

## **DETERMINATION**

**Case reference:** ADA/002147

**Objector:** an eligible parent

**Admission Authority:** Manchester City Council

**Date of decision:** 12 October 2011

### **Determination**

**In accordance with section 88H (4) of the School Standards and Framework Act 1998, I do not uphold the objection to the admission arrangements determined by Manchester City Council.**

**I determine that for admissions in September 2012 the arrangements for the secondary schools for which Manchester City Council is the admissions authority shall be as determined by the Council.**

### **The referral**

1. An objection has been referred to the Adjudicator by an eligible parent about the admission arrangements for 2012 for the secondary schools for which Manchester City Council (the Council) is the admissions authority.

### **Jurisdiction**

2. These arrangements were determined under section 88C of the School Standards and Framework Act 1998 (the Act) by the Council, which is the relevant admissions authority. The parent submitted his objections to these determined arrangements within the prescribed timescales. I am satisfied this objection has been properly referred to me in accordance with section 88H of the Act and that it falls within my jurisdiction.

### **Procedure**

3. In considering this matter I have had regard to all relevant legislation, guidance and the School Admissions Code.
4. The documents I have considered in reaching my decision include:
  - a. the objection submitted on 12 May 2011;
  - b. the Council's response to the objection submitted on 8 September (sic);

- c. the Council's booklet for parents seeking admission to schools in the area in September 2011;
- d. maps of the area identifying relevant schools.

## **Background**

- 5. The admission arrangements for secondary schools in Manchester for which the Council is the admission authority include an oversubscription criterion that gives a measure of priority to children attending primary schools maintained by the Council. This criterion comes after criteria relating to looked after children, those with special social or medical needs and siblings. The precise wording of the criterion is:

*Category 4:....children who attend a Manchester LA primary school prioritised according to the distance between their permanent home address and the school, measured in a straight line.*

- 6. Children attending a primary school not maintained by the City Council are considered in the next criterion in order of priority.

## **The Objection**

- 7. The objector argues that the arrangements are faulty for the following reasons.
  - a. This criterion unfairly and unlawfully discriminates against a particular group, contrary to paragraph 1.72 of the Code, which requires that admission arrangements must be fair and must not directly or indirectly disadvantage a child from a particular racial or social group.
  - b. The criterion is contrary to the requirements of the "Greenwich judgement" which prohibits Local Authorities from giving priority in the allocation of school places to residents of the area for which they are responsible.
  - c. The arrangements contravene Article 14 of the European Convention on Human Rights which prohibits discrimination, and enjoins that the rights and freedoms set out in the Convention shall be secured without discrimination on any ground such as sex or race.
  - d. The City Council has failed in its duty, set out in paragraphs 1.101 and 1.102 of the Code to analyse information on the intakes to the schools for which it is responsible, and to act on any information that suggests that its policies appear to be unfairly disadvantaging one group of children compared to another.
- 8. The objector illustrates the unfairness of the criterion by reference to his own family's circumstances. They live in Manchester. When their son was four, they chose to send him to a Jewish primary school located in the Borough of Stockport, less than a mile from the City boundary. The school

in question has a wide catchment area, draining children from a number of Local Authority areas. There is a Jewish primary school within the City of Manchester, but this is located inconveniently for those living in the south of the City. When they came to apply for a place in a Manchester secondary school for their son, they were unsuccessful in their application for a popular school because they were afforded lower priority than families whose children attended Manchester primary schools. Since the family's reasons for choosing a Jewish primary school for their son were religious, the objector asserts that the policy of giving priority to children attending Manchester primary schools is indirectly discriminatory and contrary to the Code and other legislation.

9. The objector draws attention to the finding of the Local Government Commissioner who commented in a decision that a fair admission system which took account of the primary schools attended by applicants for places in secondary schools "would not exclude primary schools which happen to be outside the LEA boundary."

### **The City Council's Response**

10. The Council submits that the complaint is without merit. In support of this view it makes the following principal points.
  - a. The Council's admission policy does not expressly afford priority to children who live within its administrative area. It gives priority to children attending primary schools situated in that area, regardless of their place of residence. This may have the effect of favouring children who live in the Council's administrative area, but paragraph 2.72 of the Code indicates that this is not unlawful, provided that the feeder schools have been selected on an objective and consistent basis. It is the Council's view that it has acted in an objective and consistent manner in formulating and applying its admissions policy. The arrangements are not inconsistent with the Greenwich judgement as reflected in the Code.
  - b. On the question of unlawful indirect race discrimination, it is submitted that unlawful discrimination would only arise (for the purposes of Section 19 of the Equality Act 2010) if the policy put people with a 'protected characteristic' (in this case Jewish people) at a 'particular disadvantage' compared with people who do not share that protected characteristic (i.e. non-Jewish people). It is not enough for a person simply to show that a policy has the effect of deterring them from acting in a way which they would like to act because, for example, it is a desirable way of manifesting their religious beliefs. The phrase 'particular disadvantage' connotes a 'high standard' - the policy must engage an issue of 'particular importance' within a person's religious beliefs. That does not appear to be the position in the circumstances set out in the objection. The Council believes that the policy does not put Jewish children at a 'particular disadvantage'.

- c. The objector does not suggest that the decision to send his son to a Jewish primary school was the product or manifestation of an important religious belief. He certainly does not suggest, for example, that the family's Jewish faith or culture placed any obligation or requirement that his son should be educated at a Jewish school. The objector sent his son to a Jewish primary school because it was desirable to do so. As a result any disadvantage to his son in the secondary admissions process does not constitute a 'particular disadvantage' for the purposes of Section 19 of the Equality Act 2010. There has, therefore, been no indirect discrimination. The policy is a proportionate means of obtaining a legitimate aim, to allocate school places within the Manchester area.

## **Consideration of Factors**

### *Unfair Disadvantage*

11. Oversubscription criteria serve to allocate a limited number of places to a greater number of applicants. Inevitably they operate to the disadvantage of some applicants. Such disadvantage can be said to be unfair in circumstances where a child who is a member of a particular social or racial group is denied a place at a school which he would have been offered, but for his membership of that group.
12. In this case there is no suggestion that the criterion is intended to disadvantage the children of Jewish families, but it is argued that, since Jewish families are more likely to send their children to a primary school outside the Manchester City boundary (because of the location of the only convenient Jewish primary school), the criterion indirectly disadvantages those children.
13. Families have a vast range of factors in mind when deciding which primary school to choose for their children. Religious affiliation is one such factor. There will be many families resident in Manchester who choose schools in neighbouring Authority areas for a number of other reasons; they too will be "disadvantaged" by the use of the criterion objected to. The criterion objected to disadvantages that group of families who have chosen, for whatever reason, to send their children to primary schools outside Manchester. This cannot be regarded as a "particular social or racial group".
14. Conversely there will be many Jewish families who choose to send their children to schools maintained by the Council. They might be described as being "advantaged" by the criterion in question, but they are so advantaged in the company of all the other families – of all faiths and none – whose children attend those primary schools.
15. I have concluded that the criterion in question is consistent with the requirement that admission arrangements be fair and not disadvantage – directly or indirectly – a child from a particular social or racial group.

### *Indirect Discrimination*

16. I now turn to the related but distinct matter of indirect discrimination. The Equality Act 2010 makes it unlawful for a person to apply to another person a practice or, in this case, a criterion which is relevant to a protected characteristic. The protected characteristic in this case is religion and/or race. I agree with the City Council that for a criterion to be considered discriminatory under the terms of the Equality Act, it would have to be demonstrated that it put Jewish families under a particular disadvantage, and was not a proportionate means of achieving a legitimate aim.
17. I am reinforced in this view by the judgment reached in the case of *G (by his litigation friend) v Head Teacher and Governors of St Gregory's Catholic Science College (2011) EWHC 1452 (Admin)*. This includes the following: "The words used by Parliament are 'a particular disadvantage'. The adjective 'particular' is obviously intended to indicate that what is recognised is more than a disadvantage – that would apply if a person was unable to act in a way in which he or she wished to act because, for example, it was considered to be desirable as a way of manifesting his or her beliefs. It is clear that more than choice is needed to constitute a particular disadvantage..."
18. In this case, the disadvantage which a Jewish family might experience is a function of the choice made when selecting a primary school for their child. I accept that such a choice took account of the family's religion and/or race, but as I have said above, such choices are made by all families on the basis of a range of considerations, including religious affiliation. I do not accept that Jewish families can be regarded as being at a particular disadvantage.

### *Contravention of Article 14 of the European Convention on Human Rights*

19. Article 14 of the European Convention on Human Rights prohibits discrimination, and enjoins that the rights and freedoms set out in the Convention shall be secured without discrimination on any ground such as sex or race.
20. The objector does not specify which of the rights and freedoms set out in the Convention he considers have been infringed. However, I extend my conclusions in respect of indirect discrimination to this point. If, as I have concluded, there has been no indirect discrimination on the grounds of race or religion, this Article is not engaged.

### *Greenwich Judgment*

21. I have considered the objector's view that the criterion objected to is unlawful in that it is inconsistent with the "Greenwich Judgment". The case of *R v Greenwich Borough Council ex. p. Governors of the John Ball Primary School* arose on the break-up of the Inner London Education Authority. Greenwich, one of the successor authorities, redefined the

admissions arrangements for a secondary school close to its border with Lewisham so as, amongst other things, to sever the de facto feeder school relationship that had previously existed with the nearby John Ball Primary in Lewisham. The decision reached by Greenwich Borough Council in the particular circumstances of that case was declared unlawful. However, neither the judgment nor subsequent legislation necessarily have the effect of prohibiting the use of local authority boundaries as part of a set of admission arrangements. The list of prohibited oversubscription criteria contained in paragraph 2.16 of the Code includes no reference to Local Authority boundaries. The Greenwich judgment does mean that there can be no blanket priority for the children of residents.

22. In any event, in this case, the Council's arrangements give first priority to children looked after by a local authority, second to those with health or social needs and third to siblings of children already attending the preferred school. None of these criteria relate to the place of residence of the families. Indeed, neither does the criterion objected to. It might be expected that the majority of children attending Manchester primary schools are also resident in the City, and that the majority of the City's primary age residents will be attending Manchester primary school. But there will be cases where this is not so, especially where families live near the City boundary.

23. I have concluded that, as the oversubscription criteria included in the arrangements objected to do not depend directly on the place of residence of an applicant they are not inconsistent with the Greenwich judgment.

#### *Additional Factor*

24. As mentioned above, the criterion objected to is not prohibited by paragraph 2.16 of the Code. Indeed, in a section which considers a range of commonly used and acceptable criteria the Code includes a reference (at paragraph 2.72) to oversubscription criteria for secondary schools which include a list of "named feeder schools". The Code comments that such criteria can have the benefit of promoting good curriculum and geographical links and local continuity between phases. In the arrangements objected to there is no list of named feeder schools for each of the secondary schools for which the Council is the admissions authority, but to all primary schools maintained by the Council. Whilst, to some extent, this broad approach undermines the benefits of this type of criterion identified in the Code, it cannot be argued that the criterion objected to is inconsistent with the Code.

#### *Failure to Promote Equality*

25. I have carefully considered the assertion that the Council has failed in its duty (set out in paragraphs 1.101 and 1.102 of the Code):

- a. to analyse information on the intakes to their schools to find out whether they attract applications from a wide range of families or fail to attract all sections of the local community, and

- b. to act on any information that suggests that its policies are unfairly disadvantaging one group of children compared to another.
26. The Council has chosen not to comment on the arrangements it makes to analyse information on school intakes. Whilst it is clear that they have sought to respond to concerns which have been brought to their attention in the past, including by the Local Government Commissioner, I note that the Code is clear that such analysis is something which Local Authorities “should” do. It is not one of the mandatory requirements of the Code, but the Council is reminded that, where it chooses not to follow the non-mandatory requirements of the Code, it needs to be able to justify that decision. It should also bear in mind that section 149 of the Equality Act 2010 imposes a duty on it to have regard to the elimination of discrimination.
27. As the Council is persuaded that its arrangements are fair it does not need to act to effect changes as required by paragraph 1.102. Its position would be more secure if it were able to demonstrate that it had complied with paragraph 1.101 and section 149 of the Equality Act 2010.

### **Conclusion**

28. In the light of the foregoing considerations, I have concluded that the arrangements made by Manchester City Council are consistent with the requirements of the Code and do not require amendment.

### **Determination**

29. In accordance with section 88H(4) of the School Standards and Framework Act 1998, I do not uphold the objection to the admission arrangements determined by Manchester City Council.
30. I determine that for admissions in September 2012 the arrangements for the secondary schools for which Manchester City Council is the admissions authority shall be as determined by the Council.

Dated: 12 October 2011

Signed:

Schools Adjudicator: Andrew Baxter