Summary

The latest Office of the Schools Adjudicator Annual Report for the period September 2015 to August-2016 was published on 26 January 2017. It gives an account of the casework activities of the Office of the Schools Adjudicator (OSA) and analyses the 152 statutory reports on local authorities’ work during the same period.

This briefing will be of interest to lead members and senior officers concerned with school admissions and school organisation. Local authorities may wish to use this to discuss admissions and other related matters with their school governing bodies.

Overview

The report, as usual, was submitted to the Secretary of State on 1 November 2016 but not published by DfE until 26 January 2017 and can be found here, and the associated DfE news here. Earlier annual reports have now been archived.

This is the seventeenth annual report issued by the Chief Adjudicator since the inception of the Office of the Schools Adjudicator (OSA) in 1999. It is the first report of the fifth holder of the office of Chief Adjudicator, Shan Scott, who replaced Dr Elizabeth Passmore on 4 April 2016. Dr Passmore stepped down from the role at the end of February 2016, and Andrew Bennett covered the post briefly on an interim basis. The report is made on a school rather than a financial year basis, so the period covered is September 2014 to August 2015 and therefore spans the stewardship of three different individuals.

2015/16 was the first year in which changes to statutory timescales (requiring earlier deadlines for determining admissions arrangements and lodging objections to them) took effect; thereby completing the implementation of amendments to the School Admissions Code made in December 2014 (see Related Briefings).

The format of the report broadly reflects the style adopted in recent years but was shorter - 57 pages as against 71 in 2015. The most obvious change was the omission of a section reporting progress on ‘main findings’ from the previous year. Other, less significant, changes were the relegation of a (slightly curtailed) ‘background information’ section to an appendix; and omission of an appendix summarising case statistics - although these data are included in the main text and the “Table index” allows them to be found.

The main sections are:

- Introduction and executive summary including 6 ‘main findings’ and related recommendations.
Briefing in full

Executive summary, main findings, and recommendations

As noted above there is no mention of progress on the issues and recommendations encapsulated in the ‘main findings’ section of the previous (2014/15) report. A reminder of these issues is included in the ‘Comment’ section below.

The report says (in paragraph 11) that this year’s main findings reflect both matters identified during adjudicators’ casework and those raised by local authorities via their reports. They cover areas where children are not being well served or legal requirements are not being met; as well as those where the system is working well and instances of good practice. Recommendations are directed for the consideration of the Department for Education (DfE). They are quoted in full below:

Main finding 1. The new timetable for consulting on admission arrangements and for their determination and the new deadline for objections to admission arrangements has worked very well. The shorter prescribed minimum period for consultation has not prevented some very good consultations taking place. The earlier deadline for objections means that more cases were resolved in time for the admission arrangements for secondary schools to be revised where necessary before the deadline for applications for secondary schools of 31 October.

Main finding 2. Local authorities have a duty to object to the admission arrangements of any own admission authority school in their area if they are of the view or suspect that the arrangements are unlawful [Paragraph 3.2 of the Code]. As the number of schools for which a local authority is not the admission authority grows, so does the importance and scale of this task. It is concerning, therefore, that eight local authorities were not confident that the arrangements of all schools in their area were lawful. Moreover, the data shows that while 686 sets of admission arrangements were queried across 63 local authority areas, 414 of those queries were raised by just seven local authorities. I consider that it is likely that in some parts of the country local authorities do not scrutinise arrangements adequately.

Recommendation. The DfE may wish to consider emphasising to local authorities the importance of scrutinising admission arrangements and consider whether they could work with representatives of local authorities (especially those which appear to fulfil this requirement) to promote cost-effective ways of doing so.

Main finding 3. More objections this year have referred to the naming of feeder schools in oversubscription criteria. These have tended to be upheld where the selection of feeder schools, often at some distance from the school which has named them, has meant that children who live...
locally to the school who do not attend these feeder schools face a significantly longer or more difficult journey to alternative schools.

**Recommendation.** The DfE - working with other interested parties – may want to consider the case for guidance to admission authorities on how to maximise the benefits of feeder schools in terms of continuity of education and shared work across schools while ensuring that the selection of feeder schools does not cause unfairness to other local children.

**Main finding 4.** A number of objections have been made based on paragraph 2.9 of the Code which says that admission authorities **must not** refuse to admit a child solely on the grounds of a number of reasons including that the child applied later than other applicants or has missed entrance tests for selective places. An identically worded version of this paragraph was included in the 2010 Code but making clear this applied only to in-year admissions and not to admissions in the normal round. In the normal round, there are deadlines for applications and a requirement to take all reasonable steps to inform parents of the outcome of selection tests before that deadline. Local authorities and admission authorities rightly make provision to deal with unavoidable late applications or cases where a child is unable for good reason to take a selection test on the set day. However, there has to be a point at which the local authority can begin the work of co-ordination and at which the admission authority can begin to rank applications. Paragraph 2.9 without the caveat that it applies only to in-year admissions creates unfortunate ambiguity and has been used by some objectors to challenge admission authorities who have set reasonable deadlines for tests for selection and made sensible arrangements for late testing.

**Recommendation.** When the Code is next revised, if a provision equivalent to paragraph 2.9 is included, the DfE may want to consider making it clear that this relates only to in-year admissions.

**Main finding 5.** There are a number of different ways that admission arrangements for academies in multi-academy trusts (MATs) are determined. The MAT may determine the arrangements for all schools in the trust centrally, it may set parameters within which governing bodies of individual schools determine arrangements locally or it may delegate the determination of arrangements to individual governing bodies entirely. Adjudicators have found that roles of the trust and local governing bodies are not always clearly set out in the scheme of delegation or always understood by the parties concerned. This can make it difficult to ascertain whether admission arrangements have been determined as required.

**Recommendation.** The DfE might wish to consider publishing guidance to MATs to ensure that responsibility for determining admission arrangements is clearly set out and reflected in schemes of delegation to local governing bodies as appropriate.

**Main finding 6.** Evidence from local authorities suggests that the interests of children needing a school place in-year may not always be fully served and that some children may be out of school for too long.

**Recommendation.** While many local authorities continue to co-ordinate in-year admissions for some schools at least, the DfE may wish to consider whether to bring forward proposals for local authorities to have a duty to co-ordinate all in-year admissions.

**Review of the year’s casework and related activities**

The report, as usual, records a peak of casework activity over the summer and lower levels of activity at other times, although the workload showed a reduction from 2014/15. The most significant change in Admissions casework (the bulk of OSA’s activity) was brought about by the earlier deadline for referrals. This meant that more could be completed before the end of the
reporting period (August 2016) and consequently fewer cases needed to be carried forward (77 compared with 115 in 2015) into the next reporting year.

As before, headline figures on admissions cases relate to the number of complaints / referrals received rather than the admissions authorities concerned; so, multiple objections about the same issue are invariably disposed in a single determination – although a higher volume of objections can indicate a more ‘difficult’ case. This, together with the ‘carry forward’ issue makes year on year comparisons more difficult but overall activity probably decreased. This impression is reinforced by a substantial decline in adjudicator fees (£756k to £405k year on year). Since Adjudicators are on ‘call-off’ contracts and paid an hourly rate this is probably the best index of workload. It should be noted however that cost information is reported on the standard financial year not the school year used for case statistics. Thus, the figures in the report include the cost of casework in the summer term of 2014/15 (logged in the previous annual report) but not for the summer term 2015/16, which will show up in the report due to be submitted in November this year. Thus, the financial information, whilst valid for year on year comparison, lags behind the casework reporting and probably reflects a decline in activity which started the year before.

Admissions (including requests to vary arrangements) again accounted for more than 90% of cases referred to the OSA. There was a further reduction in cases related to maintained school organisation matters, as a result of equivalent decisions relating to Academies falling to be determined by the Secretary of State rather than OSA. The workload on directions to schools to admit individual pupils and disputes over land transfer remained at low levels.

The 12 adjudicators in post at the beginning of the reporting year had reduced to 9 by the end. The website currently identifies only 8 names, although there was an advertisement for new recruits in the autumn of 2016. The 6.5 FTE administrative support staff reported in 2015 has been reduced to 5.9. Overall expenditure decreased from £1.1m to £782k, year on year, the bulk of the decrease being accounted for by less direct expenditure on Adjudicators’ casework and training activity.

There was a significant increase in legal costs. Expenditure on legal advice declined slightly (£40k against £45k) but total expenditure was boosted by £100k – reflecting the fact that OSA was ordered to pay this sum to a claimant following a challenge by way of Judicial Review (JR). Very little is said about this case in the text perhaps because the date of the payment was April 2015. For the reason noted above, this cost related to a JR case which fell into the previous reporting year; although very little detail was given then either (see paragraph 35, p.16 of the 2014/15 report). Paragraph 16 indicates that two JR claims were received. One, which the OSA ultimately ‘won’, concerned the definition of ‘boarding’ is explained in some detail. The other is not discussed beyond the bald statement that “... a determination was partially quashed by the High Court by consent . . . [and] remitted to a different adjudicator for redetermination.” It seems from press reports at the time that this related to the issue of feeder schools that gave rise to main finding 3 (see ‘comment’ section below).

At significantly less than the cost of running an average size primary school OSA remains good value for the key role it performs. Although there is some indication in the report (namely circumstantial evidence that the arrangements of own admission authority schools are being less rigorously scrutinised than hitherto) that OSA’s workload ought to be greater than it is.
Admissions

Objections to admissions arrangements remained the largest category of OSA’s work. However, the number of cases considered during the year decreased from 375 to 315 – a figure very close to the 318 considered in 2014/15. The number brought forward from the previous year (115) was significantly less that the 157 that had been carried forward from 2013/14 but there was a smaller reduction in new referrals from 218 to 200. A smaller number still (77) had to be carried over into the 2016/17 reporting year – doubtless reflecting the earlier deadline for objections. Overall this meant that the number cases finalised declined from 260 to 240.

The number of different admission authorities involved – probably the better index – fell back to 81 from the elevated numbers in 2014/15 (155) and in 2013/14 (204) and below the 94 involved during 2012/13. The balance of decisions remained similar to previous years with two thirds being wholly or partially upheld. Within this there was an even split between those partially and fully upheld. More cases were rejected (both in absolute numbers and as a proportion) 73 up from 51. A smaller number (18 down from 42 in 2014/15) were found to be ‘out of jurisdiction’. A similarly small number (6) was withdrawn compared to 8 and 9 in the previous two years.

As before, more referrals came from parents than any other group (about half the total) and the remainder came mainly from other schools, members of the public, local authorities and a very small number from appeals panels, the Local Government Ombudsman, a private nursery, a diocese, a parish priest and a parochial church council.

The report devotes 25 paragraphs over 8 pages (rather less than the 44 paragraphs over a dozen pages in 2015) to a careful analysis of the most frequent grounds for objection and the most prevalent failures to comply with the Code (which were not always the same). These are corralled into the same categories as before, noting some changes, as follows:

- Inadequate, or entire absence of, consultation.
- Admission authorities’ failure to determine arrangements annually, and properly record their decisions. A new issue flagged up here was that an admissions authority’s failure to determine arrangements could result in a subsequent objection being deemed ‘out of jurisdiction’ (see ‘Comment’ below).
- Problems with publication, both on school websites and notification to the LA for inclusion in composite documents.
- Complaints about priority for children attending a school’s nursery provision continued at a lower level than two years ago; but the complication of the issue where the early years pupil premium is used as an oversubscription criterion is picked up later in the section on LA reports.
- Similarly, objections arising from out of year-group admissions continued at a low level following a recent Code change.
- On Sibling priority – no objections had been upheld, suggesting that admissions authorities have usually “… struck an appropriate and fair balance …” between the competing claims of siblings and firstborn/only child applicants.
- Catchment areas.
- The increase in objections about feeder schools noted in 2015 continued at a “significant number” reflecting an increasing trend for MATs wanting to link primary and secondary schools within the same trust (see ‘Comment’ below).
Objections to faith-based criteria – noting that some objections relating to ‘faith schools’ were about matters unconnected with faith-based oversubscription criteria.

The overall complexity of arrangements “... continues to be a matter of concern.”

Under a final heading, General matters the report discusses cases where objections based on failure to comply with Code requirements on consultation or publication were upheld but no changes were required because the substantive provisions of the arrangements were found to be Code compliant (see ‘Comment’ below).

Matters discussed under this section in 2015, but not in the latest report, included: widespread non-compliance with regard to sixth form admissions; the consequences of an amendment brought in by the Education Act 2011 allowing anyone to object to arrangements determined by any admission authority; the proper response to objectors who seek anonymity; matters arising from the OSA’s work which fall outside its remit; and differences in the observed behaviour that, whilst some schools were anxious to comply with the Code when shortcomings were drawn to their attention, others were markedly less so. In the absence of any specific comment it is difficult to infer whether this is because these issues have gone away or that there was simply nothing new to say.

Other Casework

The number of requests for in-year variations to maintained schools’ determined admission arrangements (25: 19 new and 6 carried forward from 2014/15) fell back again from last year (23 new and 6 carried forward from 2013/14). Since all of them were dealt with there was no carry forward to 2016/17. As before most requests arose from the need to reduce a PAN (Published Admission Number) because of unforeseen circumstances. The report again notes the confusion arising from the fact that such requests for Academies are dealt with by the Education Funding Agency (EFA) on behalf of the Secretary of State. The call, in 2014, for all such work to be done by OSA is not explicitly repeated; but evidence to support such a case continues to accumulate.

As in previous years, appeals against a local authority’s notice to direct a maintained school to admit a child formed a small but important part of OSA’s work. The OSA also has a role in advising the Secretary of State who holds the equivalent power in respect of Academies. So, although the legal framework is different, the OSA follows a very similar procedure and these cases are not separately accounted for. The number of cases dealt with decreased again to 11 from 15 in 2015/15. Within this small total the same numbers were: upheld (1) - i.e. the school was successful in resisting the direction; and withdrawn (3) i.e. the school conceded and agreed to admit. However twice the number (4 up from 2 in 2014/15) were not upheld – i.e. the direction was allowed to stand. And the number deemed to be ‘out of jurisdiction fell from 9 in 2014/15 to 2 in 2015/16. In summary, therefore the placement went ahead in 7 cases out of 11, compared to 5 out of 15 last year. A considerably better outcome from the LA point of view. The significance of this is that a persistent problem flagged up in previous reports has been that cases failed less frequently on merit than because the local authority had not fully complied with the legal requirements. Although the report does not acknowledge it explicitly, this improvement probably reflects work done by ADCS to draw LAs’ attention to the technicalities of this problem and give advice on its solution.

The number of statutory proposals referred to the OSA remained low, following the major changes to school organisation legislation. The total dealt with fell to 4 (3 new and 1 carried over)
having been 10 (8 new and 2 carried over) in 2014/15. Three, all of which were approved, related to ‘amalgamations’ of infant and junior schools. The one case rejected was because a school was seeking to expand without having the capital funding in place for necessary building work.

Similarly, the number of land transfer cases remained small (5 new referrals as against 4 in 2014/15 and 6 in 2013/14) as they relate only to transfers arising from maintained schools acquiring VA or Foundation status, not becoming Academies - which are determined directly by the Secretary of State.

Local Authority Annual Reports on Admissions

This is the fifth time (since the passage of the Education Act 2011) that a report must be produced by Local Authorities, published locally, and submitted to the Adjudicator by 30 June. Compliance with this requirement has been consistently good although, whilst all 152 local authorities prepared and sent their report to the OSA, fewer did so by the specified deadline in 2016 than in previous years. Only 108 (against 118 last year) met the actual deadline, and it took until early September - and several reminders – for the remainder to come in. The OSA report draws several conclusions based on these returns - to some extent these are correlated with its own casework experience; but it is made clear that the report is essentially a summary of what LAs said without passing comment on their veracity.

The report is focussed on a limited number of issues, primarily on assessing aspects of the admissions process that are intended to support the admission of children who may otherwise have difficulty in securing a place. These are in three categories: specific groups (looked after children and those with disabilities or SEN); the operation of coordinated admissions and fair access protocols; and, the admissions appeals system. LAs may also report on any other issues they wish to include. Additionally, the Chief Adjudicator can ask authorities for feedback on issues of interest to her. This year she sought information on four matters, all of which had also been explored the previous year, namely:

- how LAs fulfil their responsibilities in objecting to admission arrangements that they consider unlawful;
- LAs’ concerns about fraudulent applications and preventative actions;
- Primary school admission for summer-born children; and,
- utilisation of the new permission within the Code allowing priority to be given for applicants eligible for the pupil, service or early-years premiums.

Two matters on which information had been requested in 2015 (publication of a composite prospectus on sixth form admissions; and on whether LAs retain a local admissions forum) were not pursued in 2016.

This section of the report is slightly longer than the review of OSA’s own activities and contains much useful information which, given the 100% return, represents a comprehensive national picture. One helpful feature in previous reports, which recorded the progress of academy conversion, was dropped this time.
Obligatory Reporting

The sections covering the obligatory reporting topics reveal a relatively stable position with some areas of improvement and others of continuing concern. As a concise report on 152 returns this deserves to be read in full and a further full summary is not attempted here.

One consistent factor is the higher proportion of problematic behaviour associated with own admission authority schools in general and academies in particular; be that a failure to recognise that admission of children with formally identified special needs is obligatory for a named school or refusal to engage with fair access protocols. In the latter case the report notes, once again, that schools in the academy sector are much more likely to resist fair access protocol arrangements than are maintained schools. The Chief Adjudicator also says: “I must state unequivocally that, despite what some schools seem to believe, all are bound by the protocol that applies in their authority, whether they have formally agreed it or not.” (paragraph 95 page 39); which, apart from three words, is identical to the one made (paragraph 154 page 55) last year.

The position on coordinated admissions appears to be similar to previous years. Coordination for main transfer ages remains well supported and highly beneficial for parents. Some improvements are noted whilst persistent issues and problems mean there is still scope for improvement. However, the increased number of own-admission authority schools - particularly primary phase academies (including 'free schools') sometimes gaining that status at an inconvenient point in the cycle - has resulted in practical problems. Some such institutions did not understand, or were insufficiently capable of fulfilling, their newly acquired responsibilities with consequential disruption to the whole process. It is reported that the difficulties of keeping up with an increasingly complex task is exacerbated because of “…the pressure on staff in admissions teams where budget cuts have resulted in the loss of posts and the concomitant losses of experience and expertise.” Some authorities have managed to mitigate these pressures with improved IT systems and imaginative use of social media to communicate with parents.

As expected, most schools still cooperate with their LA on in-year admissions despite removal of the statutory obligation. The number of LAs that are involved in administering in-year admissions for ‘all or some’ schools in their area increased to 134; and within this, 50 co-ordinate all in-year admissions. Again, as expected, those who choose not to are found disproportionately amongst academies and own admission authority schools - although the discrepancy appears to have decreased. Nevertheless, the increase in these kinds of school as a proportion of the whole is increasing the likelihood of parents experiencing difficulties.

Responses to questions asked by the Chief Adjudicator

On objections to admission arrangements by a local authority, LAs queried the admission arrangements of approximately 7% of own admission authority schools in their areas; slightly down from last year when it was almost 8%. 8 LAs declared themselves “not confident” that all community, voluntary controlled and own admission authority admission arrangements were fully compliant with the Code – significantly less that the 18 that said this in 2015. Slightly more than half of all authorities (79) were “confident” that schools were generally compliant, with those who were “very confident” increased slightly to 65 - up from 59 last year. In total, 689 sets of admission arrangements were queried across 63 local authorities, showing a reduction from last year (737 schools in 65 LAs); but two-thirds (414) of these queries were raised by just seven local authorities (down from 10 ‘active’ LAs last year.) Given the increase in the number of own admission authority
schools the proportionate decline is greater than the actual numbers suggest. In the words of the report a possible explanation is “…increasing numbers of schools … [and]… staffing cuts in local authorities, means that there is less detailed scrutiny of admission arrangements than might be desirable and so fewer causes for objection are identified and pursued.” (Paragraph 106 page 42).

In 2016 1,848 own admission authority schools failed to meet the requirement to send the local authority a copy of their full admission arrangements, including any supplementary forms, by 1 May. This was down from 1,916 last year but still above the 1,374 reported in 2014. Again, most these were primary, but for the first time academies overtook voluntary aided schools as the largest non-compliant category. The Chief Adjudicator again signals that these figures suggest that too many LAs fail to escalate an unsatisfactory response at local level into formal objections to OSA.

The response on fraudulent applications, again, indicated a very small number of cases, suggesting the concern is that fraudulent applications are made at all, rather than the scale of the problem. This was the third year the question was asked, and answers showed, at 267, offers withdrawn because of fraud had fallen slightly from the 284 reported in 2015 but still represented a substantial increase from the 186 when the question was asked for the first time in 2013/14. All local authorities describe a range of measures used to check for fraudulent applications, most drawing on cross-referencing applicants’ details with other local authority departments or national databases and some employing spot checks of various kinds. Overall local authorities are alert to the issue of fraudulent applications and are generally confident in their ability to deal with it. The increases noted may reflect LAs getting better at detection rather than greater dishonesty amongst parents.

Concerns about summer-born children starting school emerged in July 2013 when the DfE issued guidance supplementary to what the Code had to say (in paragraphs 2.16 and 2.17) about deferred entry and/or part time education for children in the year they reach compulsory school age; and the admission of children outside their normal age group. Despite changes in the latest version of the Code this remains a live issue. The earlier section of this report indicates slightly less activity - although this could be related to that fact that some people are expecting further Code changes to emerge.

For the first time under this heading OSA asked about the incidence of parents seeking to exercise their right to ask for part time education for ‘rising fives’. Whilst some responses were provided, the “overwhelming majority of local authorities had no information to share, or no comment to make.” This, together with noting that the option is rarely mentioned in admissions arrangements, leads to an inference that few parents are aware of it and an observation that many schools would experience organisational difficulties if take-up was markedly increased.

Questions were asked for the second time on The Pupil, Service and Early Years Premium seeking information on the extent to which the new opportunity to use eligibility as an oversubscription criterion had been taken up. Forty-three LAs had considered this for Community and VC schools (up from “fewer than one in five” in 2014/15) but only 16 (similar to “about one in eight” last year) had consulted on the possibility. No additional authorities had apparently introduced the idea beyond the six reported last year. There has been further take up in own admission authority schools where the opportunity has been taken by 97 schools (55 in 2015), 44 of which are secondary academies (up from 33) and a further 17 are primary academies. LAs’ comments continue to express a degree of uncertainty including some concern about whether the
use of the criterion would have the claimed beneficial impact on social mobility, and the risk of unlooked for consequences. In the case of the service premium, the small number of LAs which have significant service populations generally felt that the existing provisions of the Code (e.g. allowing places to be allocated in advance) were adequate and there was no need for further complication. The potentially unhelpful interaction of the early years premium priority in the context of the, otherwise discouraged, nursery provision priority discussed last year is further reflected in the 2016 comments (at paragraph 124, page 49).

Voluntary Reporting

This year LAs chose to comment on relative few additional matters – although some took the opportunity to reinforce responses to matters already covered above. Notably the difficulties arising from having to deal with ever increasing numbers of own admission authority schools whilst coping with significant constraints on their own resources. Amongst additional matters raised several reflected themes similar to those reported in previous years. They were:

a) The lack of information about in-year admissions provided by some own admission authority schools and academies. This included advocacy of reintroducing obligatory coordination of in-year admissions.

b) Anxieties about planning to meet the rising demand for primary school places, often exacerbated by the impact of new free schools; and academies that admit above their PAN. A new issue raised under this heading, perhaps arising from the housing crisis, was difficulties caused by the large scale relocation of homeless families from one area (notable London) to another.

c) A new concern - which also linked to OSA casework – was the increasing propensity for MATs to create formal ‘feeder school’ links between schools within their trust which had not had a previous de-facto feeder relationship.

d) Problems related to pupils with challenging behaviour – notably increasing difficulties placing them in own-admission authority schools.

e) Although fewer than in previous years, some authorities continue to raise issues about the need for better awareness amongst parents of the proper timescale for seeking reception places and the consequent escalation of appeals costs. There is also a call for a universal definition of the ‘home address.’

f) Finally, as in previous years, some of the LAs’ concerns are seen as an inevitable consequence of what several describe as the “slim” Code. Several local authorities, for example, point to potential difficulties in reconciling references in the Code to children with challenging behaviour, citing statements in paragraphs 1.6, 1.9g) and 3.12 that may not sit comfortably together, causing difficulties for local authorities if trying to negotiate admissions with schools, and confusion – and sometimes distress – for parents.

Comment

2015/16 was a year of change. Elizabeth Passmore, the first Chief Adjudicator to have been ‘promoted from the ranks’, retired after 12 years’ service. As stated in my commentary last year, she will be greatly missed both by colleagues and those who have benefitted from her stewardship. Her substantive successor, Shan Scott, took responsibility for this report but was in the saddle for only the third term of the academic year, so it is too early to pass comment on her performance.
As ever, the OSA annual report provides a valuable snapshot on the state of play in policy and practice in school admissions with helpful contextual information. It remains less informative (through no fault of its own) on school organisation related matters as OSA jurisdiction extends only to the declining proportion of LA maintained schools. Those involved in school admissions should read it in its entirety because it is a mine of information and insight, clearly and concisely expressed. The patchy, and sometimes misleading, coverage elsewhere is another good reason to read the source document.

Main Findings and Recommendations from 2015

As noted above the practice of reviewing progress on main findings and recommendations from the previous year has been dropped. In the absence of any explicit reference to this fact, it is impossible to say why - or even to know whether it was by accident or design. The full text of the relevant section of the 2014/15 report (paragraph 16 page 8) was reproduced year (see related briefings below)

Several of those Findings/Recommendations correspond to issue reflected both in the latest and earlier reports, namely: consultation & determination; complexity; the shortcomings of own-admission authority schools; faith related criteria and vulnerable children. The most notable omissions are the absence of comment on arrangements for Y12 admissions; and, the question of who can make a valid objection.

On the latter point (main finding 5), the 2015 report was clearly influenced by some high-profile campaigns by organisations perceived to have an ‘agenda’ to use the objection route to highlight aspects of school admissions policies they didn’t like. This undoubtedly generated a troublesome additional workload for OSA, although the wisdom of curtailing the right to object was questioned (in last years’ CSN briefing and elsewhere). However, the fact that similar orchestrated campaigns seem not to have been repeated and workload clearly fell back in the following rounds may have removed the need to pursue that recommendation.

The absence of a continuing focus on schools with 6th forms is harder to account for. There may have been fewer objections – although it has always been standard practice for Adjudicators to look at this aspect when schools with sixth forms come to their attention for any other reason. And it is difficult to imagine that there has been a sudden improvement in practice on the ground here when so many other ‘wicked issues’ persist from year to year.

One possible explanation for the absence of comment on both these matters may lie in the possibility of further changes to the Code. DfE officials indicated informally that this was under consideration over the summer of 2015 and the responsible minister Nick Gibb, announced in Parliament that there would be a consultation about further Code changes (Hansard: 7 Sep 2015 : Column 198). Although he was responding to a backbencher initiated ‘adjournment debate’ about summer born children, it was known that other possible areas of change were being considered. However, other pressing issues seem to have pushed this matter down the political agenda and, a year and a half on, the promised consultation has yet to emerge. At this stage, it may therefore be considered unhelpful to pursue these matters.

Main Findings and Recommendations from 2016

As indicated above, several of the findings and recommendations in the current report reflect continuing concerns and merit little further comment. The first two (which share a single
recommendation) record the successful implementation of the earlier timetable for determining and objecting to admissions arrangements; but further evidence of insufficient scrutiny by LAs, and consequently unchallenged non-compliance with Code. Evidence continues to accumulate that the changes brought in by the Education Act 2011, its associated regulations, and the new Admissions Code, are having their predicted impact. The previous steady improvements in the levels of Code compliance and streamlined administration, both in-year and at the normal age of transfer have stopped and – after some indication in 2013/14 that the system may be stabilising – the deterioration observed in 2015 persists. Once again, despite a universal understanding amongst LAs that they have a duty to secure Code compliance by all admission authorities in their area, OSA considers that too few are prosecuting it with sufficient rigour. Recent rounds of resource constraint, with more to come; alongside the increased complexity of the task arising from the greater numbers of own admission authority schools, will make further decline difficult to prevent.

The other three findings/recommendations are new (albeit with some thematic similarities) and interesting and all bear on the more legalistic aspects of OSA work. Main finding 4 may be considered a minor detail, but if there is a legal flaw in the Code which undermines good public administration around coordinated admissions there is serious case for concern. It is a sad fact that where public services work well they tend to be taken for granted; but anyone who can still remember the chaos that reigned in the early 1990s prior to coordinated admissions (even when at that time there were considerably fewer own-admission authority schools) would not be complacent about potential degradation of the LA role in this task.

The other two, findings/recommendations 3 (feeder schools) and 5 (MATs) are linked, and are also connected by the Judicial Review case that seems to have been somewhat glossed over in the main text. The Aspirations Academies Trust for Rivers Academy, Feltham, in the London Borough of Hounslow, was challenged by local primary and junior schools when it amended its arrangements to give priority as feeders to two primary schools which were part of the same MAT, but had not historically sent many children to the secondary academy (see case references ADA2858, ADA2860, ADA2866 and ADA2867). On the 28 August 2015, the adjudicator upheld the objections and required the Trust to amend its arrangements accordingly. However, the Trust challenged this decision in the courts, and press reports in April 2016 indicated that they had ‘won’ their case and the arrangements remained the same for another year. Unhappy with the outcome the same schools (and two additional individuals) again lodged objections. However, as is now clear from the current annual report, the case was not so much ‘won’ as overturned “by consent” (para 16 p.10). This means that the OSA conceded and withdrew the determination without a court hearing; but it also meant that there was no formal consideration of, or public judicial pronouncements on, the merits of the case. As would have been the case in any event, the matter was remitted to another adjudicator for reconsideration. This approach is usually adopted when the respondent (i.e. the defending party) realises they are wrong; but it can also be done if they think they have the right answer but are concerned that the argument leading to that conclusion is weak or that there are legal technicalities or other flaws that need to be addressed. Subsequent events suggest the latter explanation applied. The reconsideration of the original objections, alongside dealing with the new ones, took place over the summer of 2016 and was published on 11 November 2016 (see ADA3055, ADA3128, ADA3183, ADA3184, ADA3185, ADA3221). The new adjudicator, after lengthy and careful further consideration (and doubtless legal scrutiny) came to the same conclusion and ruled that the two disputed feeder primary schools should be removed from the oversubscription criteria. The Trust was given until 28 February 2017 to comply.
Self-evidently the second part of this story not only took place outside the year under review; but it will not have been known whether the Trust would comply willingly or seek to fight on, by the time the text was finalised for submission to the Secretary of State in November. It is therefore understandable that the Chief adjudicator would not wish to go into too much detail in the 2016 report. However, this case does illustrate and give important context to the two findings/recommendations it touches on.

It also serves to illustrate a further point that might have been made in finding/recommendation 5. The OSA is rightly concerned that the ability of a MAT to decide whether it will dictate policy for all its academies or delegate the task wholly or partly to a local ‘governing body’ is a source of confusion. However, as this case shows, the growth of MATs where the overarching Trust controls a number of academy schools in geographically separate areas is also in potential conflict with parents’ right to expect that the admissions policies for all the schools they might wish their children to attend will be locally coherent. A similar issue is also noted in paragraph 48 about some MATs’ attempts to introduce cross-sibling rules (i.e. giving priority for one school where a sibling attends another) across a wide range of otherwise unconnected schools. The worrying development in all these cases is the desire of some MATs to implement policies and practices across all their schools for reasons of brand identity or corporate advantage; but which work against the interests of some of the communities that the individual schools are intended to serve.

Legal issues including OSA ‘Jurisdiction’

The financial annex highlights an important question of the uses of public money that is not explicitly discussed in the main text. Annex 2 records that £100k was paid to a claimant by order of the high court following the outcome of a Judicial Review hearing in April 2015. Because of the mismatch between financial and school years this related to activity covered in the 2014/15 report (see paragraphs 35 & 36 p.16). Little detail was provided but this is a staggeringly large sum, being more than twice the OSA’s own expenditure on all legal advice for either year including the other cases in which it was involved. It also represents about 13% of OSA’s entire cost for the financial year in which the pay-out was made. Obviously, this was decided by the court and not within the control of OSA, but; in the first place, it cannot be right that an admissions authority should have spent so much money that otherwise could have been used for children’s education to defend its desired approach to admissions arrangements. Secondly it is little short of scandalous that it was allowed to recover such a large sum from central funds; particularly when, it would seem, its efforts ultimately failed as the appellant obtained leave to appeal against the OSA re-determination (and therefore clearly didn’t like the outcome) but subsequently withdrew; so, the final decision, which was probably not far from the original one, stood.

Secondly there is evidence within the report of another emerging legal issue that might have been worthy of its own finding/recommendation. The ability of the OSA to decide any case rests on the correct interpretation of its legal powers. For much of the time this is sensible and unproblematic - no public agency can be expected to solve problems it wasn’t set up to address. This applies, for example, to individual admission appeals where OSA has routinely to explain that such complaints must be directed elsewhere. Legislation has solved some historic problems; e.g. the anomaly whereby parents correctly identified a flawed admissions policy but were not technically allowed to object, was removed by allowing anybody to object to anything. Others, namely the inability to enforce a decision to direct admissions, have (as noted above) been addressed by informing LAs about the correct procedures. But this report draws attention to a new, and potentially problematic, development.
Paragraph 27 highlights circumstances where the failure of an admissions authority to ‘determine’ its arrangements formally has led to OSA being unable to process an objection because it was technically ‘out of jurisdiction’. In the words of paragraph 29: “It must be extremely frustrating for parents who believe they have legitimate concerns about admission arrangements to find that these cannot be investigated because the admissions authority has failed to comply with its statutory duty to determine the arrangements.” Quite so! But is this really the case? I don’t doubt that legal advice has been taken; but questions of statutory interpretation are never finally settled until the courts have considered them. It is certainly a change from previous practice where this was not seen as an obstacle and, where it happened, cases were successfully concluded (See for example ADA 1393 from 2008). Of course, the legislative framework has changed more than once since then, notably in 2011 when adjudicators lost the power they previously had to change arrangements directly. However, when that legislation was brought in there was no discussion during the passage of the Bill of the possibility that by adopting the ruse of deliberately failing in their statutory duty, an admissions authority could escape effective scrutiny. Indeed, the responsible minister assured the House that the adjudicator’s powers to rule on the Code would not be diminished. It is certainly hard to believe that this was anything other than an unintended consequence of the change. As such the legal interpretation that this is the case (if the assumption is correct) should be open to challenge and clarification by the courts.

In addition to the ‘intention of parliament’ point there are other arguments that could be deployed. Elsewhere in the report (see paragraph 49 p.20) it is noted that objections based on failures to meet the consultation or publication requirements of the Code have been upheld – but the arrangements have not been changed, because their actual provisions were found to be Code compliant. This tends to leave the objectors disappointed, largely because an objection on technical grounds is usually a proxy for (or an additional argument alongside) the substantive issue that objector wants changed. But to win on the technicality is not necessarily to prove your point on the substance. It is clearly right and proper that this should be case – the purpose and function of the Code and OSA is to secure fair and appropriate outcomes for parents and children. If this applies for objectors, mutatis mutandis, it should apply also to admissions authorities.

It is easy to see the legal logic that arrangements that haven’t been determined don’t technically exist and therefore cannot be considered. But this analysis breaks down immediately when confronted by the real world. If a set of arrangements are formulated and believed to be a valid reflection of the admission authority’s policy and, in turn, provide the set of instructions the LA will follow when implementing coordinated admissions; they are for all practical purposes ‘the determined arrangements’. Even if the admissions authority had failed to arrange a formal meeting and record a decision within the prescribed timescale, the individual members of the authority could not have been unaware of what was being said and done in the name of the school. In the absence of any alternative or corrective action it is perfectly reasonable to deem the published arrangements to have been ‘determined’ by default. This sort of logic is very common in other areas of law (e.g. employment law where established custom and practice has often been deemed to become a contractual entitlement even if it is not in the written document.) There is no reason it should not apply here.

It is not certain that any case taken forward on that basis would be challenged. After all it is not easy to base an argument on a school’s own admitted failure to fulfil a statutory duty. But even if a test case was precipitated and lost, the attendant publicity would provide a strong impetus for the matter to be rectified via the parliamentary route. It is, of course, possible that such action is
already in the pipeline and the relative silence of this year’s annual report is to avoid encouraging exploitation of the loophole before a patch is in place. However, in the interests of transparency, we should be told.

**External links**

OSA Office of the Schools Adjudicator Annual Report: September 2015 to August-2016

DfE Press release: Chief Schools Adjudicator for England: annual report

DfE Fair access protocols in school admissions

**Related briefings**

Schools Adjudicator – 2015 annual report (February 2016)

Schools Adjudicator – 2014 annual report (January 2015)

Schools Admissions Code – Update (December 2014)

Changes to the Schools Admissions Code – Consultation (September 2014)

Free Schools Admissions DfE update to recent advice.pdf (June 2014)

Free Schools Admissions – recent DfE advice (May 2014)

Office of the Schools Adjudicator Annual Report 2013 (December 2013)

School Organisation – DfE consultation and recent advice (September 2013)


School admissions: Revised Admissions and Appeals Codes, consultation on Regulations, Adjudicator’s Annual Report, and LGO report (November 2011)

Education Act 2011 (November 2011)

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