

Report

on an investigation into complaint nos
10 012 911 and 10 013 069 about
Sacred Heart High School

2 May 2012

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Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

This report has been produced following the examination of relevant documents and interviews with the complainant and the Chair of the independent Appeal Panel for the school.

The complainant, the School and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.

Report summary

Subject

During the school year Mr M moved into the area and applied for places for his daughters. When the School said it was full and could not take the girls, he appealed.

One of the five members appointed to the Panel to hear his appeals was unable to attend. The four other members heard the appeals and decided, on the Chair's casting vote, not to give his daughters places at the School.

Finding

The Ombudsman found that the Panel acted with maladministration by beginning and hearing the appeals with four members, when the statutory Code of Practice, then in force, said that a Panel should have either three or five members.

She also found that there was no evidence to show that the Panel had properly considered:

- all of Mr M's reasons for wanting his daughters to attend the School;
- whether, in each case, the School had demonstrated that admitting the girls would cause prejudice to the education of other pupils or effective use of its resources;
- each girl's case separately and individually.

An Appeal Panel has to have at least one 'lay' member and one with experience of education. Examining the way the four members of the Panel voted showed that if three members had heard Mr M's appeals he would have had a greater chance of success. The Ombudsman concluded that the reduced chance of success was an injustice to Mr M as was the absence of evidence to show that the Panel had properly considered his appeals.

The Ombudsman expressed her regret that the School was unwilling to accept the findings in her draft report and had refused to offer Mr M fresh appeals. This meant she had no option but to issue the Report.

The School converted to an Academy during the course of this investigation. This means that the Ombudsman no longer has jurisdiction over its actions or the actions of its Independent Appeals Panel. For this reason the Ombudsman will send her report to the Education Funding Agency. The Agency acts on behalf of the Secretary of State for Education and will monitor the response to the Ombudsman's recommendations.

Recommended remedy

The School should have apologised to Mr M and offered him fresh appeal hearings. Time has passed and the children are in another academic year. Mr M has the right to

apply again for his daughters to have places at the School and a new right to appeal under the Code.

The School should review its arrangements for clerking Appeal Panels and the source of its legal advice to satisfy itself about quality and effectiveness of its appeals.

Summary of complaint

1. Mr M complains about the way an independent Admissions Appeal Panel considered his appeals for places at Sacred Heart High School for his daughters S (Year 8) and N (Year 10). In particular, that the Panel did not properly consider his religious reasons for wanting his daughters to be educated at an all girls' school.

Investigation

Background

2. The Sacred Heart High School was, at the time, a Voluntary Aided Catholic girls' high school and the only all girls' school in the area. It is its own admissions authority.
3. Mr M and his family, who are Muslim, moved into the area on 22 June 2010 and applied to the School for places for his daughters S and N. He was told by the Council that the School would not give his daughters places because it was full and that he could appeal against the School's decision.
4. Mr M completed an appeal form on the 17 July 2010. The Clerk to the Appeal Panel wrote to him on 20 August 2010 saying that school holidays meant an appeal would not be arranged until the new term.
5. The appeals were held on 1 October 2010: N at 9:30 and S at 10:00.
6. S and N remained out of school and had not attended school since June 2010.

The relevant law

7. The School Admission Appeals Code 2009 contains statutory guidance. This means that an Admission Authority and an independent Appeal Panel must comply with the mandatory elements of the Code and also with the advisory elements – unless it has good reason for not doing so which must be recorded.
8. Appeal Panels must consider whether the education of those children already admitted to the school, or the resources provided to the school, would be adversely affected if the school has to admit another child. This is referred to as prejudice.
9. The Appeals Code states:
*“3.1 Panels **must** follow the two-stage process as set out below for all appeals, other than those against decisions made on the grounds of the infant class size prejudice:*

- a) **First Stage: establishing the facts**, at which the panel considers whether the school's published admission arrangements:
 - i. comply with the mandatory requirements of the School Admissions Code and Part 3 of the SSFA 1998.
 - ii. were correctly applied in the individual's case and decided whether "prejudice" would arise were the child to be admitted.
- b) **Second Stage: balancing the arguments**, at which the panel exercises its discretion, balancing the degree of prejudice to the school against the appellant's case for the child being admitted to the preferred school, before arriving at a decision."

10. The published admission number for each year of the School is 225 and Years 8 and 10 both had the maximum 225 pupils on roll.

Panel members

11. The Appeal Panel was to be made up of five members but one member could not attend and dropped out on the morning of the appeal. The Clerk judged that the hearing had begun as the individual Panel members had considered the papers before arriving and before it was known that one member was not attending. The Panel continued with four members and the Chair had, and used, a casting vote.

12. The Appeals Code states:

"1.3 The clerk, acting on behalf of the admission authority must appoint either three or five members to each panel..."

*1.8 Admission authorities **must** ensure that appeal panels have a minimum of three members at all times, including at least one lay member and one non-lay member. Where a panel with five members has begun considering an appeal and any of the members is unable to continue due to unforeseen exceptional circumstances, it can still continue to sit provided that the panel has a quorum as described above. Where a panel starts with three members, and one has to temporarily withdraw (e.g. because of illness), the panel **must** postpone the remaining hearings until a later date. However, all appeals would have to be reheard if the absent panel member could not return to complete the hearings. Appeals administrators **should** consider what contingency arrangements can be made to ensure that three member panels can go ahead if, for example, a member pulls out at short notice before hearings commence..."*

*2.34 Panels **must** ensure that decisions on appeals where there is not unanimous agreement are reached by a simple majority of votes cast. Where there are equal numbers of votes (i.e. where the panel initially comprises five members but one panel member drops out – see paragraph 1.8), the panel chair has a second or casting vote.”*

13. The School says the legal advice it obtained is that while the Regulations, which it considers are advisory, state that panels should comprise of three or five members, the Code in paragraph 1.8 only states that there should be a minimum of three members at all times. Further the Code gives no advice on what to do if a member drops out and how to reduce from four to three.
14. The Clerk considered that to go from four to three members could open the Panel to a charge of unfair practice, since it was not clear which Panel member to drop. The Clerk considered the Panel had begun to consider the papers when it became clear that the fifth person was not available and so judged the hearing had begun.
15. Although Mr M had been given different times for each of his appeals, the Panel decided, and Mr M agreed, to hear both at the same time as the School's and the parents' case was the same for both girls.

The first stage – the School's case for prejudice

16. The School's written case against admitting S into Year 8 was that:
 - to admit more children than the published admission number of 225 would 'prejudice' the education of those children already admitted to the School as it had health and safety concerns: it could not increase class sizes especially in science and technology; overcrowding was already an issue in corridors and staircases; only a certain number of chairs and tables will fit in a classroom.
 - 37 of the 225 children on roll in Year 8 have special educational needs although only one has a Statement.
 - to admit one more child would prejudice the efficient and effective education of all students as increasing numbers would not allow for the smaller groups needed to support those with special needs.
 - S would be in the ninth category for priority under its admissions criteria – children of other faiths not being educated in a Catholic Primary School.
17. The School's written case against admitting N was based on the same points as S above with the variations that in Year 10, 17 of the 225 children on roll have

special educational needs although only one has a Statement, and the addition that:

- Year 10 is an options group for GCSEs and it would be unsettling to existing students for another child to enter at this very late stage.
18. The Panel asked the School's Presenting Officer, the Headteacher, if there was any record of any incidents due to the School's health and safety concerns. The Headteacher replied that there had only been small accidents, no major ones, as the School had kept its numbers to the published admissions number.

19. The Appeals Code states:

*"3.2 The panel **must** consider the following issues.*

*b) Whether or not there would be prejudice caused by the additional admission of the child. Where this is the case, the admission authority **must** be able to demonstrate this over and above the fact that the published admission number has already been reached. The panel **must** consider a number of factors in reaching a decision as to whether or not there would be prejudice. This may include considering, in light of current school organisation and structure, what effect an additional admission would have on later year groups (i.e. 'future prejudice') or, if the application was for a year group other than the normal year of entry, whether any changes have been made to the school's physical accommodation or organisation since an admission number was originally set for that year group. The panel can decide what weight to give the arguments presented...*

*3.4 Panels **must** consider the admission authority's arguments about the effect an additional admission would have on the school in the current and following academic years."*

20. After hearing the School's case the majority (three of the four Panel members) found that the School had demonstrated that admitting more pupils would create 'prejudice'. One member decided the School's case was not made. The Panel did not consider the School's case separately for Year 8 and Year 10 – it made one decision.
21. The Chair has served on appeal panels for this School several times before. When interviewed he told my Investigator that the School's case at appeal is very similar year after year. He had not, however, noticed that the School's figures for the number of children in four out of the five years were all exactly the published admissions number. He commented during his interview with my Investigator that this was very "tidy".

22. The School says that in the previous two academic years 2009 and 2010 no appeals were successful and that is why the numbers are the same as the published admissions number of 225. The School believes the Panel would have no reason to query the numbers as it would have no doubt as to question the School's veracity and neither should the Ombudsman.
23. The Appeals Code requires that a school must be able to demonstrate that prejudice would be caused **over and above** the fact that the published admissions number had already been reached. Panels must be seen to thoroughly test a school's case in order to reach a decision. This Panel did not question why the School's numbers appear never to go over the published admission numbers. This gives the strong impression that this Panel accepted the School's argument without properly testing it.
24. The School says that during the appeal the Headteacher's submission explained the position for each child separately and in both cases there would have been prejudice.

The second stage – the parents' reasons

25. Having decided that admitting more pupils would cause 'prejudice', the Panel went on to hear Mr M's reasons for wanting his daughters to have places. The main points of his written case and his oral representation noted by the Clerk, for both girls were:
 - a. they need a girls' school and they do not have the choice of a Muslim school;
 - b. he may have to consider educating them in Bradford or abroad;
 - c. Mrs M's health is poor and she is expecting twins;
 - d. they have three young children at home;
 - e. S and N are currently not attending any school;
 - f. they recognise Catholics are very protective of children regarding such things as boyfriends;
 - g. he is aware pupils at Sacred Heart High School had not had the difficulties that girls at other schools have had;
 - h. S and N have had bad experiences on buses in the past with boys;
 - i. if S and N had to travel by bus Mrs M would have to accompany them along with the other three young children and she is pregnant with twins and unwell; and

- j. S and N attended Catholic primary schools but not secondary schools.
26. The Chair of the Panel, in interview, said that during his oral submission to the Panel Mr M did not explicitly raise the issue that he required a girls' school because of his faith. He said:
- he has heard such arguments before and would consider them but they would not be an overriding consideration;
 - if it had been raised it would not have directly impacted on the decision the Panel made;
 - he knew the School to be very popular with Muslims who want a single sex education.
27. In response to our investigation, the School says the Panel had read the documents and if Mr M chose not to raise his need for an all girls' school in his oral submission the Panel should respect that. The School says the Chair had asked if there was anything else Mr M wanted to add and Mr M had not raised it orally. The School says Mr M's main concern at the appeal was about travel arrangements as the School is close to his home. The School says that further evidence that the matter of a girls' school was not a major issue was that Mr M's daughters had always attended mixed schools.

The deliberation and decision of the Panel

28. The Headteacher and Mr M left and the Panel then considered whether Mr M's reasons for wanting places for his daughters outweighed the 'prejudice' that it had decided would be caused by admitting more pupils. The Panel was split evenly – two members minded to award the girls places and two minded to refuse. The Chair used his casting vote to refuse places.
29. The notes of the appeal record the Chair's views:
- "School's case was stronger. Transport – could go by taxi. Need to sort their problems out. Can make use of available resources."*
30. The Chair explained during interview that when he said they could make use of available resources he was referring to the travel issues. He felt the children were old enough to make their own way to school and if Mr and Mrs M did not want that, they would need to explore other options for travelling to school. He said he feels that the default position is for mixed schools.
31. The Clerk recorded the decision as the *"same for both children"*.

32. The Clerk's notes do not record the Panel giving consideration to Mr M's other grounds for appeal; his concerns about wanting his daughters to be educated in a girls' school and this being the only such school in the area.

33. The Appeals Code states:

*"3.6 At this stage the panel **must** consider whether the appellant's grounds for the child to be admitted outweigh any prejudice to the school. The panel **must** take into account the appellant's reasons for expressing a preference for the particular school (e.g. why they want that school in particular and what it can offer the child that others cannot)."*

34. The School says its legal advice is that it would have been inappropriate for the Panel to have led the parents to ask about their need to have a girls' school. I do not accept this – the Panel would have been referring to a point made in Mr M's written submission that was not brought up during the verbal submission of the appeal. The fact that Panel did not refer to Mr M's "need" for a girls' school can be taken as evidence it failed to consider all the points he raised and restricted itself to his oral submission.

The decision letter

35. The Appeals Code states:

*"2.35 The Panel **must** communicate the decision of every appeal, including the reasons for that decision, in writing to the appellant and the admission authority.*

*2.37 The Panel **must** ensure that the letter is expressed clearly without the use of jargon, to enable parties to:*

- a) see what matters were taken into consideration;*
- b) understand what view the Panel took on questions of fact or law which the Panel had to resolve; and*
- c) know broadly on what basis the Appeal Panel reached its decision and, in the case of the unsuccessful party, enable them to understand why they did not succeed.*

*2.38 The Panel Chair **must** ensure that the letter:*

- a) reflects the type of appeal that was considered:*
 - ii. in the case of other appeals, making reference to the two-stage process where applicable;*

- b) *contains a summary of relevant factors that were raised by the appellant and considered by the Panel along with a summary of any legal advice the Panel sought, especially if this advice was received after the Panel retired to make its decision;*
 - c) *explains how, and why, any issues of fact or law were decided by the Panel during the hearing, for example whether an appellant lived at a particular address; and*
 - d) *gives clear and detailed reasons for the Panel's decision, addressing the key questions that the Panel consider."*
36. The Clerk sent two separate but identical decision letters to Mr M on 8 October 2010; one for S and one for N. The letters stated that the Panel considered that there were other school places available in the area for S and N and other means of transport were possible. It also stated that other resources could be deployed to enable S and N to attend an alternative school.
37. Both letters also stated that the options groups for Year 10 were full and to admit N would be disruptive to existing groups and N's GCSE results. The School says the reference to GCSE groups in both letters was an oversight but did not affect the Panel's decision not to allow the appeals.
38. The Chair explained during interview that he does not see the letters as it would delay matters and did not know they were the same. Paragraph 2.38 of the Code requires the Chair to ensure the letter reflects the appeal and is correct.

Findings

Maladministration

39. The Appeals Regulations are mandatory and are referred to in the parts of the Appeals Code stating what **must** be done by Appeal Panels and Admission Authorities. It is maladministration for the School to act in the belief that they are advisory.
40. The decision to reduce the Panel from five members to four was maladministration. One member of the Panel informed the Clerk on the morning of the hearing that he would be unable to attend. The Code in force at the time is clear that an appeal panel should have either three or five members. The Appeal Regulations and Appeals Code say that when a panel has begun to consider an appeal it can continue if a member has to leave by reason of illness or death, so long as at least three members remain, with the Chair having the casting vote. Contrary to the School's claim, the hearing had not begun and the provision to continue if a member has to leave during a hearing did not apply. It is absurd to suggest that a panel hearing begins when the members receive their papers.

41. It should not be beyond the wit of a trained Clerk to devise how three could be chosen from four to form the Panel. The absence of any guidance in the Code is no excuse for not using some common sense. There must be at least one lay member and one member with experience of education. The third place could be decided by any reasonable means such as the toss of a coin. The Panel's failure to do this was maladministration.
42. The decision that the Panel should hear both appeals together was sensible, agreed by all parties and was not maladministration. However, the Panel should have considered and decided for each Year (8 and 10) whether admitting an additional child would cause prejudice and whether Mr M's reasons for wanting each place outweighed that prejudice. The School argues that because its written submission to the hearing (see paragraph 16) refers to GCSE work it is clear that both pupils were given separate consideration. I do not accept this as evidence that the Panel deliberated and decided on each child separately. The Clerk's notes do not record any comments by the Panel members about any individual circumstances of either girl during the deliberations – just the circumstances of the family as a whole. There was a significant difference between the girls as one was to enter the beginning of the first GSCE year. There is no evidence that the Panel considered Mr M's daughters individually when it came to make its decisions and its failure to do so was maladministration.
43. There is no evidence that the Panel took account of the religious or cultural reasons given by Mr M in his written submission for wanting a girls' school. This was maladministration.
44. The decision letters for both S and N were identical even though the cases were slightly different. The reference to Year 10 options in the decision letter on Mr M's appeal for S to have a place in Year 8 was not appropriate, suggests that each case was not individually considered, and was maladministration.
45. The School asked the Council to respond to a draft of my report as it arranged the appeals. The Council has agreed to take appropriate steps to ensure lessons are learned and future appeals are heard in accordance with the Code. In its role in training clerks and panel members the Council says it will raise the issues in this report during the training it provides. The Council still disputes that the Panel was wrong to reduce from five members to four.

Injustice

46. The Panel was incorrectly constituted with four members. An Appeal Panel must have at least one lay member and one member with experience of education. There were three lay members and one with experience in education and so one of the lay members should have stepped down. If that had happened, an

examination of the way the votes were cast by the Panel shows that Mr M would have had a better chance of success in his appeal.

47. I conclude that the maladministration of hearing Mr M's appeals with a Panel of four members has caused him an injustice as he would have been more likely to have succeeded if there had been three members.
48. The cumulative effect of the maladministration by the decision not to reduce to three Panel members, the Panel's failures to consider the reasons Mr M gave in his written submission and to consider the case of each daughter individually, together with the fact that the Panel was divided and the Chair needed to use his casting vote, lead me to conclude that Mr M has been caused the injustice of his appeals not being properly considered.

The request for a fresh appeal

49. I made the School aware of my provisional findings and invited it to remedy the injustice to Mr M by offering him new appeals with a fresh panel and clerk, for both S and N. The School declined telling me that: it does not believe the appeals were flawed; the Panel acted properly; and offering new appeals would set a precedent.

50. The Appeals Code states:

"4.4 The Ombudsman is not able to overturn an appeal panel's decision but he may make recommendations for a suitable remedy. Where the Ombudsman considers a complaint and finds that there was maladministration that caused injustice, he often proposes that a fresh appeal be conducted before a new panel, and where possible, with a new clerk. In those circumstances, the Ombudsman would recommend that the new panel have the same powers as the original panel. Although there is no further right of appeal in law (only the courts can overturn an appeal panel's decision), admission authorities have the discretion to arrange a new panel following an Ombudsman's recommendation and undertake to re-consider the appeal."

51. To remedy the injustice caused to Mr M by the maladministration of the Appeal Panel I recommend that the School should apologise to Mr M for the failings identified in this Report.
52. In order to avoid maladministration in the future I recommend that the School should consider its arrangements for clerking its Appeal Panels and the source of its legal advice and satisfy itself as to the quality and effectiveness of its appeals.

53. The School should have agreed to offer Mr M fresh appeal hearings. I am not now making that as a formal recommendation. This is because time has passed; the children are in another academic year; Mr M has the right to apply again for his daughters to have places at the School; and he has a new right to appeal under the Code if his applications are rejected.
54. The School's resisted my provisional findings and my suggestion for a remedy. That left me no option but to issue this Report under Section 31B of the Local Government Act 1974. The School converted to an Academy in December 2011 and so no longer exists as a body in jurisdiction.
55. The Secretary of state for Education issued a statement in January 2012 confirming that he would endorse an Ombudsman's recommendation following an investigation into the actions of a school which has converted to Academy status. This report will be referred to the Education Funding Agency. As an agent of the Secretary of State it will monitor the response to my recommendations.

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2 May 2012