



Office of  
the Schools  
Adjudicator

## **DETERMINATION**

**Case reference:** ADA2889

**Referrer:** Central Bedfordshire Council

**Admission Authority:** The Academy Trust of Lark Rise Academy, Dunstable

**Date of decision:** 21 July 2015

### **Determination**

**In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements for Lark Rise Academy determined by the Lark Rise 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 Lark Rise 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 nursery when allocating places in the reception class.

### **Jurisdiction**

2. The terms of the academy agreement between the academy trust of Lark Rise 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 22 January 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, dated 22 June 2015 and a reply to my further enquiries dated 29 June 2015;
  - d. the LA's response, dated 6 July 2015, to the school's letter of 29 June 2015;
  - e. the school's admission policy for 2016, determined at a meeting of the governing body on 22 January 2015;
  - f. minutes of the meeting of the school's governing body held on 22 January 2015;
  - g. general information concerning primary school admissions on the LA's website; and
  - h. 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 nursery. The LA contends that this contravenes paragraph 14 of the Code, which states that "*admission authorities **must** ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective*". The LA further contends that this criterion is non-compliant with paragraph 1.9e) in the Code, which states that admission authorities "***must not** [prioritise applications] on the basis of any practical or financial support parents may give to the school or any associated organisation*" except where optional fees are paid for additional nursery hours; the LA submits

that this exception would apply only to those children in receipt of the early years pupil premium (EYPP), the pupil premium (PP) or the service premium (SP). Finally, with reference to the previous point, the LA contends that the criterion is non-compliant with paragraph 1.39B in the Code, which allows priority in a school's oversubscription criteria to children who are in a school, or school established and school run, nursery only if they qualify 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, in the third bullet-point in the section headed "Notes", the specific detail required by paragraph 2.14 concerning the operation of waiting lists is not provided.

### **Background**

8. The school is a primary academy school for pupils between the ages of three and eleven; it became an academy in October 2010 and, until September 2014, was part of a tripartite system within the LA, providing education for pupils aged up to nine. The school has a capacity of 360 and there are about 280 pupils on roll. The governing body is the admission authority under the articles of the academy trust.
9. The arrangements for 2016 were determined by the governing body on 22 January 2015, using 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 45. The arrangements provide that children with a statement of special educational needs, 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 with siblings at the school
  3. Children of teaching and non-teaching staff
  4. Children who have attended Lark Rise Nursery Unit
  5. Any 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”. There is a note detailing the requirements for consideration under criterion 3, children of staff. 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 was increasingly oversubscribed for admissions in both 2014 and 2015, although not heavily. In the admissions round for entry to the reception class in September 2015, 53 first preference, five second and one third preference applications were received. None of the second or third preference applications was considered under the first four oversubscription criteria listed above; eight of the first preference applications were unsuccessful, all coming under criterion 5. One place was allocated under criterion 1. Six late applications were received, none of which was considered under criteria 1-4 and none of which was successful. The data for 2014 admissions were broadly similar, although one of five applications considered under the final criterion (“any other children”) was successful. No second or third preference applications were received in that year; this emerging pattern, following the admissions round of 2013 when the school was not oversubscribed, suggests a growing pressure on places and that the nursery criterion in particular has become more significant in the allocation of places. This is borne out by the fact that in 2014, the last place allocated was to one “other child” (the equivalent of criterion 5 in the above list) living just over 840 metres from the school, whereas in 2015 the last place was allocated to a child who had attended the nursery, living at more than 3,190 metres from the school.

### **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 prioritised applications on behalf of children in named nursery provision. The LA explains that it has made the objection following comments on this issue in these annual 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 the removal*

*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 school’s determined arrangements for 2016 included a priority for those children who had attended the nursery. This second letter referred again to the OSA annual reports but 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 have set out the reasons given by the LA for the objection and factors relevant to the nursery attendance in relation to oversubscription criteria used in allocating places in reception classes. I shall now consider the case presented by the school in defending the retention of criterion 4 in the 2016 arrangements despite the advice of the LA that it should be removed.
15. The school’s response to the objection begins by stating that the determined arrangements for 2016 are unchanged from those for 2015, which were *“consulted on and accepted as meeting the terms of the Code”*. That there was no objection to the 2015 arrangements does not of itself mean that they were compliant with the Code in force at that time. It is true that the previous Code did not contain paragraph 1.39B; however, that paragraph in the revised Code issued in December 2014 must now be taken into account, as must the other paragraphs cited in the objection, 14 and 1.9e).
16. The minutes of the meeting of the governing body held on 22 January 2015 record that *“the Governors agreed that the current Admissions Policy did not need to be changed. It was therefore formally determined as the Admissions Policy for September 2016.”* It appears to me from this minute, therefore, that no consideration was given either to the LA’s recommendation concerning nursery related criteria, or to changes in the revised Code that came into force on 19 December 2014. Although I understand the school’s claim that it received no more than a “recommendation” from the LA to remove the nursery criterion, it is the governing body’s responsibility, as its own admission authority, to satisfy itself that its arrangements are fully compliant with the Code. In the school’s very detailed response to the objection the only reference to the revised Code issued in December 2014 is that it *“came very late in the consultation period for September 2016 and ... we felt unable to make this change without giving our parents/carers due notice.”* In fact, the Code was issued at a time to allow full consultation on changes to arrangements for September 2016 for the statutory eight weeks required prior to 1 March 2015, as evidenced by other schools within the area which removed a nursery or pre-school criterion as advised by the LA.

17. 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 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.
18. The LA informs me that there was a telephone conversation between its admissions manager and the school’s chair of governors on 12 March 2015, *“in which a discussion regarding the response from other schools and academies took place. During the conversation the Chair of Governors queried how the school could determine arrangements which they had not consulted on (i.e. remove the nursery priority criterion), the Council’s response was that it was necessary to do so in order for them to have fully compliant admission arrangements.”*
19. The bulk of the school’s response to the objection argues a social and pedagogical case for uninterrupted transition from the nursery to the school, stating for example that *“children in the Nursery play a full part as members of the whole school community ... this is fundamental to their personal, social and emotional development”* and that *“the excellent teaching and learning which commences in Nursery and Reception ... underpins and greatly contributes to our consistent ‘outstanding’ results.”* A further aspect of the school’s argument is that it is *“difficult to understand”* why it is allowable for middle schools to name feeder lower schools, but naming attendance at a nursery is not. There is a straightforward answer to this point: attendance at nursery or pre-school is not compulsory. Parents of children of pre-compulsory school age may not wish to send their children to a nursery or pre-school at all, or they may prefer different provision from that offered by a particular setting, for a variety of legitimate personal reasons. In my view, it would fail a fairness test to say that attendance at one nursery or pre-school rather than any other, or indeed at any nursery or pre-school at all, should secure priority in the allocation of places for a reception class. Moreover, it is possible that a parent might have been unsuccessful in gaining a place for their child in the school’s nursery, or unable to accept an allocated place through a change in family circumstances, which would impose a double penalty if that subsequently became the reason for their also not being allocated a place for the child in the school’s reception class.

20. Paragraph 14 in the Code, cited in the objection, 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. I have already explained above in some detail that, in my view, criterion 4 in the school’s arrangements is unfair because parents are under no obligation to secure nursery or pre-school education for their children.

21. As regards “objectivity”, an argument might be advanced that in offering priority to all children who have attended the nursery, all are given an equal (and thus “objective”) opportunity of access to reception class places; however, paragraph 1.39B in the Code is clear that the permission granted for admission authorities to prioritise applications on behalf of children attending a school established and/or school run nursery or pre-school applies only to children in receipt of support through one of the three premium payments.

22. While I understand the school’s pedagogical argument regarding continuity in the education of young children, paragraph 1.39B in the Code 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.*

23. Paragraph 1.9e) in the Code, to which the objection specifically refers, states that “admission arrangements ... **must not** ... give priority to children on the basis of any practical or financial support parents may give to the school ... The exception to this is where parents pay optional nursery fees to the school or school-run nursery, for additional hours on top of their 15-hour funded early education, where children from the school nursery class or school-run nursery are given priority for admission to Reception”. Concerning this, the school has stated that “The children in Lark Rise Nursery only attend for 15 hours per week; parents/carers do not have the option of paying for the facility purely as childcare ... it is not a profit-making organisation”. This aspect of the objection I therefore discount, as irrelevant to this school’s situation.

24. It is clear to me, however, that the school’s arrangements do not comply with the requirements of paragraph 1.39B quoted previously. The criterion in the 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 nursery. In doing so, it

disregards the restriction imposed by the Code, that is, that priority for children attending named nursery provision may be given only to those children in receipt of the EYPP, the PP or the SP.

25. I determine, therefore, that the school's oversubscription criterion 4, giving priority to children who attend Lark Rise Nursery Unit, does not comply with the requirements of the Code and that it should be removed, or modified to apply only to those children specified in the Code, in order to comply with paragraphs 1.39B and 14 in the Code. I do not find any non-compliance with paragraph 1.9e).
26. 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 stated 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 bullet point note that mentions a waiting list, no information is given, as required by paragraph 2.14 in the Code, about how long the list will be maintained, nor is it made clear that each time a child is added to the list it will be ranked again according to the oversubscription criteria.
27. In considering this determination, I brought these other matters to the school's attention. The school provided a detailed response, explaining that, since becoming an academy, the school buys back admission services from the LA. It also stated that "*we have never experienced the situation where two students live exactly the same distance from the school ... [and that] we assumed [the LA's] additional tie-break explanation in the Starting School Information Booklet would be used to decide this matter.*" The final tie-breaker to which this statement refers is random allocation, acceptably described in the LA publication mentioned by the school. The school, as its own admission authority, is at liberty to purchase admission services from elsewhere; however, it is responsible for determining and publishing in full its admission arrangements on its own website in order to comply with paragraph 1.47 in the Code. Not to publish information about "*an effective, clear and fair tie-breaker*" with the arrangements not only fails to comply with paragraph 1.8 in the Code but also means that part of paragraph 14, "*Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated*", is not satisfied.
28. With reference to the waiting list, the school explained that it used to state that the list "*would only be retained until the Autumn Term, but felt it was fairer to remove this qualification and retain the list for longer.*" That is a choice open to the school beyond the minimum of 31 December specified in paragraph 2.14 of the Code, but again it should be made explicit in the published arrangements together with the statement, required by paragraph 2.14, that "*each added child will*

*require the list to be ranked again in line with the published oversubscription criteria.”*

29. In its response to my further enquiries on these two matters, the school undertook to include the necessary amendments and clarifications to make its published arrangements compliant with the Code.

## **Conclusion**

30. 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 children who have attended the school's nursery. I found that the criterion does not comply with paragraph 1.39B in the Code and moreover that, in relation to paragraph 14, it is unfair to parents who may 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. The permission in the Code regarding priority for children who have attended a named school-run nursery or pre-school applies only to those in receipt of the EYPP, the PP or the SP. The criterion in the school's arrangements takes no account of this limitation; I therefore uphold the objection, but note that there is not an issue of non-compliance with paragraph 1.9e), as the nursery does not offer parents the opportunity to make additional or "top-up" payments in addition to the state-funded 15 hours' attendance.
31. 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 readily agreed to amend its published arrangements so that they comply with the Code in these matters.
32. 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**

33. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements for Lark Rise Academy determined by the Lark Rise Academy Trust.
34. 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.
35. 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