

DETERMINATION

Case reference: ADA2424

Objectors: A parent

Admission Authority: The governing body of the JCB Academy Trust,
Rocester, Staffordshire

Date of decision: 29 August 2013

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the governing body of the JCB Academy Trust for admissions in September 2014.

I have also considered the arrangements in accordance with section 88I(5) of the Act and have found there are other aspects which do not conform with the requirements relating to admission arrangements in the ways set out in paragraph 16 of this adjudication.

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 make any remaining revisions to its admission arrangements as quickly as possible.

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 a parent about the 2014 admission arrangements (the arrangements) for the JCB Academy (the school). The objection relates to indirect sex discrimination as regards the academy's admissions policy which designates 60 places for males and 60 places for females.

Jurisdiction

2. The terms of the academy agreement between the JCB Academy Trust Limited (the academy trust) and the Secretary of State for Education require that the admissions policy and arrangements for the school are in accordance with admissions law as it applies to maintained schools. The arrangements were determined on that basis by the governing body which is the admission authority for the school.

3. The objector submitted an objection to the determined arrangements on 22 April 2013. I am satisfied the objection has been properly referred to me in accordance with section 88H of the Act and that it is within my jurisdiction to consider this objection.

Procedure

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

The documents I have considered in reaching my decision include:

- the objector's form of objection sent by email dated 22 April 2013;
- a copy of the 2014 admissions policy and the funding agreement, supplied by the school on 14 May 2013;
- copies of correspondence with the Department for Education (the department), for the period February to April 2012, provided during the school visit on 9 July 2013;
- a copy of the document '*Technical Guidance for Schools in England*' produced by the Equality and Human Rights Commission;
- the sixth form application form accessed from the school's website by me on 22 May 2013; and
- the minutes of the governing body meeting on 24 April 2012.

5. I arranged a visit to the school on 9 July 2013 in order to view at first hand the curriculum arrangements and facilities in the school and I took the opportunity to explore the guidance and advice the school had taken into account in constructing its arrangements.

The Objection

6. The objection was made by a parent after his son was refused a place at the school. The objection relates to the school's admission policy which states that 120 students will be admitted, 60 male and 60 female, but the objector believes that '*as only a small number of females apply to this engineering-biased academy, this gives the females a distinct advantage*' at admission and is therefore '*indirect sexual discrimination*'.

Background

7. The JCB Academy is a co-educational academy school that is designated as a university technical college specialising in engineering and business education for 14 to 19 year old students. The published admission number (PAN) for Year 10 is 120, which is then shown as 60 males and 60 females, and the PAN for the sixth form is 30.

8. During the school visit on 9 July 2013 it became apparent that from the outset, the school has tried to encourage girls to apply and that as early as 2009 there had been discussions with the department about how the school might give priority for admission to girls, but this was said not to be possible. In 2012 the school had 226 applications, only 25 of which were from girls, but after applying the complex oversubscription criteria which includes a random allocation process, only 11 of those 25 girls were offered places. The school was conscious that if it had not been required to operate the random allocation process across all applicants, then all the

girls who had applied could have been offered places, thereby providing '*a much healthier cohort...in a school that is overwhelmingly male*'.

9. Frustrated with having to turn away the majority of girls after having struggled to encourage them in the first place, this prompted further discussions with the department about how to achieve a more equitable gender balance in the school, including whether female applicants could be exempted from the random application process. The school provided copies of the correspondence for the relevant period, February to April 2012, during my visit to the school on 9 July 2013.

10. Whatever discussions have taken place with the department, it was clearly understood that the governing body should take its own legal advice before deciding how to proceed, and that any change to the arrangements might still be referred to the Office of the Schools Adjudicator for a binding decision. The school changed the PAN of 120 to 60 males and 60 females in the 2013 admission arrangements which were determined by the governing body on 24 April 2012, and the minutes of that meeting confirm that the aim of having two PANs was to encourage girls into engineering.

Consideration of Factors

11. The Code at paragraph 1.2, in accordance with section 88D(1) of the Act, requires an admission authority to determine the PAN for each 'relevant age group' (the age group at which pupils are normally admitted). With the laudable aim of encouraging more girls into engineering, the school has actually set two PANs for year 10, one for males and the other for females, so that female applicants would not be subject to the complex oversubscription criteria which led, in 2012, to the majority of the girls who applied not being offered a place. However, the school is not permitted to set two PANs. The only exception where having two PANs is legally permitted is at section 88D(2) of the Act, for a boarding school that has boarding and day places at the school. Therefore the school is simply not permitted by admissions legislation to have two PANs.

12. However, the objector believes that '*as only a small number of females apply to this engineering-biased academy, this [the use of two PANs] gives the females a distinct advantage*' at admission and is therefore '*indirect sexual discrimination*'. I have therefore given consideration to whether the school's action might be objectively justified by applying section 85 of the Equality Act 2010 (Equality Act).

13. On the face of it, having two identical PANs, one for boys and the other for girls does not look discriminatory because both sexes appear to have been treated equally. However, as this school is oversubscribed by boys, the effect of specifying separately the number of places for males and females is to give any girl who applies (up to the PAN) a place without being subject to other oversubscription criteria, which would still be applied to boys (unless there were fewer than 60 male applicants). It is likely, therefore, that girls would be given a place that may not have been allocated if the oversubscription criteria were to have been applied to all applicants, irrespective of gender, with the result that girls are given priority over

boys simply on the basis of their sex. Furthermore, in the Equality and Human Rights Commission's '*Technical Guidance for Schools in England*' the examples of discriminatory criteria at paragraph 2.42 includes: '*setting fixed proportions of boys or girls in a co-educational school*'. Consequently, it is my view that the effect of having two PANs indirectly discriminates against boys, and contravenes section 85 of the Equality Act 2010 (Equality Act).

14. The Equality Act covers discrimination based on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and these categories are known as "protected characteristics". I considered whether, by using the provision in section 158 of the Equality Act, the PAN arrangements could be permitted as "positive action" to allow the school to act in a way which would otherwise amount to unlawful discrimination in favour of girls. Section 158(1) and (2) state:

1. *This section applies if a person (P) reasonably thinks that:*
 - (a) *persons who share a protected characteristic suffer a disadvantage connected to the characteristic,*
 - (b) *persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or*
 - (c) *participation in an activity by persons who share a protected characteristic is disproportionately low.*
2. *This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of:*
 - (a) *enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,*
 - (b) *meeting those needs, or*
 - (c) *enabling or encouraging persons who share the protected characteristic to participate in that activity.*

I have taken "*participation in an activity*" to mean the participation of girls in the education provided in this school which prepares them for a future career in engineering where the number of women is disproportionately low. The appropriate test is whether the school's action can be objectively justified as a proportionate means of achieving one of the aims in section 158, and specifically the aim of increasing the participation of girls, in accordance with section 158(2)(c). I would need to consider whether the school's PAN arrangements are capable of achieving this aim; and then whether that action is proportionate in the circumstances.

15. However, I also note that section 158(6) of the Equality Act does not allow the school to do anything which is prohibited by another act. So, even if the action of having two PANs were to be a proportionate means of achieving the school's legitimate aim of encouraging more girls into engineering it would still not be permitted as the Act at section 88D(2) does not allow the school (as it is not a boarding school) to have more than one PAN, and the funding agreement does not give the school a derogation to have more than one PAN. Therefore, it is my view that this co-educational school cannot have two admission numbers, one for males

and the other for females because the provision in section 158 of the Equality Act with respect to positive action cannot exempt the school from the requirements of admissions law which does not permit the school to have two PANs.

Other matters

16. In reviewing the 2014 admission arrangements I noticed that there were other aspects of the admission arrangements that appeared not to comply with the requirements relating to admission arrangements, so I used my powers under s88I of the Act to review the arrangements as a whole for full compliance with the Code. I took the opportunity, during the visit on 9 July 2013, to raise with the school several points which appeared to me to contravene the Code, as these points could be amended immediately by the school as a permitted variation under paragraph 3.6 of the Code. I offered the school the opportunity to make the amendments to the arrangements to comply with the Code, and agreed to note their progress in my determination. I raised the following points:

- The school should have had the determined arrangements for 2013 and 2014 on its website, as only the 2012 arrangements were on the website at the time of the visit and these were out-of-date. The website currently shows only the 2013 arrangements;
- Although the school had supplied the determined arrangements by email, the arrangements were presented in the same form as the original funding agreement and had not been brought fully up-to-date with the new Code. After my visit, the school provided a copy of the amended 2014 arrangements which have been revised appropriately, but have yet to be made available on the website;
- The application form for external applicants to the sixth form requested information that is not required to apply the oversubscription criteria. The form available on the school's website at the time of this adjudication still requires amendment. To comply with the Code at paragraph 1.9, questions related to personal information such as special needs, hobbies and interests, positions of responsibility, reason for wanting to study at the school should be removed because of the general risk that such information could be used as a form of selection such as by behaviour or attitude. For the same reason, an applicant should not be required to include a copy of their most recent school report as the school is able to contact the applicant's previous school in order to obtain GCSE predictions;
- All references to aptitude tests for sixth form external applicants should be removed, including the reference still on the Admissions webpage;
- As applications for a sixth form place may be submitted by the external student or their parent, there should be no requirement for both parent and prospective sixth form student to sign; it may be signed by the parent or student and the form available on the website has still to be amended.

Conclusion

17. I do have considerable sympathy with the school's efforts to increase the proportion of girls in a specialist engineering school that is *'overwhelmingly male'*. I also acknowledge the school's laudable aim of making it easier for girls to get into engineering employment where females are underrepresented. However, this co-educational school is oversubscribed by boys, and so having two identical PANs, one for boys and the other for girls, has the effect of making it easier for the girls to get into the school simply on the basis of their sex. Accordingly, I agree with the objector that having two PANs gives the small number of females that apply a distinct advantage at admission, and that this is indirect sex discrimination.

18. The school cannot use the provision for positive action in section 158 of the Equality Act as section 158(6) of the Equality Act does not permit the school to do anything that is prohibited by another act. Therefore, the school cannot set two PANs, even if it were to have been an objectively justifiable "positive action" because only one PAN is permitted by the Act at section 88D(1) and the Code at paragraph 1.2. As there is no derogation in the funding agreement to exempt the school from admissions law, I therefore conclude that this co-educational school cannot have two admission numbers, one for males and the other for females, for the reasons stated, and so I uphold this objection on the basis that it does not comply with admissions law and the Code.

Determination

19. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the governing body of the JCB Academy Trust for admissions in September 2014.

20. I have also considered the arrangements in accordance with section 88I(5) of the Act and have found there are other aspects which do not conform with the requirements relating to admission arrangements in the ways set out in paragraph 16 of this adjudication.

21. 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 make any remaining revisions to their admission arrangements as quickly as possible.

Dated: 29 August 2013

Signed:

Schools Adjudicator: Cecilia Galloway