered so it may not be clear in which order they are applied.

14. Paragraph 1.6 of the Code says:

“The admission authority for the school must set out in their arrangements the criteria against which places will be allocated at the school when there are more applications than places and the order in which the criteria will be applied. All children whose statement of special educational needs (SEN) or Education, Health and Care (EHC) plan names the school must be admitted. If the school is not oversubscribed, all applicants must be offered a place.”

The arrangements do not refer to EHC plans and do not make it clear that if a boy's EHC plan names the school, he must be admitted. Reference is made in the arrangements to statements of special educational need which are no longer in use. Had they still been in use, or if this reference is intended to refer to EHC plans, then the reference is misleading. Arrangements are required to be clear that children whose EHC plan names the school must be admitted before any oversubscription criteria are applied. Paragraph 1.30 of the Code re-emphasises this in the context of schools which use banding as this one does. If a child's EHC plan does not name the school, then their application process is the same as that for all other children.

15. Paragraph 1.7 of the Code and its footnotes define the children who must be given highest priority because they are looked after or were previously looked after. The arrangements refer to residence orders when residence orders were replaced by child arrangements orders in the Children and Families Act 2014. This could render the arrangements unclear.

16. Immediately following the oversubscription criteria there is a sentence which says:

“In the case of twins, where one is allocated a place in the ballot, the remaining twin will also receive a place within their relevant band.”

This is the first mention in the arrangements of a ballot or of a band so is out of context and the arrangements are not clear.

17. After the misleading statement about children with statements of special educational need, the arrangements say:

“All applicants under category 4 are treated equally, and in common with many other schools, where there are more applicants than places available, all potential pupils (including those in categories 1 - 4) will sit a special ‘test’ for the purposes of banding ability. This enables us to ensure the school has a very wide range of ability within it. Pupils are allocated to one of 3 bands according to results.”

As noted above, the oversubscription criteria are not numbered and so this paragraph is unclear for that reason. It is also inaccurate because children who have an EHC plan which names the school, must be admitted (other than to grammar schools) even if they have not

taken any test. Furthermore, children who or are looked after, or previously looked after must also be given highest priority even if they have not taken the test.

18. Paragraph 1.25 of the Code says:

“Banding can be used to produce an intake that is representative of:

- a) the full range of ability of applicants for the school(s);
- b) the range of ability of children in the local area; or
- c) the national ability range.”

It is not clear from the arrangements which of these objectives the arrangements are intended to secure. The school did not answer this question in its response to my enquiries. I will return to this question later as it is critical to the decision which I reach.

19. The arrangements say: “Pupils are allocated to one of 3 bands according to results” and there are 30 admitted from Band 1, 60 from Band 2 and 30 from Band 3. There is no indication in the arrangements of how or in what proportion the children who take the test are put in each band. The school could choose, for example, to put the top 10 per cent of children in the test in to Band 1, the next 15 percent into Band 2 and the remaining children into Band 3, then pick 30 from Band 1 and 60 from Band 2 resulting in three quarters of the intake coming from the highest ability quartile. The full ability range would be represented, but the intake would not be representative of any of the three groups permitted in paragraph 1.25.

20. Paragraph 1.27 of the Code requires:

“The admission authority **must** publish the admission requirements and the process for such banding and decisions, including details of any tests that will be used to band children according to ability.”

These arrangements include no detail of the process, or the test itself, such as the type of test or how a boy who may be ill on the appointed day, or be prevented from attending by another good reason, such as bereavement or transport failure, could take the test. The date on which it is intended to be sat is only found in small print at the bottom of the supplementary information form. The arrangements do not meet the requirements of paragraph 1.27 or of paragraph 1.26:

“Admission authorities’ entry requirements for banding **must** be fair, clear and objective.”

In addition, paragraph 1.32c of the Code says: that:

“Admission authorities **must**: ... take all reasonable steps to inform parents of the outcome of selection tests before the closing date for secondary applications on **31 October** so as to allow parents time to make an informed choice of school”

There is no indication in the arrangements of the steps which the school takes to meet this requirement. The local authority did comment on this issue as follows:

“It has been a shared reading of the current School Admissions Code, between the school and LA, that the ability banding test is not a selection test. Therefore, the requirement to share the test result was not included in their admissions arrangements. The ability banding test result does not determine whether or not a boy will gain a place at the school, in the same way as a grammar school selection test. Whether a parent/carer knows the result of the test has no bearing on the process. However, on reading of the primary legislation (School Standards and Framework Act 1998) there is a different interpretation.”

The Act clearly defines banding as a form of selection in section 99 and so the requirements for all forms of selection apply to banding including that set out in paragraph 1.32c of the Code. This is a requirement that has been relaxed because of the difficulty of testing due to the pandemic, but that relaxation was not in place when these arrangements were determined. It is proposed that this requirement is removed for banding tests in a future version of the Code, but until that change is approved by Parliament, it remains in place.

21. The arrangements do not explain how any places not taken up in any band would be reassigned to boys from another band. Other than grammar schools, schools are not permitted to keep place empty if there are children who would like them.

22. Following the statement about the number of places available for allocation from each band, the arrangements say:

“Where there are more applicants than places within a particular band, allocation of those places will be by way of random selection with all pupils having equal opportunity.”

If this is the practice (and it would be an unlawful practice to the extent that it would not meet the requirement to give highest priority to looked after and previously looked after children), then I have to ask what is the purpose of the oversubscription criteria set out earlier in the arrangements which state that priority for places will be given to brothers of boys at the school and on the basis of social and medical need. It is possible that random allocation is intended to be used for those referred in those oversubscription criteria as “all other pupils”. In any case, the arrangements are not clear and do not conform with the Code.

23. I have set out above many ways in which the arrangements are not clear or do not meet the requirements of the Code for other reasons. There are also things which the Code

requires to be in the arrangements but which are not. First of these are details of the waiting list as set out in paragraph 2.14:

“Each admission authority **must** maintain a clear, fair and objective waiting list until at least **31 December** of each school year of admission, stating in their arrangements that each added child will require the list to be ranked again in line with the published oversubscription criteria. Priority **must not** be given to children based on the date their application was received or their name was added to the list. Looked after children, previously looked after children, and those allocated a place at the school in accordance with a Fair Access Protocol, **must** take precedence over those on a waiting list.”

In addition, paragraph 1.35 requires:

“a fresh round of random allocation must be used each time a child is to be offered a place from a waiting list.”

Waiting lists are not referred to in the arrangements, they should be and the way in which they work alongside the banding clearly explained.

24. Another requirement of the Code found in paragraph 2.17 is not met as the arrangements are silent on out of normal age group admissions and so do not meet the requirement that:

“Admission authorities **must** make clear in their admission arrangements the process for requesting admission out of the normal age group.”

25. I did not receive a copy of the supplementary information form (SIF) used by the school until 4 November 2020. Paragraph 2.4 of the Code says:

“In some cases, admission authorities will need to ask for supplementary information forms in order to process applications. If they do so, they must only use supplementary forms that request additional information when it has a direct bearing on decisions about oversubscription criteria or for the purpose of selection by aptitude or ability. They must not ask, or use supplementary forms that ask, for any of the information prohibited by paragraph 1.9 above or for:

- a) any personal details about parents and families, such as maiden names, criminal convictions, marital, or financial status (including marriage certificates);
- b) the first language of parents or the child;
- c) details about parents’ or a child’s disabilities, special educational needs or medical conditions;
- d) parents to agree to support the ethos of the school in a practical way;

e) both parents to sign the form, or for the child to complete the form.”

26. The SIF does not conform with these requirements for several reasons. It asks for the names of up to two parents or guardians and for their relationship with the child. The SIF also asks if the child is looked after, this information will be provided on the common application form used by all local authorities and so is not necessary on the SIF. There is a question about the child’s present school. As none of the oversubscription criteria refer to feeder schools, this cannot be asked. Finally, there is a section for the primary school headteacher to complete concerning any special needs the child has. While it is necessary to know if there are any factors which need to be known to enable a child to access the test, such as large print, other questions about a child’s disability or special needs are prohibited.

27. The school addressed my concerns about the above matters by providing a document described as a “proposed policy”. My jurisdiction is for the determined arrangements, not for the proposed policy and I make no comment on the conformity of the proposed policy with the Code. However, I do take this as acceptance that the current arrangements do not conform with the Code. The Code requires that the arrangements be amended so that they meet the Code’s requirements.

The proposed variation

28. Paragraph 3.6 of the Code requires that admission arrangements, once determined, may only be changed, that is varied, if there is a major change of circumstance or in certain other limited and specified circumstances. It is without doubt that the Covid-19 pandemic is a major change of circumstances which has adversely affected the country since March 2020. I am, however, concerned that the school did not make this request for a variation until 5 October 2020, little more than three weeks before the closing date for applications and just over one month before the date set to carry out the testing process which its arrangements commit it to and from which commitment it now wants to be relieved.

29. The school explained that it invites about 100 children every year to sit the test on its site. Thousands more children sit the test in other schools in Lambeth. The school said:

“This year with COVID-19 restrictions in place, it is widely thought by the headteachers of the schools and Lambeth LA as the admissions authority for the community schools, that there is no viable way of testing the children en mass (potentially up to 700 children in the community schools and more in others) in a safe way. Therefore we are requesting that the premise of admitting a comprehensive intake by using an ability test is removed. Instead the admissions criteria alone will be used to determine rankings and offers.”

Consideration of proposed variation

30. In considering this variation I have taken into account section 103(3) of the Act which says:

“Any admission arrangements to which [section 101(1) or (1A)] applies (whether authorised by section 100 or section 101) may be varied if (and only if) the arrangements as varied are designed to secure [the objectives mentioned in section 101(1)(a) and (b), section 101(1A)(a)(i) and (b), section 101(1A)(a)(ii) and (b) or section 101(1A)(a)(iii) and (b)].”

31. The objectives mentioned in section 101 of the Act are the three set out in paragraph 1.25 of the Code and referred to earlier in this determination. That is to produce an intake that is representative of:

- a) the full range of ability of applicants for the school(s);
- b) the range of ability of children in the local area; or
- c) the national ability range.”

32. I cannot tell from the arrangements which of these objectives the banding process is intended to achieve. As noted above, the reply from the school on this issue did not answer this question. I have learnt from the consideration of the admission arrangements of other schools in Lambeth which use the same banding test that it is the first of the above objectives that those arrangements are designed to secure. I am therefore proceeding on the assumption that the same objective is shared by the school.

33. If without testing the school applies the four oversubscription criteria in the order they are set out, then:

- a) all looked after and previously looked after children would be admitted as required by the Code. This will be a small number and could come from anywhere in the ability range of the applicants.
- b) brothers of boys already at the school could be a significant number but would be drawn from the full ability range of applicants.
- c) boys with medical or social reasons for attending the school will also be a small number, and again could come from the whole ability range of applicants.
- d) the largest number of boys admitted would be on the basis of a lottery. The laws of probability would result in these boys being representative of the full ability range of applicants for the school (as they would of the full height range, for example).

34. From this I conclude that without undertaking a banding process and by applying the oversubscription criteria in the order they are set out, an intake representative of the full ability range of applicants would be achieved. The sitting of a test and the banding process itself appears to be entirely unnecessary to achieve that outcome.

35. This means that the proposed variation will lead to one of the three outcomes and is therefore permitted by section 103(3). It also allows the school to offer places without

requiring boys to undertake a test when it may present a health risk to them, their families and school staff. I therefore approve the proposed variation.

Summary and consideration of timing of changes

36. The school requested approval of a variation to its admission arrangements which would enable it to avoid bringing children together in large numbers for testing. It considered that to do so during the Covid-19 pandemic would endanger the health of pupils, staff and their families. The proposal was to not test, not to place pupils into bands and to use the existing oversubscription criteria, currently used to prioritise children within bands, to prioritise all children for places.

37. When I considered the arrangements, I found that they did not conform with the Code in the ways set out above and must be revised.

38. I have decided that applying the oversubscription criteria in the order they are set out will produce an intake representative of the full range of ability of boys applying to the school without putting at their health at risk. I therefore approve the proposed variation.

39. Paragraph 3.1 of the Code says:

“The admission authority must, where necessary, revise their admission arrangements to give effect to the Adjudicator’s decision within two months of the decision (or by 28 February following the decision, whichever is sooner), unless an alternative timescale is specified by the Adjudicator. An Adjudicator’s determination is binding and enforceable.”

I have considered the time scale which I should set for the arrangements to be revised in this instance. The school will need to implement the variation urgently to be relieved of the requirement to administer the test. It has already begun considering how the arrangements could be revised in other ways to address the issues set out in this determination although removal of the test will address most of these. I therefore see no reason to depart from the usual two-month period for the arrangements to be revised.

Determination

40. In accordance with section 88E of the School Standards and Framework Act 1998, I approve the proposed variation to the admission arrangements determined by the governing board for London Nautical School for September 2021.

41. I determine that priority for places at the school will be given on the basis of the four oversubscription criteria in the order they are stated in the arrangements and that the details of the banding process are deleted from the arrangements.

42. I have also considered the arrangements under section 88I(5) of the Act and find that they do not comply with requirements relating to admission arrangements in the ways set out in this determination.

43. 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.

Dated: 6 November 2020

Signed:

Schools Adjudicator: Phil Whiffing