DETERMINATION

Case reference: **ADA2574**

Referrer: **A member of the public**

Admission Authority: **Dixon's Music Primary Academy, Bradford**

Date of decision: **8 April 2014**

Determination

In accordance with section 88I(5) of the School Standards and Framework Act 1998, I have considered the admission arrangements of Dixon's Music Primary Academy, Bradford. I determine that the arrangements do not conform with the requirements relating to admission arrangements.

By virtue of section 88K(2) of the Act, the adjudicator's decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements as quickly as possible, but no later than 15 April.

The referral

1. The admission arrangements (the arrangements) of Dixon's Music Primary Academy (the school), a mixed academy free school for children aged four to 11 for September 2014 came to the attention of the schools adjudicator in an e-mail dated 4 January 2014.

2. The person referring the arrangements believes that the placing of a limit on the number of admissions from those living within a defined distance from the school is an unreasonable use of a catchment area, and also that the school is in breach of what the School Admissions Code (the Code) requires because musical aptitude testing takes place after the deadline date for applications for places.

Jurisdiction

3. The terms of the academy agreement between the proprietor and the Secretary of State for Education require that the admissions policy and arrangements for the academy school are in accordance with admissions law as it applies to maintained schools. These arrangements were determined by the governing body on behalf of the proprietor, which is the admission authority for the academy school, on that basis.

4. These arrangements were referred to the adjudicator on 4 January 2014. This is well after 30 June 2013, the date by which an objection to admission arrangements should be made. As it appeared to me that they may not

conform with the requirements relating to admission arrangements, I have used my powers under section 88I of the School Standards and Framework Act (the Act) to consider the arrangements as a whole.

Procedure

5. In considering this matter I have had regard to all relevant legislation and the Code.

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

a. the referrer's email dated 4 January 2014;

b. the school's response to the referral and to matters I raised with it in a letter dated 15 January 2014;

c. the views of Bradford Metropolitan District Council (the council) concerning matters raised in the referral and supporting documents;

d. copies of the minutes of the meeting at which the proprietor of the school determined the arrangements;

e. a copy of the determined arrangements;

f. a copy of the school's agreement with the Secretary of State, and

g. a copy of the impact assessment carried out for the Secretary of State by the Department for Education (DfE) concerning the establishment of the school.

7. I have also taken account of information received during a meeting I convened on 7 February 2014 at the school, and in subsequent correspondence with the school and with the council.

Other Matters

8. The matters of potential non-compliance which I raised with the school in a letter of 15 January 2014 were:

(i) that the reference in the arrangements to the admission of children holding statements of special educational needs which names the school "with the support of Bradford LA" does not conform to the requirements set out in annex B of the school's academy agreement, which refers to all local authorities (LAs);

(ii) that the school's supplementary information form (SIF) asks for information not permitted by the Code (paragraph 2.4) namely:

(a) the gender of the child, and

(b) information concerning siblings, and

(iii) that no statement concerning deferred entry is included within the arrangements, as required by paragraph 2.16 of the Code.

9. I subsequently raised with the school the wording used in the arrangements to describe the six places offered on the basis of musical aptitude. This is:

"6 places will be awarded to children who show a particular interest or aptitude (ie potential) for Music and who are committed to studying it".

I invited the school to comment on my view that this wording may not be in accordance with selection which is permitted under section 102 of the Act which refers only to selection by reference to aptitude and not to the other matters mentioned in the school's arrangements.

10. At the meeting which I held on 7 February 2014, I raised with the school my concern that the arrangements did not permit the creation of a single waiting list for places, as required by paragraph 2.14 of the Code.

Background

11. Dixon's Music Primary Academy opened on 28 August 2012 and admitted its first group of pupils in September of that year. The school admitted only one form of entry at that time because of restrictions resulting from its building programme.

12. In December 2011 the school had consulted interested parties, including the council, on its proposed admission arrangements, prior to determining these for September 2012, in April 2012.

13. Section 9(2) of the Academies Act 2010 requires the Secretary of State to take into account what the impact of establishing a school which is an additional school, that is to say one which does not replace an existing maintained school, would be likely to be on schools in the area. An assessment of the likely impact of the establishment of Dixon's Music Primary Academy was carried out and published by the DfE in 2012, and it refers to these consultations by describing concerns expressed by some parents in the following way:

"Some concerns were raised by parents of younger children about a city-wide catchment rather than a local, smaller one; however, even those who would prefer a school closer to their home understand that a city-wide catchment could break the mono-ethnic pattern of school provision in central Bradford."

I shall refer again to the findings of the DfE impact assessment below.

14. The referrer first wrote to the Office of the Schools Adjudicator (OSA) on 8 November 2013. In response to a request from the OSA, the school provided a copy of what had been posted on its website as its determined arrangements for September 2014, but was not able to provide evidence concerning their determination.

15. The school subsequently confirmed that no formal resolution concerning the admission arrangements for September 2014 had been made by the governors. As a result of the school's confirmation, I came to the conclusion that there was no evidence that the arrangements had been determined by the governors and therefore that the school had no determined admission

arrangements. I decided as a result that I had no jurisdiction under section 88I of the Act to consider the arrangements. I wrote to the parties to that effect on 2 December 2013.

16. The initial referral was concerned, among other things, with the inclusion in what were understood to be the arrangements for admissions in September 2014 of the use of a defined area near to the school from which the number of admissions was limited, and to the timing of the tests for musical aptitude which are part of the arrangements. The school and the council therefore provided me with their comments on these matters at the time of this initial referral.

17. Having viewed the arrangements which the school believed it had determined, I also set out in the letter of 2 December 2013 a number of matters which, if they had appeared in determined arrangements, I believed would have contravened the requirements of the Code.

18. The school was reminded that it needed to determine arrangements that complied with the law on admissions and the Code without delay, and was asked to provide the schools adjudicator with a copy of the arrangements immediately they had been determined. The school e-mailed these on 30 December 2013, but did not at that time provide evidence of their determination by the governors. A relevant minute of the meeting of the governing body held on 10 December 2013 was however provided in an e-mail dated 9 January 2014.

19. A copy of the determined arrangements was posted on the school's website. These had taken into account the comments which I had made concerning possible areas of non-compliance in the version of them which the school had wrongly believed it had determined. However, the information requested on the school's SIF, one of the matters which I had raised, had not been changed.

Consideration of:

A. Matters raised by the referrer

20. In summary, the school's arrangements for admission of pupils in September 2014, as determined on 10 December 2013:

a. set an admission number of 60;

b. state that 15 places will be awarded to children living within 1.5 miles of the school and that 45 places will be awarded to children living further away;

c. state that after the admission of pupils with a statement of special educational need which names the school (later referred to as statements naming the school "with the support of Bradford LA"), priority for admissions is determined by oversubscription criteria.

These oversubscription criteria give first priority to looked after and previously looked after children, followed by up to six children on the basis of their musical aptitude, then to siblings of children at the school, and finally to other children on the basis of an independently scrutinised random selection. For admissions in September 2014 tests of musical aptitude were held on 25 January 2014.

21. I have viewed the school's agreement with the Secretary of State and in particular the annex which sets out the requirements concerning the admission of pupils. This contains no derogation concerning admissions to the school except the inclusion of a right of appeal to the Secretary of State concerning the proposed admission of a named pupil with special educational needs.

(i) The timing of tests of aptitude

22. The use of tests of aptitude in relation to admissions to primary schools is highly unusual, but it is permitted by section 102 of the Act, which allows schools, rather than specifying schools with any particular age range, to admit up to ten per cent of their pupils by reference to their aptitude in a subject for which the admission authority for the school are satisfied that it has a specialism.

23. When setting out requirements concerning tests of selection, the Code at paragraph 1.32c says that "Admission authorities **must…….** take all reasonable steps to inform parents of the outcome of selection tests before the closing date for secondary applications on 31 October so as to allow parents to make an informed choice of school". The clear purpose of this provision within the Code is to ensure that parents are aware of whether their child qualifies for a place at a selective school at the point at which they have to decide whether to express a preference for a place there. The reference to secondary schools and the date of 31 October makes no sense in this context if the school in question is a primary school, since preferences for primary schools have to be expressed by 15 January. I believe that the Code talks in terms of the closing date only for secondary applications for the reason that selection tests for primary schools were not envisaged when the Code was drafted. It is also clear to me that if the purpose achieved by paragraph 1.32c of the Code in respect of admissions to selective secondary schools is to be achieved also for admissions to selective primary schools, and I can see no reason why this would not be equally desirable, then the relevant admission authority would need to let parents know the outcome of tests of selection before 15 January. So while the arrangements cannot be said to formally breach what the Code says, they do mean that parents who have sought a selective place at the school have to decide whether to express a preference for a place there without knowing whether their child qualifies for one or not. To this extent the arrangements are in my view unfair, and so breach the requirement of procedural fairness in paragraph 1.8 of the Code.

24. The school has accepted this argument and has told me that it intends to incorporate the relevant change in its admission arrangements for September 2015.

(ii) The use of an inner catchment area

25. Secondly, the referrer brought to my attention the question of whether the restriction of admissions from within 1.5 miles of the school is a reasonable approach. The referrer contends that this violates paragraph 1.14 of the Code, which states that "catchment areas **must** be designed so that they are reasonable and clearly defined".

26. The definition of what the school refers to as its "inner catchment area" is that it is the area which falls within 1.5 miles of the school. This is in my view a clear definition, although the school, and initially the council, were unable to provide me with a map showing where this radius fell. So parents do not have an easy means to check whether they live within the distance used by the school for the purpose of allocating places, although I was told by the school that they are able to contact the council, whose computerised system determines this, prior to expressing a preference for the school.

27. The council has provided me with its view that the use of an inner catchment area by the school is not in breach of the requirements of the Code, since it says that there is no requirement in the Code for admission arrangements to prioritise those living closest to a school. It believes that the arrangements, concerning which it had been consulted when the school was established, are lawful and that the school's intention is to offer places to children from across the city and hence "to reflect all local communities".

28. The school has stated that its intention in restricting admissions from within 1.5 miles of the school is to "attract a more diverse, city-wide intake and to break the pattern of mono-ethnic provision and educational apartheid in our city. 25 per cent of the city's population lives within 1.5 miles of the school, and our admission arrangements reflect this" and that "to have recruited on distance rather than randomised selection would have done great damage to the intake of a small number of primary schools located immediately around us".

29. I have considered these statements by the council and the school, which concern the geographical distribution of different ethnic groupings within the city of Bradford, very carefully. I have sought the assistance of both the school and the council in understanding the background to them.

30. The assessment of the likely impact of the school's establishment carried out by the DfE in 2012 took place in the knowledge that the school intended to limit admissions from within 1.5 miles. However, this assessment took the view that "as the children are primary age it is unlikely that many will travel any great distance to school" and so carried out an impact assessment on schools based on a proxy catchment area based on the maximum distance of one mile (average 0.5 miles) travelled to school by 80 per cent of pupils in Bradford. It therefore considered the impact on schools within a one mile radius of Dixons Music Primary Academy assuming that children admitted to it would live locally, even though the school's intended arrangements would prevent this. This assessment also drew on the view expressed to it at the time by the council that it was projecting an increase in the primary school population in Bradford of 11.2 per cent in coming years, the impact of which was said to be " a 7.2 per cent shortfall of primary places by 2015/16". The

impact assessment concluded that;

"Given the need for additional primary places across Bradford……it would appear unlikely that any single school is likely to suffer uniquely or significantly as a result of the creation of Dixons Music Primary."

31. The impact assessment made no attempt to consider the effect of the school's intended admission arrangements in terms of the ethnicity of those likely to be admitted, but limited itself to establishing that the additional school would not cause an over-provision of places in its area even if local children were those admitted to it. The council has recently confirmed that it anticipates that the number of reception age pupils living in the school's inner catchment area will increase in the next two years "in line with the overall population".

32. In other words, at the time when the school was about to be established, the projected need for local places was such that, even when it was assumed in the impact assessment carried out by the DfE that local children would be those admitted, other local schools were not expected to suffer any significant impact as a result of the school's establishment. The fact that this general shortage of local school places has translated in practice into a significant current demand for places at the school from within its inner catchment area has been demonstrated by figures which the school has helpfully provided to me concerning expressions of preference for places at the school for September 2014. There have been 145 such preferences from parents living within the area from which it restricts admissions to 15 children and 45 expressions of preference from the area outside, for which there are 45 places.

33. The evidence that the demand for places at the school comes from those living within 1.5 miles is therefore clear. It is also clear that the school's arrangements mean that the overwhelming majority of these parents must be denied a place because priority is given to those living beyond this distance. It seems to me that this imbalance renders the use made by the school of its inner catchment area unreasonable, and therefore that the arrangements fail to comply with the requirement of reasonableness set out in paragraph1.14 concerning catchment areas.

34. In response to my request to it for background information about the city, the council referred me to profiles of its electoral wards contained in the Bradford Observatory, to its Economic Strategy and to its Equality Action Plan as relevant sources. I have also considered very carefully the information which the council has supplied. The Bradford Observatory contains detailed information drawn from 2011 census returns which give the following (self-reported) information about the city as a whole, and the electoral ward in which the school is situated (City Ward):

Ethnicity and religious affiliation	Bradford City (percentage)	City Ward (percentage)
White	63.9	14.5
British Pakistani	20.4	42.7
Black British/African	0.9	5.4
Christian	45.9	21.8
Muslim	24.7	57.3

35. This picture of widely different community characteristics is repeated across the electoral wards that make up the area from which the school's admission arrangements limit the number of admissions. All but a small part of it falls within six wards. Two wards are entirely within the area which the school defines, and each has fewer than 25 per cent of the residents who describe themselves as "white". Of the remainder, one has fewer than 10 per cent of residents describing themselves as "white", and for three other wards this figure exceeds 60 per cent.

36. The council's Equality Action Plan refers to the four most deprived wards in the city, saying that they are home to 40 per cent of its total Pakistani origin community and 52 per cent of the Bangladeshi origin community. Three of these are either wholly or substantially within the school's inner catchment area.

37. My overall understanding of the ethnicity data that I have reviewed is that the area from which the school's admission arrangements restrict admissions is home to a higher proportion of Asian-heritage children than is the average for Bradford, and that this probably approaches twice the city average.

38. If admissions were random across community lines, the school's admission arrangements, by making a quarter of the admissions from the area which has approximately double the average ethnic minority of the city and three quarters from the remaining area would result in a school population in which the ethnic minority proportion was only about one quarter. That is to say, the school would achieve its aim of having a representation from the Asian community which would resemble that of the city as whole.

39. To do so, the school's arrangements put a limit on the number of local admissions. In the light of a local need and desire for places at the school, they therefore intentionally act to the disadvantage of those living within 1.5 miles compared to those living further away. The reason given by the school for creating this relative disadvantage is the different ethnic composition of the two populations.

40. The Equality Act 2010 prohibits discrimination on the grounds of race (section 9) and of religion or belief (section 10). Section 85(1) of this Act then

applies these prohibitions to the arrangements and decisions which admission authorities for schools make as to who is offered admission as a pupil.

41. Some schools are allowed to discriminate on the grounds of religion or belief in the way they make admissions, because section 89(12) of the Equality Act applies exceptions set out in schedule 11 to that Act. Paragraph 5 of schedule 11 disapplies the provisions of section 85(1) "so far as relating to religion or belief" to those schools which are listed in the register of independent schools as having a religious ethos or which are maintained schools designated by the Secretary of State as having a religious character. Dixon's Music Primary Academy is an independent school and it is not so listed. It must therefore comply with the requirement not to discriminate on the grounds of race, or of religion or belief, in its admission arrangements.

42. The arrangements determined by the school are designed to act in a way that discriminates against those living within 1.5 miles of the school. This discrimination has the effect of limiting the number of children from the Asian community and also those who are of the Muslim faith who are admitted to the school. I have therefore considered whether the school's practice amounts to indirect discrimination on the grounds of race and religion or belief, since each is listed as a protected characteristic for the purposes of section 19 of the Equality Act 2010 where indirect discrimination is defined. The effect of section 19(2)(d) of the Equality Act is that a provision, criterion or practice will not be discriminatory if it can be shown that it is "a proportionate means of achieving a legitimate aim".

43. The school has provided me with a detailed analysis of the current school populations of primary schools in its immediate area, of those within its defined area of limited admissions and across the city as a whole in terms of the percentage of pupils for whom English is not their first language. No source for the data has been provided but I have no reason to doubt its accuracy. These data do show very high percentages of children whose first language is not English in many schools, with generally the highest percentages of such pupils in schools which are nearest to Dixon's Music Primary Academy. The proportion then declines with distance, as the school has pointed out to me.

44. The school is seeking to achieve around 20 per cent representation from the Asian community, the average figure for the city. However, the figures which the school has presented to me also show that there are already a number of schools in the city with more balanced pupil populations, at least in terms of English as a first language, than that which the school is seeking to achieve. One in five of the primary schools within 1.5 mile of the school have greater than one third but less than two thirds of pupils for whom English is not their first language. This figure falls to one school in eight for the rest of the city, where it is also the case that one in four schools has between 10 and 30 per cent of pupils whose first language is not English, according to the figures provided by the school.

45. The council is the admission authority for the majority of primary schools in its area and its admission arrangements for them give priority for admission based on the distance between the child's home and the school. As a result,

pupils mostly go to a school near to where they live. The figures given in the previous paragraph therefore mirror the pattern of widely differing communities described earlier. However, within this pattern there is across the city a significant minority of schools where there is neither a preponderance of children whose first language is English, nor a preponderance of those for whom this is not the case.

46. As I have said, it is my view that the school's arrangements are capable of leading to an outcome which meets its aims for them, which is to achieve a balance of community representation resembling that of the city as a whole. Considered in isolation, it seems to me that this might be seen to be a legitimate aim for a school in Bradford, since it would be generally advantageous to any child living in the city who was fortunate enough to be educated in such an environment.

47. The evidence which I have seen about English as a first language does not however amount to evidence about the balance of community representation across the city's schools and it could not be said to give an accurate picture of the likely community mix in a given school. I cannot say that I have seen evidence, therefore, that there is a "pattern of mono-ethnic provision and educational apartheid" in Bradford as the school claims, and which it says its admission arrangements will "break". Were Bradford schools collectively to conform to the view of them expressed by the school, there might be a need for a non-segregated school to be established. But the evidence which I have seen does not lead me to believe that such a situation exists. So while the school's aim for its admission arrangements might be capable of being a legitimate one, I am of the view that the need for the outcome it seeks to establish is far less than the school maintains.

48. In view of the fact that the school has not been able to demonstrate in any clear way that there is a need for the aim which it seeks to achieve through its arrangements, I am not able to see this as a legitimate aim within the terms of the Equality Act 2010. I am therefore of the view that this aspect of the arrangements results in indirect discrimination on the grounds of both race and religion or belief in terms of this Act.

49. I have also considered the arrangements from the point of view of the ease with which children living beyond 1.5 miles from the school might in practice be able to attend it. The council's policy for school transport is that it provides assistance with travel for children under eight years of age who live further than two miles away from the school they attend, but not if this is not the nearest school to the home address and this nearest school has an available place.

50. This means that in the circumstances of Bradford, where there is a high density of schools, anyone living more than two miles from the school is almost certain to have another school nearer to them which may well have an available place. The effect, then, is that assistance with transport to the school would not be available to children living in the band between 1.5 and two miles from the school and would be uncertain for those living further afield. The school is therefore reliant upon parents providing their own transport, and

this is likely to disadvantage those from poorer homes. At least one of Bradford's most deprived wards is in the area more than 1.5 miles from the school. By effectively promoting the use of transport rather than promoting walking to school, the use made by the school of its inner catchment area is therefore in breach of the requirement of paragraph1.8 of the Code which requires admission authorities to ensure that their policies "will not disadvantage unfairly, either directly or indirectly, a child from a particular social …….. group".

51. My view is therefore that the use made by the school of its inner catchment area is unreasonable, that it results in indirect discrimination on the grounds of race and of religion or faith, and that it disadvantages those from a particular social group. All of these matters contravene what the Code requires.

B. Other matters

52. Paragraph 1.6 of the Code requires all admission authorities to admit any child whose statement of special educational needs names the school. This is not altered in the case of the school by the requirements set out in annex B of its academy agreement, which refers to all LAs. The qualification in the school's arrangements to "the support of Bradford LA" therefore places it in breach of these requirements. The school has accepted that the reference to "Bradford LA" concerning the admission of children with a statement of special educational need must be removed.

53. Paragraph 2.4 of the Code states that "admission authorities….**must** only use supplementary forms that request additional information when it has a direct bearing on decisions about oversubscription criteria or for the purpose of selection by aptitude or ability." The use by the school of a supplementary information form which asks for information about the gender of the child and concerning siblings (information which is already available to the school via the council's Common Application Form) is therefore in breach of this requirement. The school has agreed that only those children applying for a specialist music place should be asked to complete the school's SIF and that this form should only ask for information which is directly related to such an application.

54. Paragraph 2.16 of the Code states that in relation to the admission of children below compulsory school age admission authorities must make a statement in their arrangements setting out the right of parents to request deferred entry either on a full-time or part-time basis. The school's arrangements contain no such statement and are therefore in breach of what the Code requires. The school has accepted that a statement concerning deferred entry should be included in its "new arrangements".

55. Section 102 of the Act refers only to selection by reference to aptitude and not to the other matters mentioned in the school's arrangements, which are to an "interest" in music and to a "commitment to studying it". The school has written to me accepting that the use of additional wording in association with its description of the admission of pupils on the basis of musical aptitude may

not be in accordance with the Code, but saying that the wording was intended to assist the understanding of parents concerning the meaning of “aptitude”, particularly those for whom English is a second language. My view of this is that these terms cannot help to explain the concept of aptitude as the school maintains, since they have a different meaning to it. The Act means that selection on the basis of aptitude must be on that basis alone, and the school’s use of what appear to be alternative or additional requirements mean that its arrangements do not meet this stipulation.

56. The Code (paragraph 1.2) requires an admission authority to set a single published admission number (PAN) for each relevant age group and if there are more applications than this number, that these places be allocated by the sequential application of defined oversubscription criteria. Paragraph 2.14 of the Code states that an admission authority “**must** maintain a clear, fair and objective waiting list…..stating in their arrangements that each added child will require the list to be ranked again in line with the published oversubscription criteria.”

57. I have considered whether, in defining two separate groups of places, the school is failing to meet these requirements. The number of places in the two groups, when added together, equals the overall PAN. The arrangements mean that if the school is oversubscribed, the oversubscription criteria are applied to applications from parents living within the two defined areas separately, meaning that the criteria act in relation to each group of places as if it had its own PAN. The school has not been able to say how it could create a single waiting list using its determined admission arrangements.

Conclusion

58. As I have set out above, the school’s arrangements do not conform to the requirements of the Code concerning procedural fairness in relation to the date on which information about the outcome of selection tests is available.

59. I have also set out my thinking concerning the designation of the areas closest to the school as one from which limited admissions are made. I have set out why I have concluded that the use made by the school of this area in its admission arrangements is:

(i) unreasonable, in contravention of paragraphs 1.8 and 1.14 of the Code;

(ii) indirectly discriminatory on the grounds of race and religion or belief, in contravention of the Equality Act 2010, and

(iii) disadvantageous to those from a particular social group, which is prohibited by paragraph 1.8 of the Code.

60. I have stated why I am also of the view that the school’s arrangements do not permit it to meet the requirement of the Code concerning the drawing up of a waiting list for places, and why I have come to the conclusion that the school’s arrangements do not conform to the requirements of the Code concerning:

(i) the admission of children with a statement of special educational need,

(ii) information requested in the school's SIF,

(iii) the requirement that a statement concerning deferred entry be included, and

(iv) the use of wording which implies that factors additional to aptitude form part of the school's selection tests.

61. The school now needs to amend its arrangements for admissions in September 2014 as these amended arrangements will apply to late applications and the waiting list. It also needs to determine arrangements that are compliant with what the Code requires that will apply to admissions in September 2015, before April15.

Determination

62. In accordance with section 88I(5) of the School Standards and Framework Act 1998, I have considered the admission arrangements of Dixon's Music Primary Academy, Bradford. I determine that the arrangements do not conform with the requirements relating to admission arrangements in the ways set out in this determination.

63. By virtue of section 88K(2) of the Act, the adjudicator's decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements as quickly as possible, but no later than 15 April.

Dated: 8 April 2014

Signed:

Schools Adjudicator: Dr Bryan Slater