

## **DETERMINATION**

**Case Reference:** ADA/002176

**Admission Authority:** The Governing Body of Tomlinscote School and Sixth Form College, Surrey

**Date of Decision:** 15 August 2011

### **Determination**

**I determine that the arrangements for Tomlinscote School and Sixth Form College, referred to me by an Admissions Appeals Panel, are unlawful. They do not comply with the Equality Act 2010 (“the Act”) or mandatory requirement, paragraph 1.72, of the School Admissions Code.**

**The following exception to over-subscription three, siblings, “when the older sibling obtained a place *only* because he or she was in possession of a statement of special educational needs (“SEN”),” should be deleted.**

### **The Referral**

1. On 21st June 2011, the Office of the Schools Adjudicator received a referral, via an email from Surrey County Council (“the Council”), from an Admissions Appeal Panel which had considered an appeal made by a parent regarding admission to Tomlinscote School and Sixth Form College (“the School”). The Panel believes that an aspect of the school’s arrangements is unlawful. Appendix 1 paragraph 18 of the School Admission Appeals Code (“the Code”) specifies that an Appeals Panel must refer to the Schools Adjudicator (“the Adjudicator”) any arrangements that it identifies in the course of its deliberations that it considers unlawful.

### **Background**

2. The School is a larger than average co-educational foundation school serving pupils aged 11-19 in Frimley, Surrey. It has up to 15 places available for pupils with speech, language and communication learning needs. The School is oversubscribed.

3. The Appeal Panel has objected to an “exception” to the School’s third oversubscription criterion – siblings. The School’s admission arrangements state that there are two exceptions to this priority, the first being

“when the older sibling obtained a place *only* because he or she was in possession of a statement of special educational needs (“SEN”).”

4. The Appeal Panel believes this exception does not meet the requirements of paragraph 1.72 of the Code. They also:

*“considered the provisions of the Equality Act 2010 (“the Act”) and decided that statement children were being discriminated against because of something arising from the consequence of their disability, namely the inability to have the benefit of a sibling at the School. The Appeal Panel also found that the excepted provision was not a proportionate means of achieving a legitimate aim that is, restricting the admission of pupils who live outside the admissions priority area or where Tomlincote is not the local school. The Appeal Panel also considered whether the impairments that led to the issue of the statement would be construed as a disability under the Act and found this to be the case.”*

## **Jurisdiction**

5. Section 88I (5) of the Schools Standards and Framework Act 1998 empowers the Schools Adjudicator to consider any admission arrangements that come to his attention by means other than an objection or referral by the Secretary of State where it appears to him that the arrangements may not comply with statutory requirements or the mandatory requirements of the School Admissions Code (the Code). Where the Adjudicator decides to consider the arrangements, he must decide whether or not they comply.

6. I have concluded that I have the jurisdiction to consider these arrangements.

## **Procedure**

7. In coming to my conclusions, I have had full regard to all relevant legislation and guidance. The documents I have considered in reaching my decision include:

- the initial reference submitted via Surrey County Council on behalf of an Admission Appeals Panel on 21<sup>st</sup> June 2011;
- a letter from The School dated 21<sup>st</sup> July 2011;
- the report of the Ofsted inspection of the School in May 2011;
- the School’s determined admission arrangements for 2012.

## **Comments from the school**

8. A letter from the School’s Executive Principal and Chair of Governors dated 21<sup>st</sup> July 2011 states that the School has received advice that the exception which is subject to this objection *“could be construed as discriminatory. Measures have been taken to remove this exception in time for the publication of the School Admission Policy affecting Year 7 entry for September 2012”*.

## **Consideration of Factors**

9. Paragraph 2.21 of the Code sets out the advantages of using siblings of children who are still at the school as an oversubscription criterion. This is described

as good practice because it “*supports families and can reassure parents about the safety of children when walking to school. Older children can also offer support to their younger brothers and sisters.*” Accordingly, the use of siblings as an oversubscription criterion with a high priority is very common. This is the case at the School, where siblings is the third oversubscription criterion, after looked after children and exceptional need. This priority has ensured that, to date, all siblings have been offered places at the School.

10. Paragraph 1.72 of the Code states that admission authorities must ensure that their admission arrangements are fair and do not unfairly disadvantage, either directly or indirectly, a child with SEN. Given that the Code describes the use of a siblings oversubscription criterion as good practice and the fact that the School recognises this by giving the siblings criterion third priority, it is clear to me that the “exception” to the siblings criterion serves to unfairly and directly disadvantage children with statements of SEN as they may not be able to enjoy the benefits of a sibling attending the School and therefore this exception does not meet the requirements of the Code.

11. Part 6 of the Act prohibits discrimination on grounds of disability in the context of education, Given that a statement of SEN is the outcome of a multi-disciplinary assessment process that has concluded that a child’s needs are significantly different from their peers and are such as to warrant the special provision described in the statement, I understand the Appeal Panel’s view that a child with a statement of SEN can reasonably be considered as a child with a disability and that such children fall within the scope of the requirements of the Act; and I accept that this may be true in many cases. There are also circumstances in which a child with SEN will not have a disability for the purposes of the Act. Notwithstanding this the “exception” is clearly designed to discriminate against the ability of a pupil with SEN who may also have a disability to enjoy the benefits of a sibling attending the school, and I believe that this can be regarded as unfair discrimination. Further, the exception may amount to discrimination under the Act against the siblings who are being treated unfavourably because their sibling has a disability; and, the School may be in breach of its public sector equality duty at section 149 of the Act for failing to give due regard to advancing equality of opportunity and fostering good relations.

12 I note Ofsted’s finding that “*the School operates highly effectively as a cohesive community where discrimination is challenged robustly and everyone has equality of opportunity*”. It is therefore not surprising that, having had this matter brought to their attention by the Appeals Panel, that the School has taken steps to remove the exception which is the focus of this referral.

13 When reviewing its admission arrangements in light of this determination and the advice it has received, the governing body should also review their general definition of a sibling. The current definition refers to “brother or sister” and it would be preferable if the School were to adopt the definition, recommended by the OSA,

which is used by Surrey County Council and many other admission authorities. This is set out below. It more clearly meets the requirement of paragraph 2.22 of the Code that who is a sibling should be clearly defined and the requirements of paragraph 2.16 of the Code not to discriminate on grounds of parents' marital status.

*"A sibling is a brother or sister (that is, another child of the same parents, whether living at the same address or not), or a half-brother or half-sister or a step-brother or step-sister, living at the same address, or foster children living at the same address."*

## **Conclusion**

14 The Admissions Appeal Panel was right to refer this matter to the Adjudicator. I have concluded that the exception to the sibling over-subscription criterion relating to children with special educational needs is unlawful as it does not meet the requirements of the Equality Act 2010. This is because it discriminates against pupils with SEN, a group of people with a protected characteristic, a disability. The exception also breaches the requirements of paragraph 1.72 of the Code as it clearly disadvantages pupils with SEN. I therefore uphold the objection and determine that the exception must be removed from the School's arrangements.

15 The School has reflected on this matter and decided to remove the exception before this determination requires them to do so. This decision is to be welcomed. The School will also wish to consider their definition of "sibling" to bring it more in line with recommended practice.

## **Determination**

16 I determine that the arrangements for Tomlinscote School and Sixth Form College, referred to me by an Admissions Appeals Panel, are unlawful. They do not comply with both the Equality Act and a mandatory requirement, paragraph 1.72, of the School Admissions Code.

The following exception to over-subscription three, siblings, "when the older sibling obtained a place *only* because he or she was in possession of a statement of special educational needs ("SEN")," should be deleted.

Date: 15 August 2011

Signed:

Adjudicator: John Simpson