Office of the Schools Adjudicator

Determination

Case reference:	**ADA3776**
Objector:	**An individual**
Admission authority:	**The Mercian Trust on behalf of Queen Mary's High School, Walsall.**
Date of decision:	**11 October 2021**

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, Dr Vallely and I partially uphold the objection to the admission arrangements for September 2022 determined by the Mercian Trust on behalf of Queen Mary's High School, Walsall.

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 revise its admission arrangements within two months of the date of the determination unless an alternative timescale is specified by the adjudicators. In this case we determine that the arrangements must be revised by 31 October 2021.

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 person (the objector) about the admission arrangements (the arrangements) for Queen Mary's High School (the school) a girls' selective academy school for pupils aged 11 to 18 for September 2022. The objection is to a number of aspects of the arrangements for admission to Year 7. The local authority for the area in which the school is located is Walsall Metropolitan Borough Council. The local authority is a party to this objection. The Mercian Trust and the school are parties to the objection, as is the objector.

2. This is one of a number of objections to the admission arrangements for September 2022 for different schools referred to the Office of the Schools Adjudicator by the same objector. Dr Marisa Vallely and I have been appointed as joint adjudicators for these objections as permitted by the Education (References to Adjudicator) Regulations 1999. I have acted as the lead adjudicator for this case and have drafted this determination.

3. There are a number of aspects which are common to all objections. We are aware that the objector has made objections to other schools in previous years about these same aspects. Those objections have been determined by different adjudicators and ourselves. We have read the relevant previous determinations and taken them into account. Those determinations do not form binding precedents upon us, and we have considered each of these aspects afresh. The approach we have taken is to discuss each of the common aspects in the objections which have been made this year and agree the wording of our determinations in relation to those aspects. Some identical wording will appear in each of the determinations in relation to these common aspects.

4. Where an objection also contains aspects, which are unique to that objection, the lead adjudicator has made a determination on each of those aspects which has then been read and agreed by the other adjudicator prior to completion of the determination.

Jurisdiction

5. The terms of the academy agreement between the academy trust 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 academy trust, which is the admission authority for the school, on that basis. The objector submitted his objection to these determined arrangements on 8 April 2021. We are satisfied the objection has been properly referred to us in accordance with section 88H of the Act and it is within our jurisdiction.

6. At the time of the determination of the school's admissions arrangements and at the time the objection was made, the School Admissions Code 2014 (the 2014 Code) was in force. A revised Code came into force on 1 September 2021, which means that the 2014 Code no longer has any effect. Since the objection and the response to it were framed in terms of the 2014 Code, we shall use the references to it which have been made by the parties to the case but will indicate if the new Code differs in any respect. It is of course the revised version of the Code which is now in force.

7. The arrangements for the school as set out in this determination were determined on 20 November 2020. At that date the 2014 Code, which was then in force, provided that children previously looked after in England and then adopted or made subject to a child arrangements or special guardianship order should have equal highest priority with looked after children in school admission arrangements (subject to certain exemptions in schools with a religious character). The new Code which came into force on 1 September 2021 extended the same level of priority for looked after and previously looked after children to children who appear (to the admission authority) to have been in state care outside of England and ceased to be in state care as a result of being adopted. All admission authorities were required to vary their admission arrangements accordingly by 1 September 2021. There was no requirement for this variation to be approved by the Secretary of State and no reason for the school to send us its varied arrangements.

8. We have made our determination in this case on the basis that the admission authority will have varied its arrangements in order to comply with the new requirements set out above.

Procedure

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

10. The documents we have considered in reaching our decision include:

a. a copy of the minutes of the meeting of the academy trust at which the arrangements were determined;

b. a copy of the determined arrangements;

c. the objector's form of objection dated 8 April 2021, supporting documents and subsequent correspondence;

d. the school's response to the objection and subsequent correspondence;

e. the local authority's response to the objection;

f. judgements in the cases of Regina v Greenwich London Borough Council, Ex parte Governors of the John Ball Primary School [(1989) 88 LGR 589] referred to as "the Greenwich Judgement"; and

g. relevant previous determinations, research papers and court judgments referred to in the text.

Objection

11. There are nine aspects to this objection. We have identified the relevant paragraphs of the Code here, but not set them out. The relevant paragraphs are set out in full when we come to our detailed consideration.

1) The objector says that CEM is a disreputable and untrustworthy organisation which cannot be trusted to devise tests that produce an accurate reflection of a candidate's ability. The relevant paragraph in the Code is 1.31.

2) The objector considers it unfair that the test results are not shared with other schools and he suggests that this breaches the spirit of the Greenwich Agreement. The relevant paragraph is 14.

3) The objector states that there is no adequate tie breaker in the arrangements as required by paragraph 1.8 of the Code.

4) The objector believes that it is unfair to use the same test paper in late testing. The relevant paragraph is 1.31.

5) The objector believes that the way in which a qualifying score is established is unfair. The relevant paragraphs are 14 and 1.17.

6) The objector believes it is unfair to age standardise test scores. The relevant paragraphs are 1.31 and 14.

7) The objector considers it unfair to give priority in the oversubscription criteria to 30 per cent of the intake to pupils in receipt of pupil premium. The relevant paragraph is 1.8.

8) The objector considers it unlawful to give priority to those children who attend Walsall primary schools. The relevant paragraph is 1.15.

9) The objector says that it is not reasonable to compare different tests as suggested in the admission arrangements under late applications. The relevant paragraph is 1.8.

Background

12. Queen Mary's High School is a girls' grammar school with academy status and is part of the Mercian Trust. It caters for pupils aged 11 to 18 and is located in Walsall. The school was rated by Ofsted as Outstanding in March 2007. The school has a Published Admission Number (PAN) of 150 for admissions to Year 7. It is oversubscribed.

13. As we have said, the objection relates to the admission arrangements for Year 7. The arrangements provide that all candidates are required to sit an Entrance Test. Parents are told their child's score and whether she has met the qualifying standard for entry to the school. The arrangements say that the parent of a child who has met the qualifying score may express a preference for the school through the common applications process. Only candidates who meet the qualifying score in the Entrance Test will be eligible to be considered for admission to the school. The qualifying score is not a pre-defined pass mark, but reflects a candidate's position in the rank order of standardised scores in the Entrance Test.

14. Where applications from candidates who have met the qualifying score exceed the number of places available, the following oversubscription criteria will be applied:

- Any looked after or previously looked after child who has met the required standard.

- Pupils in receipt of pupil premium up to a maximum of 30 per cent of places.

- Rank order of test score.

If more than one pupil achieves the same priority in the third criterion (rank order of test score) then the candidate with the lowest number in rank order will be given the place.

Consideration of Case

15. We have divided our consideration of the case into nine headings, each of which comprises one aspect of the objection. As we have said, the objector has made objections on the same points for a number of schools. Our consideration of the points which have been raised in a number of cases is generic, and so the text will be largely the same in the determinations. It may not be identical as all of the schools have different arrangements.

CEM as a reputable organisation

16. The objector has submitted a substantial amount of evidence which he suggests indicates that the Centre for Evaluation and Monitoring (CEM)), which designs the 11 plus tests used by the school, is not a reputable organisation. It follows from this that, in the objector's view, the tests designed by CEM are not fit for purpose. The objector also argues that whatever is said by CEM about the re-use of the same tests for late applicants and late sitters and age standardisation is not to be trusted. He also claims that CEM hides behind the protection of its commercial interests in order not to disclose information about the nature of its 11 plus tests and the testing process which might enable them to be properly scrutinised. It is important to the objector that an injunction was secured against him to prevent publication of information about the CEM 11 plus tests which we believe was provided to him by children who had taken the tests, whereas he considers that other individuals and organisations have not been prevented from publishing similar information.

17. We have previously seen and considered the relevance of the decision in the employment tribunal case concerning Susan Stothard and the judgements in the various court cases which the objector has been involved in. We have also previously considered copies of contributions to an 11 plus exams online forum and correspondence relating to online postings from 2011 to 2016 by various contributors. There is an article from the Times Educational Supplement forum which refers to an article from the Guardian in which CEM withdraws a previous claim that its 11 plus tests assess "natural ability" (September 2016) and correspondence with Warwickshire County Council. We have, of course, re-read all of this information very carefully because we understand its importance and significance to the objector, but where nothing has been submitted which has altered our view on a particular issue, we have tended largely to repeat what we said last year in respect of the issue in question.

18. In response to the objection, the solicitor acting on behalf of the trust said that it was not able to comment on the reputation and reliability of CEM and suggested that any concerns to CEM should be raised with them directly.

19. In its response the local authority made no comment on this aspect of the objection.

20. The Code is clear that it is for an admission authority to formulate its admission arrangements and the choice of 11 plus test is part of that. Looking at grammar schools across the country they fall into three categories in terms of who produces and marks the tests. Some grammar school produce their own test, or do so in conjunction with other schools, some grammar schools use the tests produced by GL Education and many others use CEM. GL Education and CEM are the main providers of tests for assessment which lead to grammar school place allocation across grammar schools in England.

21. CEM was originally part of Newcastle and then Durham universities and in June 2019 CEM was acquired by Cambridge Assessment and Cambridge University Press. CEM produces a range of assessment tools for schools and pupils of all ages and conducts research in collaboration with the universities concerning the assessment of pupils. Its materials are widely used across schools and colleges in England.

22. It is clear that the trust is satisfied that the tests provided by CEM appropriately identify those pupils who are capable of succeeding in a grammar school environment. It is also satisfied that the marking, validation, standardisation and reporting of the results of

these tests is commensurate with the needs of the school. As CEM is a commercial company the school pays fees to CEM to provide these tests. If the trust was not satisfied with the tests or their marking, then they could decide to use another company or produce their own tests. This they have not done because they are content to pay the fees to CEM and are confident that the process allows them to identify their pupils accurately.

23. Paragraph 1.31 of the Code says that "Tests for all forms of selection must be clear, objective and give an accurate reflection of the child's ability or aptitude, irrespective of sex, race or disability. It is for the admission authority to decide the content of the test, providing that the test is a true test of aptitude or ability". It is entirely up to schools and other admission authorities to decide who writes and marks their 11 plus tests and this trust has decided that CEM is an appropriate company to use. It is not within our jurisdiction to agree or disagree that CEM is a reputable organisation - our jurisdiction relates to whether the testing arrangements for this school comply with paragraph 1.31 of the Code. It is clear that this trust, and many other similar trusts and schools are content that the service provided by CEM fulfils the requirements of paragraph 1.31 and that the outcomes are those which the trust requires. We have seen no evidence which persuades us that the tests do not conform to the Code at paragraph 1.31 and we do not therefore uphold this element of the objection. We think it is important that we emphasise that we have seen nothing to make us doubt the suitability of the tests provided by CEM.

Sharing of test results

24. The objector considers it unfair that the test results are not shared with other schools and he suggests that this breaches the spirit of the Greenwich Agreement.

25. In its response, the solicitor acting on behalf of the trust say "The determined admission arrangements for the school deal with the admission processes for that school only and therefore it would not be reasonable to share the scores with other admission authorities which will have their own processes to follow. There is no provision within the School Admissions Code to require sharing. There is no breach of the Greenwich decision in the operation of the school's admission arrangements. Any person, regardless of their home residence, can apply for a place at the school and be entered in the testing arrangements. The Objector's comments would appear to be an attempt to extend the reach of that decision without there being any legal basis to do so."

26. The local authority made no comment on this element of the objection.

27. Paragraph 15a of the Code says that admission arrangements are determined by admission authorities and paragraph 1.1 says that these authorities must act in accordance with the Code and the law. We agree with the trust that there is no requirement in the Code for schools to share test results. As all the schools arrange the tests on the same day, in practice pupils who attend the test for this school will not be accepted into any of the other schools in the consortium of five schools which use the same tests because they will not have sat the test at any of those schools. This, in effect, reduces the number of schools for which the parents can express a preference. The objector says that these children have a "zero chance of a place" at any one of the other schools and we agree with this statement. The trust is confident that they will receive sufficient numbers of applications from pupils who have achieved the qualifying score in the test sat at the school to establish a viable year group. There is nothing in the Code or the law which prevents this action.

28. The relevant paragraph of the Code is 14 which states that: “In drawing up their admission arrangements, admission authorities must ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective…”. The objector considers that this practice “breaches the spirit of the Greenwich judgment” and is unreasonable. We disagree. The principle established in this judgment is that [what is now] section 86 of the Act imposes the same obligation upon local authorities to make arrangements for enabling the parent of a child to express a preference as to the school at which he/she wishes education to be provided for the child and to comply with such preference regardless of whether that parent lives in the area of the authority or not. As regards applications to the school, the parent of any girl in the relevant age group may apply for their daughter to be tested. Applicants are not precluded from sitting the school’s selection tests or applying for a place at the school solely by virtue of the fact that they do not live in the Walsall area, therefore the judgment has no relevance to the point being made by the objector. We therefore do not uphold this element of the objection.

Absence of a final tie breaker

29. The objector says that the tie breaker present in the admission arrangements is inadequate and this is contrary to paragraph 1.8 of the Code which states that “Admission arrangements **must** include an effective, clear and fair tie-breaker to decide between two applications that cannot otherwise be separated”.

30. The local authority made no comment on this element of the objection. The solicitor acting on behalf of the trust said, that the arrangements state that in the event of a tie, looked after children and previously looked after children or pupils attracting pupil premium will be given priority. The solicitor goes on to say that the arrangements also state that where candidates are equal on the order of merit, the positions in the three skill areas of the Test will be added together and the candidate(s) with the lowest number will be offered the place(s). The solicitor says that these arrangements are in line with the Code.

31. The arrangements have a list of oversubscription criteria as outlined in paragraph 11 above. The only reference to a tie breaker is in the last section of the oversubscription criteria. The oversubscription criteria which give priority to looked after and previously looked after children and pupils attracting pupil premium are not a tie breaker. They are oversubscription criteria. The arrangements refer to a tie breaker and say, “If one or more candidates satisfy the admissions criteria and are equal on the order of merit, the positions in the three skills areas of the test will be added together and the candidate(s) with the lowest number will be offered the place(s).”

32. Although unlikely, there may be occasions where two or more applicants have the same qualifying score and the same rank order in the three tests or the sum of the three tests and it would be impossible to separate them by this means. In order to comply with the Code, the school is required to amend the arrangements so that they include a suitable tie breaker which would separate such applicants. We uphold this element of the objection.

Re-use of the same selection tests for late sitters and late applicants

33. In a number of the objections he has made this year, the objector has claimed that late sitters are advantaged unfairly. We considered objections on the same point last year in relation to twelve other schools, and the point has also been considered by other adjudicators in previous years. The objector has again suggested that the adjudicator

determining these objections is obliged to answer a set of questions. The joint adjudicators have once again considered these questions carefully; we have considered the additional submissions made and information provided by the objector in relation to the objections he has made this year; we have read previous determinations on this issue (including our own); and we have looked at relevant court and tribunal decisions.

34. The local authority made no comment on this aspect of the objection. The solicitor acting on behalf of the school said "As part of the school's admission arrangements, it is clear that arrangements will be made for candidates who have applied late to be tested though not necessarily on the same papers as were taken on the day of the Test. Therefore, alternative papers may be used for late testing. The Objector alleges that reuse of the same tests is not compliant with the Schools Admission Code, however paragraph 1.31 states that it is for the admission authority to decide the content of the test, providing that the test is a true test of aptitude or ability. Therefore, as long as the papers used test the applicant's aptitude or ability, this will be sufficient."

35. The objector has re-submitted much the same evidence in relation to this objection as he produced last year and raises similar arguments. His view is that it is not sufficient for admission authorities to confirm to us that they have seen no evidence that exam candidates pass on information about the content of the tests they have just taken. How would they know whether this is happening or not? The objector suggests various alternatives to using the same tests for late applicants and late sitters and claims that it must be possible to compare the results of two different tests of the same type, albeit that The Centre for Evaluation and Monitoring (CEM) (the selection test providers) claim that it is not possible to compare the results of different tests. CEM (he alleges) is a disreputable organisation and cannot be trusted. The objector's argument centres on the fact that a judge granted an injunction against him to prevent him from publishing information about test content on his website; evidence relating to an information exchange about the content of selection tests for the Birmingham grammar schools; and evidence which he claims discredits CEM. The objector did not make any objections to the arrangements of any selective school about late testing procedures prior to being prevented by injunction from publishing information on his website relating to CEM selection tests which were still in use. This information was gleaned from his nephew immediately after having sat the selection tests.

36. Why (the objector asks) would a court grant an injunction to prevent him publishing information unless that information was capable of providing an advantage? If he is capable of gathering and publishing information which compromises the integrity of the test results, why (he asks) would we not believe that others do the same? If we, as adjudicators, accept that the tests are capable of being compromised (which he says we must accept as a fact), how can we uphold that the test procedures in place operate fairly and produce a true assessment of ability? Even if the first test can produce such an assessment, the procedures used for late sitters render the overall outcome across the whole of the cohort an assessment which cannot be relied upon to be a true assessment. If it cannot be guaranteed that it is possible to keep thousands of children quiet, the integrity of the tests must always be in question. According to the objector, the problem can be fixed easily by using different tests, not allowing late testing or scoring late sitters as zero. The objector asks why do admission authorities not use identical tests year-on-year if there is no risk of the results being compromised in the way he suggests is widespread practice?

37. All of the schools objected to on the same point this year use verbal and non-verbal reasoning 11 plus tests (VR and NVR tests) designed by CEM. Some use exactly the same set of tests for the first round of testing as they do for all subsequent testing rounds for entry to Year 7, and some use a different set of tests of the same type for the purposes of late testing. By this we mean a different set of 11 plus VR and NVR tests designed by CEM. Schools using the former practice argue that it is unfair to use a different test, albeit a test of the same type because it is necessary to compare like with like in order to ensure parity of results and therefore fairness. CEM does not publish its test papers, and those administering the tests are required to hold them confidentially and only to disclose the papers to candidates at the time the tests are taken.

38. The objector's view is that re-use of the same tests for applicants seeking admission to selective schools is not compliant with the Code because children recall the content of the tests and may pass it on to late sitters. When we considered this question last year, we adopted the findings upheld by the Court of Appeal in injunction proceedings involving the objector. We re-iterate these findings below and re-adopt them.

> "It is doubtless the case that some children who have sat a selection test will tell their parents, and possibly some others, something about it, but there is no good reason to think that any, let alone, much information has become generally known or available…;
>
> Any reasonable person knows that unauthorised disclosure of the content of an examination or test yet to be taken in a way that may come to the attention of candidates about to sit that examination risks undermining the purpose and integrity of the examination or test, and that such information is therefore confidential…;
>
> There is a difference between a child telling a parent and a parent telling another parent about test content, and the posting of such material on a public website;
>
> If all, or part of test content is disclosed, there is at least a risk that the integrity of the tests and public confidence in them would be compromised…;
>
> Candidates sitting the tests and their parents are under a duty of confidentiality, so that if the parent of a child who had recently taken the selection tests was to publish the questions on a website knowing that other children are about to take the same test, the parent could be injuncted to take down the content of the website…"

39. Based upon evidence given in the course of the court proceedings (which included reference to information in emails from CEM) we accept that any information passed on to candidates sitting late tests is unlikely to make a difference, however a difference of one raw score mark can equate to up to six standardised marks, which could alter a candidate's ranking significantly. We also accept that there is evidence that information is indeed passed on by some candidates, for example in the form of a screenshot relating to dialogue about the CEM 11 plus tests for the King Edward Consortium Schools taken during the period 2011 – 2016.

40. The Administrative Court and Court of Appeal did not dispute the evidence given by Warwickshire County Council in the injunction proceedings against the objector that it was legitimate for schools to use the same tests for late applicants in order to ensure consistency of standards and to avoid the additional cost of commissioning separate tests

for each occasion. If the courts had not accepted this argument, there would have been no reason to grant or uphold an injunction, the courts could have simply concluded that an injunction was unnecessary because different tests could be used. CEM has said that it would only be able to compare candidates' performance to provide an ordered age standardised score if the same test is taken. We have no reason to doubt this statement. Additionally, our view is that, if different tests were used for late sitters, this would leave admission authorities vulnerable to arguments of unfairness which simply cannot arise where identical tests are used for late sitters. In making these observations, however, we are not suggesting that use of different tests of the same type for late sitters would necessarily be unfair or unreasonable. There are advantages and disadvantages to each approach, and it is for admission authorities to determine which works best for their schools. The objector made serious allegations last year about candidates being paid by tutors to pass on questions and answers and wearing hidden cameras. These allegations were unsubstantiated and therefore we could not accept them.

41. The objector has submitted additional evidence in one of his objections, which we have taken to be relevant to all of them. This is an extract from a publication by the London Borough of Redbridge which states:

- We are aware each year that concerns are raised about candidates telling their tutors the questions in order for them to give those sitting the late tests an advantage.

- Before the tests begin we ensure that all candidates are reminded not to discuss the tests with others so that they do not reveal the questions. They are reminded that this may give an advantage to other children, reduce their own chances of being admitted to a grammar school and could result in them being disqualified from the test.

- We do not assume that children cannot recall some details of the selection tests, hence our clear statement to parents in writing and to candidates verbally before the test start.

- We make these statements to inform both the candidates and their parents directly in advance of the possible consequences, both legal and personal, of disclosing any information. Parents have been advised of the following; the 11 plus test is subject to copyright; its content must not be disclosed to any third-party including tutors/coaches. The test is for each candidate who must concentrate on their own test performance. Breaches of copyright, (such as answers being given to one or more children or to a third party) will be pursued vigorously by the examination board's legal department and the child will be disqualified. …

42. Redbridge has two grammar schools. The late testing arrangements for one of these schools, Ilford County High School, were objected to on 28 March 2019 and 14 April 2020 by this objector. He refers to this publication as evidence that even the London Borough of Redbridge acknowledges that children recall content. The publication refers to the fact that all candidates are reminded not to discuss the tests. Our understanding is that all examination boards give clear instructions to invigilators. It is in the interests of both CEM and admission authorities to protect the content of the 11 plus tests which are in use. We would be surprised if similar warnings and admonitions are not given as standard practice.

Certainly, the familiarisation papers we have seen contain a sternly worded copyright notice. The admission authority has confirmed that it has seen no evidence of the tests for the school being compromised in the manner suggested by the objector. The admission authority has also said that the points made by the objector have not caused them to think that the tests are not a true test of ability, or that the procedure for late testing could result in an outcome which is unfair nor objective.

43. Relevant paragraphs of the Code are 1.31 and 14. Turning first to paragraph 1.31, this says that: "Tests for all forms of selection **must** be clear, objective, and give an accurate reflection of the child's ability or aptitude, irrespective of sex, race, or disability. It is for the admission authority to decide the content of the test, providing that the test is a true test of aptitude or ability."

44. Our view is that what paragraph 1.31 requires is that **the test itself** must be clear, objective and give an accurate reflection of the child's ability (in the case of selective schools). So, in order to comply with paragraph 1.31, the particular test used by the school must fulfil these requirements. There is no reference here to **the procedures for taking the tests,** (requirements in relation to procedures fall under paragraph 14, as we will explain later). Paragraph 1.31 is a requirement that the selection test must be fit for purpose. The objector suggests several reasons why CEM 11 plus tests are not fit for purpose which we have considered as separate aspects to the objection.

45. Looking at the second sentence of paragraph 1.31, references to "the test" are, in our view, suggestive that what is envisaged is one set of tests to be used for all applicants in a particular year group. Although this wording is not conclusive, it is more difficult to argue that the form of selection used produces an objective reflection of ability where different tests are taken by different applicants. CEM's evidence supports this. The objector claims that only a corrupt or incompetent adjudicator would accept such evidence from CEM, as he considers CEM to be dishonest. We deal with the objector's claims against CEM elsewhere. We are aware that CEM refuses to disclose information about its selection tests in order to protect its commercial interests, but it cannot follow automatically that CEM do this because they are dishonest. What the objector is referring to (namely a child who has taken the tests passing on test questions which are made available to others taking the same test at a later date) is what we would call cheating. In any examination or test where a child passes on a test question, and another child uses that knowledge to his/her advantage, that would be cheating. This is very different to preparation or coaching. Coaching, in the context of VR and NVR tests, is providing help with the skills and techniques needed to do well in those particular types of tests. Giving people the questions before they take the test in the context of these particular tests is neither preparation nor coaching.

46. The objector argues that the results of the tests taken by late sitters are not an accurate reflection of their ability because late sitters can cheat, and therefore the test is not fit for purpose. We remain of the view that there is the possibility of cheating in any examination – GCSEs, A Levels etcetera (pupils smuggling in notes etcetera). The possibility of cheating does not apply exclusively to late testing of 11 plus candidates. Forms of cheating other than candidates passing on questions to other candidates who take the test at a later date are possible. For example, a rogue employee at CEM or an A Level examining board could give away the questions before the test or examination is taken. The person at the school or local authority who is responsible for keeping the CEM 11 plus tests confidential could give the questions to candidates in the first round of testing

before they sit the tests. The fact that candidates may cheat does not render the test itself unclear, not objective, or not a true reflection of ability. Cheating is always a possibility.

47. We emphasise that what we are considering here is whether the selection test being used for **this school** in 2021 gives an accurate reflection of a candidate's ability. In order that we can ensure that we have explained our role with absolute clarity, we considered the hypothetical possibility that we had evidence which we considered to be proof that there is a systemic practice of cheating in place which is subverting the test scores for late applications to this school. Our view is that, even if we had such proof, which we do not, this would not mean that **the test itself** does not conform to paragraph 1.31.

48. What the objector is referring to is that the **practice** of using exactly the same set of tests more than once may lend itself to an abuse. Put simply, if the school used a different test of the same type for late sitters, people could not abuse the process in the way he suggests is a possibility (although the practice could lead to arguments or complaints about lack of parity and objectivity). Certainly, if a different 11 plus test was used for late sitters, what we have described as cheating would not be possible in the way the objector describes. However, we need to make clear here that it is not our function to suggest that one method or process might be "better" than another, and we cannot require an admission authority to adopt a particular form of test or procedure for conducting a test. Our role is confined to determining whether the admission arrangements comply with the Code.

49. As the objector has rightly said, paragraph 14 of the Code is relevant. What this says is that admission authorities must ensure that the practices used to decide the allocation of school places are fair and objective. Our view is that there is a strong argument that in order for the testing **practice** to be considered objective, all applicants must take the same set of tests where this is reasonably practicable. It is not for us to say whether a practice that is different to the one used by the school would be more or less objective. We are not able to comment upon whether or not it can be guaranteed that an applicant who scores 121 in one set of CEM VR and NVR 11 plus tests is of exactly the same ability as an applicant who scores 121 in a different set of CEM VR and NVR 11 plus tests. Our view is that a practice of having all applicants take the same test, albeit a few months apart, is an objective practice for deciding the allocation of places.

50. Finally, we come to the crux of the objection, which is the assertion that the practice of using the same set of tests more than once creates an unfairness. The unfairness is said to arise because this practice allows for the possibility of cheating. As we have said, cheating is always a possibility in any set of tests or examinations. Our view is that the risk of cheating in the way the objector has described producing an advantage to the late sitter is lower in VR and NVR tests than in other examinations. An applicant taking A Level History will be given four questions and must answer three of them. The applicant is likely to remember all of the questions after having taken the examination because there are only four of them. A late sitter with advance notice of the questions could be helped considerably by knowing the questions before taking the examination.

51. Applicants taking CEM VR and NVR tests answer some 250 questions in total. If a person passed on one correct question and answer, this could mean that a late sitter might achieve the pass mark when he/she would not otherwise have achieved it, or that the late sitter might achieve a standardised mark which is up to six marks higher than the mark which he/she would have achieved. But even if this were the case, (and our view remains that the chances of both of these circumstances occurring are remote), this would still not

guarantee the offer of a place because the oversubscription criteria would then need to be applied. In order to pass on any advantage to the late sitter, a child of 10 would need to remember questions exactly and know which one of four multiple choice options is the correct answer. The child would also need to be willing to do something which he or she would surely know is wrong; and to pass on an advantage to another child possibly to his or her own detriment since the tests are a competition and the tests for late sitters are taken before any child knows whether he or she has obtained a place at the school. The person receiving the answer would need to use that information knowing this to be cheating.

52. The evidence produced by the objector indicates that there is a forum which passed on information provided by candidates who had taken the Birmingham Consortium 11 plus tests. There is evidence that some test questions were passed on, but no evidence that these were the correct questions. No answers to questions were conveyed to the parents of any candidates who sat the same tests at a later date. The postings took place after the relevant tests had ceased to be used; and the latest post was in 2016. We have not seen any evidence that the forum is continuing to pass on information obtained from candidates who have sat the Birmingham Consortium Schools tests, or evidence that any similar exchanges of information are in operation for this school. We have not been provided with any evidence that candidates sit the tests for this school wearing hidden cameras or are likely to do so for the school's 2021 admissions tests. The objector suggests that a clearly intelligent child would not care about passing on test content to a friend because he is confident of getting a place. We do not see how any candidate can be confident of getting a place until a place is offered, and our view is that the sort of child envisaged here by the objector (i.e. a child who consistently achieves very high scores in practice tests) would be intelligent enough to know the difference between right and wrong. As the objector knows from his own experience, a tutor who encourages a child to sit selection tests for schools for which he has no intention of applying in order to pass on information about test content to that tutor, risks becoming the subject of successful injunction proceedings if he or she makes the information known to others. The evidence which the objector has supplied us about the Warwickshire injunction proceedings and the statement published by the London Borough of Redbridge indicate that admission authorities go to great lengths to protect the integrity of the tests and makes us confident of their ability and willingness to do so.

53. We do not consider that general allegations of cheating and evidence of exchanges of information about the content of tests after they have ceased to be used provide any basis upon which we can conclude that the practice of re-using the same tests for late sitters for admission to this school in September 2022 is compromised. In the absence of any such evidence, our conclusion is that re-use of the same tests for late sitters does not operate to confer an unfair advantage upon them. Our view is that it is reasonable to operate this practice in order to save cost and create parity of results, as recognised by the courts. For these reasons we do not uphold this aspect of the objection.

54. The objector submitted additional evidence in the form of CEM's standard terms and conditions. There are clauses in the contract which say that CEM accepts no liability where children discuss the content of tests, and that CEM has a bank of questions which it re-uses. We were aware that CEM re-uses bank questions, and we would have expected that CEM would insert an ouster clause along these lines in contracts. We have not circulated this information to the parties because it was submitted after the deadline given for responses and we consider it places an unfair burden on schools to keep circulating information to them in addition to the copious amounts of information we have already sent

to them. We are not permitted to take information which we have not made all parties aware of. We did read the contract and it makes no difference to our conclusions on this point.

Qualifying Score

55. The objector queries the way in which the qualifying score is established. He says that “all pass marks should be set before a test is set and represent a known academic standard”.

56. The local authority made no comment on this element of the objection. In its response, the solicitor acting on behalf of the trust said that ”the school was satisfied that the manner in which the qualifying score is established is perfectly fair. The governors look at the range of scores from the previous year and compare it to the range of scores from the current year. The minimum qualifying score is set to ensure that the school recruits the necessary number of pupil premium students that it is obliged to following its successful application to the Selective Schools Expansion Fund” (SSEF).

57. The admission arrangements state that the qualifying score will be decided by the governors once they have received the order of merit.

58. The objector considers that the methodology for setting the qualifying standard (pass mark) for the tests is unclear. Accordingly, his view is that this is not a reasonable method of selection. The relevant requirements in the Code are in paragraphs 14 and 1.17. We have set these paragraphs out below. For the avoidance of doubt, we have not considered paragraph 1.31 in this section because our view, as we will explain in more detail later, is that paragraph 1.31 relates to whether the type of testing in operation, (in this case Verbal and Non-Verbal Reasoning, Maths and Comprehension tests designed by CEM provides an accurate reflection of a child’s ability.

59. Paragraph 14 states that: “In drawing up their admission arrangements, admission authorities **must** ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective. Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated.” Paragraph 1.17 states that: “All selective schools **must** publish the entry requirements for a selective place and the process for such selection.”

60. The first question for us to consider is how much information the school’s admission arrangements must contain in order to be sufficiently clear. Parents need to know which steps they must take and by when, and what their child needs to do in order to be eligible for a place at the school. This information needs to be set out so that parents can look at the arrangements and understand easily how places will be allocated. Our view is that the information can either be in the arrangements themselves or signposted clearly in the arrangements with further detail accessible via a one-click link.

61. Our view is that in order for the arrangements to be sufficiently clear, where there is a pre-established pass mark, the arrangements must state what that pass mark is. Where the pass mark is not a pre-established one, the arrangements must say this. They must also say when the pass mark will be set, and when parents will be told whether their child has reached the pass mark. There is no requirement that the pass mark must be set using a particular methodology or that it be set by a specified body. However, the arrangements must be reasonable and operate fairly; therefore, we consider that the pass mark must be

set by a competent person or body. There is no requirement that admission arrangements must set out how the pass mark is set, but if they do this the methodology must be described clearly.

62. Our conclusion on the question of clarity is that, since the entry requirements are set out clearly in the arrangements, this is sufficient to conform to the requirements in paragraphs 1.17 and 14 of the Code.

63. In terms of whether the school's qualifying standard is a reasonable one the school has explained the rationale and methodology for setting the qualifying score. As a designated grammar school, the school is permitted to select its entire intake on the basis of high academic ability and does not have to fill all of its places if applicants have not reached the required standard. This standard is defined by the "qualifying score" and is set by the governing board after applicants have taken the test and it has been marked and standardised scores have been sent to the school. It is the aim of the school's admission policy to guarantee places at the school to pupil premium applicants achieving the qualifying score, in addition to offering places to other high-scoring applicants. To achieve this, the trust analyses the order of merit (the test results) with reference to previous admission patterns and set the "qualifying score" at a level they anticipate will achieve the aims of the admission policy.

64. The trust considers that the setting of its qualifying score is a rational and fair process. We agree. From the CEM familiarisation papers and other evidence we have seen, it is apparent that the same areas are tested each year with similar types of questions; the trust has made clear that the appropriate academic standard is set with reference to previous scores achieved, which is reasonable; the school is not seeking to establish that the girls who are admitted are of exactly the same academic ability as those admitted in the previous year (in order to do this the school would need to use identical tests each year and have an identical pre-set pass mark); it is seeking to ensure that places at the school are filled by applicants who will be capable of coping in the academic environment of this particular school.

65. The objector considers that an appropriate grammar school standard should be set, and those applicants who do not meet the standard should not be admitted. No special arrangements should be made for particular applicants, such as those who are younger or eligible for the pupil premium. All should be judged exclusively on the score they achieve on the day. He considers that the purpose of grammar schools is to serve the most academically able applicants. He points out that paragraph 1.18 of the Code allows designated grammar schools to select their entire intake on the basis of high academic ability. They do not have to fill all of their places if applicants have not reached the required standard.

66. However, many grammar schools choose not to have admission arrangements which are based solely on achieving the highest scores in a selection test, and this is provided for in the primary legislation governing admissions and explicitly permissible under the Code. Indeed, grammar schools which are academies are required to provide education for pupils who are drawn wholly or mainly from the area in which the school is situated, and for this and other reasons these schools frequently employ oversubscription criteria based upon catchment areas and proximity to the school. Where a grammar school does not admit wholly on the basis of ability, it must, again by virtue of the Code, give priority to applicants who are looked after or previously looked after who reach the required academic

standard. Grammar schools are being also actively encouraged by the Government to offer priority in their arrangements to disadvantaged pupils. The effect of this is that applicants who are not looked after or disadvantaged, or who do not live reasonably close to the school, may not be offered places even though their scores are higher than those who are offered places. It is not for us to tell grammar school admission authorities that they should admit wholly on the basis of rank order performance in selection tests; whether or not they should have other oversubscription criteria; whether they must set the pass mark before or after the tests; who must set it; or what must be taken into account in setting it. It is for us to reach a conclusion about whether the arrangements which are in place operate fairly and reasonably.

67. A pre-set pass mark may not have the effect of establishing year-on-year consistency of ability where it operates alongside oversubscription criteria because the offer of a place will not be wholly dependent upon the test score. A pass mark which is set annually before the tests are undertaken will be set with reference to previous cohorts of applicants, a pass mark set after the results of the tests are known will inevitably be set only with reference to the candidates who have taken the tests. In our view both are reasonable, and neither result in an unfair outcome. The objective of the arrangements for this school is NOT, as the objector suggests it should be, to admit applicants of the highest level of ability, it is to admit looked after children, previously looked after children, applicants eligible for the pupil premium and other children who meet, or exceed, a minimum required standard of academic ability. This is a permissible and lawful objective.

68. From our experience in previous cases, we know that various factors are taken into account in setting the qualifying standard where it is set after the test scores are known. Each year the number of applicants sitting the tests and the ability of those applicants will be slightly different, not least as the number of children of the relevant age group in any part of the country will be different from year to year. It is also possible that – notwithstanding the extensive work undertaken to benchmark the tests against those used, their ability and the level of difficulty of the tests will be different, and these factors will affect the level at which the qualifying score is set. The aim, as the objector says, is to fill the school to published admission number (PAN), which is a legitimate aim. Grammar schools are able to have vacant places where there are insufficient applicants who meet the required standard, but most choose not to do so. Each pupil brings an allocated amount of funding, which schools need. We also know from our experience that schools regularly fall into budget deficit where they are unable to fill to PAN. The factors taken into account in setting the qualifying standard are the number of applicants, the range of test scores, the oversubscription criteria and the standard of education at the school. The objective is to ensure that enough offers will be accepted; that those who accept an offer for a place at the school will be able to thrive in the particular academic environment at that school; and that the school will maintain, or improve, its level of achievement in public examinations. The process is complicated by the fact that parental preference is unpredictable, and so the qualifying score will need to be set at a level where more applicants achieve the qualifying score than there are places available. However, where it is set too low, there will be a large number of dissatisfied parents whose child has achieved the qualifying score but not been offered a place. In our view, setting the qualifying score is not an enviable task, and is one that must be undertaken by persons who have detailed knowledge of the school, the patterns of offers and acceptance in previous years and most importantly the day-to-day operation of the school itself.

69. For some schools, the pass mark is set by the governing board on recommendation of the head teacher. For other schools, the pass mark is set by a committee comprised of persons with knowledge of the operation of the schools in question and their academic standards. For this school it is set by the governing board. Our view is that all these practices are reasonable. Many of the schools which are the subjects of these objections have proven track records of academic excellence and have been rated as “Outstanding” by Ofsted. The schools themselves and persons with knowledge of the schools are best qualified to determine who should set their pass marks and how they should be set.

70. As mentioned above, the qualifying score for this school is set by the governing board. This appears to us to be a fair and objective method. For these reasons, we do not uphold this aspect of the objection.

Age standardisation of test scores

71. The objector claims that the use of age standardisation in 11 plus tests is based upon the claim that different aged children in the same school year (who are taught the same) score different marks as they are younger. He claims that this conclusion is based upon children who have had no preparation for 11 plus tests. He also claims that age standardisation is a manipulation using an algorithm which is kept secret by CEM and therefore not open to public scrutiny. CEM (he says) simply cannot be trusted. He re-iterates that SATs papers, GCSEs and A levels are not age standardised. He claims that most children who sit 11 plus tests prepare. Many are tutored. Some are prepared in outreach programmes free of charge. Preparation (he says) makes the age standardisation null and void and there is no need for it, and it provides an unfair advantage to younger children. According to the objector, age standardisation is not accurate but merely guesswork. In a nutshell, the argument is that only the child’s raw scores in the tests can provide an accurate reflection of ability

> “CEM claim that a child should be able to answer questions from what is learnt in year 5. But all year 5 children learn the same irrespective of age. Children are not streamed by age, but by raw ability in a class. This demonstrates within a year group age is irrelevant to performance. There is no evidence younger year 5 children score lower marks than older year 5 children, if taught the same content. If you teach 10-year-old percentages and the same to a 9-year-old or 11-year-old, they will understand the concept and can answer questions using a method. All 9,10-, or 11-year-old children can learn the method so age is not an advantage. It does not follow an 11-year-old will score higher than a 10-year-old. Teaching a 10-year-old and 16-year-old multiplication tables will not result in a 16-year-old scoring higher marks in a test of tables. Again, age is irrelevant. Since schools do not teach NVR, all children start at the same point. Practice makes perfect, so again age standardisation is wholly unnecessary. An older child has no advantage”.

72. The objector submitted two papers in later correspondence in this case. First a paper produced by the National Foundation for Educational Research (NFER) and written by Schagen in 1990. This paper considers different statistical methods of age standardisation. The paper concludes that some methods are more secure than others but, in our opinion, (and contrary to the view expressed by the objector) it does not discredit the use of the age standardisation process.

73. Secondly, the objector submitted a Freedom of Information (FOI) request to a school in Cheshire. The school's response is a table of pupils' months of birth by year group. The objector attaches a paper showing some statistical analysis of these data and also the same data shown on a bar chart. He then compares these data with figures for months of birth in the 27 states of the European Union from 2000 to 2009. The charts show that the relatively small sample from the school does not match the huge data set from the European Union in terms of the distribution of births across months of the year. We do not believe that these papers have any relevance to the issue of the use of age standardisation. Age standardisation is not a method which sets out to ensure that an equal number of children by month of birth are admitted to a particular school or that the number admitted reflects the proportion of children born in that month. How many children in a year group were born in a particular month is not relevant to the standardisation process. The process makes allowance for those pupils who are born later in the school year and the number or proportion of these children will differ from year to year and school to school. The allowance is applied through the age standardisation process to individual children not to the cohort as a whole.

74. The local authority made no comment on this aspect of the objection. The solicitor acting on behalf of the school responded that the school believes it is perfectly fair and proper to age standardise test scores and that this is in line with paragraph 1.31 of the Code. The response goes on to say that "standardisation of scores allows a proper assessment of a child's ability and/or aptitude across any year group. This standardisation takes away the impact of being born at a particular time of year and any advantage that may have been achieved for a child born in September as against one born the following June. This is no prohibition on this approach set out in the Code and it would comply with the aims of paragraph 1.31."

75. Age standardisation is a process carried out after the tests have been taken, as opposed to a proponent of the tests themselves, therefore it could be said to be a procedure used to determine the allocation of places. Paragraph 14 of the Code therefore requires that age standardisation must be clear and objective. Dealing first with the question of clarity, the arrangements state: "The raw scores will be age standardised and the ranking is determined by the aggregate of the age standardised scores of both tests". There is a more detailed explanation of the process and its purpose in the Guide. Our view is that this is sufficiently clear to comply with paragraph 14. We do not consider it necessary for the arrangements or any additional materials linked to the arrangements to describe the methodology used by CEM to standardise the raw score results for age."

76. In considering whether the use of age standardisation is objective, what we have been told is that the very rationale for using age standardisation is objectivity. When considering age standardisation last year, our view was that CEM (as opposed to the admission authority) was the appropriate body to answer detailed questions about the 11 plus tests which they sell to grammar schools. We asked CEM a series of questions. The ones specifically relevant to this aspect of the objection were:

- Could CEM provide us with the methodology it uses for age standardisation of test results? What is the evidence base which underpins the need for this age standardisation?

- Could CEM advise us on the process it uses to ensure that the selection assessments are a true test of ability?

77. CEM's response was as follows:

> "The reason that CEM uses age standardisation, is that in assessments of ability it is expected that the older learners achieve higher scores than the younger learners. In a typical classroom, some learners will be up to 12 months older than their youngest peers. When CEM interpret assessment results our interest is in comparing learner's ability against the ability of a wider group and it is important that any differences seen are down to ability and not purely down to the age of the learners. Age standardised scores correct for the effect age has on assessment scores. Age standardised scores allow meaningful comparisons to be made between learners in a class, school or larger group.
>
> The age standardised scores are calculated from the raw scores to allow candidates to be compared when their age profiles are quite different. The age standardisation is based on the age of learners on the day they take the assessment.
>
> CEM cannot provide full details of how the calculations are done. Under Section 43(2) of the Freedom of Information Act, information that would prejudice a commercial interest can be withheld. CEM believe that disclosing this information would be likely to prejudice our commercial interest as it would enable competitors to understand our standardisation process. This could enable our competitors to understand our general approach to the test.
>
> In terms of assessment development – all questions are selected from a bank of items that have been specifically written and designed to be appropriate for assessing pupils at the beginning of the Autumn term in Year 6 of the English school system.
>
> Our tests correlate highly with KS2 SATs results: separate studies have shown correlations of around 0.75 on samples of 4000-5000 pupils".

78. The objector points out that other major assessment events such as SATs or GCSEs are not age standardised and suggests that, because these other assessments are not age standardised, the selection tests for grammar schools should not be age standardised. This issue could of course be argued both ways; if age standardisation is deemed appropriate for grammar schools' tests, then why is it not introduced into the SATs and GCSE processes? A look at the online conversations about this topic shows clearly that there are strong views on both sides of this argument, both from parents and assessment providers. This determination, however, concerns the objectivity and reasonableness of the admission arrangements for a specific school and deals only with the selective school tests for that school. We will therefore limit our conclusions in this matter to the school in question, its admission arrangements and the selective assessment tests which are part of them. In doing so, we emphasise that we are not passing any judgement on the arguments for or against age standardisation of other tests but we note that those other tests serve different purposes.

79. The difference between verbal and non-verbal reasoning tests and many other types of tests is that success cannot be achieved simply by repeating specific learned information. For example, to do well in the comprehension questions, it will be necessary to have a wide vocabulary and the ability correctly to deduce answers from what is said in a piece of text. Candidates are required to have absorbed information from many sources and to apply it

correctly. Whilst the ability to memorise may not be improved by maturity, the ability to reason is something entirely different.

80. If maturity is developed over time, it would seem to us that children may not all be able to approach these tests from the same level, as the objector suggests. Nobody would suggest that a three-year-old would be capable of approaching these tests in the same way as a ten-year-old, for example. There is an age gap of nearly a year between the oldest child taking the 11 plus test and the youngest. The questions for us are whether age makes a difference; if so, what that difference is; whether standardising the tests by age compensates for the difference; and whether it compensates effectively. The tests are a competition, and in order for any competition to operate fairly, the objective must be that all competitors come to the starting gate at the same time and that there is a level playing field insofar as the tests themselves are capable of achieving this. Familiarisation with the types of questions asked and practice may improve scores, but admission authorities and test providers have no control over whether children prepare or are coached.

81. There is significant and compelling research evidence that children who are "summer born" perform less well in tests than children born at other times of the year. This gap is clear in primary aged children and remains an issue even into the later stages of secondary school. A study by the Institute of Fiscal Studies entitled "When You Are Born Matters; The Impact of Date of Birth on Child Cognitive Outcomes in England" collates many previous pieces of research and looks at the reasons why summer born children perform less well. The paper also puts forward some suggestions about mitigating this effect. The objector questions its relevance to CEM 11 plus tests. However, we note that there is research referred to about the British Ability Scales (BAS), which were conducted during survey interviews when the child was aged around 5 and 7. At age 5, the BAS tests covered vocabulary, picture similarity and pattern construction. At age 7, they covered reading, pattern construction and maths, and are a similar type of test to VR and NVR tests. The following conclusions were reached:

> "**National achievement test scores should be age-adjusted to account for the fact that children born at different times of the year have to sit the tests when they are different ages.**
>
> These age-adjusted scores should be used to calculate school league table positions, to determine entry to schools that select on the basis of ability, and potentially to assign pupils to ability groups within schools. Some studies have overcome this difficulty by focusing on outcomes measured at around the same age for individuals beyond the end of compulsory schooling, which breaks the perfect correlation between age at test and age at school entry. For example, Black, Devereux and Salvanes (2008) identify the impact of school starting age on IQ scores taken as part of men's enrolment to military service at around age 18 (as well as the likelihood of teenage pregnancy and earnings) using Norwegian administrative data. **They find that starting school younger has a small positive effect on IQ scores, as well as on the probability of teenage pregnancy. By contrast, they find a large and significant positive effect on IQ scores arising from sitting the test at an older age".**

82. It is important to be clear about the purposes and rationale of age standardisation and why it might be (or not be) necessary. Age standardisation assumes that the period of birth does not affect the innate intellectual ability of the pupil at the time of taking the test but that the test performance may be affected by age. A younger child might well not perform as well in the test simply because of age and experience rather than because of lower ability. At the time pupils take the 11 plus, one child taking the test might be born on the first day of the school year (September 1) while another might be born on the last day (August 31). With what amounts to a whole year's difference in their ages, the older child is clearly at an advantage; for example, they will have been exposed to more language and, on average, a greater range of vocabulary. As children are exposed to new vocabulary at the rate of more than 1000 words per year, the difference can be very significant for the 11 plus tests. Age standardisation removes this potential unfairness, and the marks are adjusted to make them "standard" for all children regardless of their age.

83. We are of the view that age standardisation removes some of the potential unfairness for summer born children in the 11 plus tests and therefore its inclusion in the admission arrangements for these schools is fair. We also consider that the purpose of using age standardisation is to attain an objective assessment of the ability of a cohort of children which is not skewed by age and its associated advantages. As CEM says, this is in order to enable meaningful comparisons of ability within the cohort of children sitting the tests therefore age standardisation provides a more extensive assurance of objectivity.

84. The objector makes the point that age standardisation is made "null and void" by the extensive preparation which children receive before the 11 plus tests. He maintains that "Most children who sit tests prepare. Many are tutored. Some are prepared in outreach programmes free of charge." We accept that preparation and tutoring may improve the test scores for an individual child, but the objector has not produced any evidence to substantiate the statement that it renders the need for age standardisation redundant. Logically, if all pupils are tutored and improve their scores because of preparation or coaching, then the attainment gap between summer born children and others would remain the same - albeit at slightly higher score levels.

85. We are aware that test familiarisation materials are made available to pupils who will be sitting the tests and these documents appear on the admission sections of the websites of some of the schools. These materials are familiarisation information to show how the tests are carried out, completed and marked and they provide examples of the type of question which will be asked in the tests. They are designed to prevent undue anxiety for those pupils who are sitting the tests.

86. We are also aware that many pupils receive additional preparation through tutoring for the 11 plus tests. A literature review commissioned by the Office of the School Adjudicator (OSA) which looked at disadvantaged pupil performance in the 11 plus test studied this element of the process and confirmed that "Pupils that have been tutored are more likely to access a grammar school, and children in households with larger incomes are more likely to have access to tutoring. Tutoring is found to be effective at supporting pupils to pass the 11-plus." However, there is nothing in the law or the Code which forbids the use of paid tutoring or additional coaching. Indeed, the law relating to admissions and the Code apply to admission authorities, local authorities, governing boards and adjudicators. But they do not and could not interfere with what parents choose to do in supporting their children's learning whether through commercial tutoring or other means. We are unaware of the scale of additional tutoring/mentoring/support for pupils in the primary schools local to

the school. But, even if, as the objector suggests, it is widespread, it does not follow that this renders the use of age standardisation "null and void". Coaching and tutoring are used to gain an advantage. Age standardisation does not confer an advantage to younger children, it places them on an equal footing with older children in order to determine an objective assessment of ability.

87. In summary we are of the view that there is substantial and compelling research which shows that "summer born" children are at a disadvantage when being tested for ability towards the end of their primary education and that the application of an age standardised weighting to the test scores reduces this disadvantage and makes the tests "fairer" and more objective. Whilst tutoring, coaching or mentoring appears to improve the test results of many pupils, there is no evidence in the research materials we have looked at and the objector has not produced any evidence to suggest that it diminishes the achievement gap due to age. We therefore do not accept that additional preparation for the 11 plus tests negates the need for the age standardisation weighting, and we do not uphold this aspect of the objection.

88. The objector refers to the fact that the Key Stage 2 Standard Attainment Tests are taken a few months prior to the 11 plus tests and are not age standardised. This is correct, but it is also true that summer born children as a group do less well in these tests than autumn and spring born children. Of course, Key Stage 2 tests serve a different purpose and the fact that there is no need for them to be age-standardised has little bearing on what is appropriate for 11 plus tests. GCSEs – also mentioned by the objector – are taken by pupils each year at age 16, but they can be and are taken by younger children and by adults of all ages.

89. We are therefore of the view that age standardisation is appropriately used in 11 plus tests and we do not uphold this element of the objection.

Priority given to children in receipt of pupil premium

90. The objector accepts that "pupil premium discrimination appears lawful" by which we take him to mean that it is lawful to give priority in the oversubscription criteria to children who are in receipt of pupil premium funding. However, he asserts that 30 per cent of the places is too high a proportion; he questions what would be reasonable and whether 99 per cent of place be reasonable. He maintains that the school should justify the 30 per cent and explain why it is reasonable. He says that this figure is unreasonable and amounts to indirect discrimination.

91. The local authority does not consider it unfair for the school to give priority to pupils in receipt of pupil premium as it is permitted under the provision of the 2014 Code (paragraph 1.39-1.39b) and the 2021 Code (paragraphs1.39-1.42). The local authority is supportive of the inclusion of the priority as a means of promoting inclusion and equality of opportunity for children and young people in Walsall.

92. In its response to the objection, the solicitor acting on behalf of the trust says "paragraph 1.39A of the School Admissions Code states that admission authorities may give priority in their oversubscription criteria to children eligible for the pupil premium and therefore it is not considered to be unfair. In 2018 the school made a successful application to the SSEF for funding. As a condition of this, the school had to submit cost-effective expansion proposals which addressed a need for additional places in the local area and to

set out deliverable plans to increase applications from and admissions of children eligible for pupil premium in the local area. In order to ensure delivery of its Fair Access and Partnership Plan as part of its successful Selective Schools Expansion Fund bid, the school agreed to increase its Year 7 PAN and to prioritise pupils qualifying for pupil premium in the oversubscription criteria. The school is therefore obliged to prioritise pupil premium pupils." Neither response answers the objector's question about the reasonableness of the proportion of pupil premium applicants who are given priority under the oversubscription criteria.

93. "Many children and young people living in our most deprived communities do significantly worse at all levels of the education system than those from our least deprived communities. This is often referred to as the 'attainment gap'." This is a quote from a DfE paper which led to the introduction of the concept of pupil premium funding. The funding was introduced in 2014. The DfE's paper introducing pupil premium funding states that evidence shows that children from disadvantaged backgrounds:

- generally, face extra challenges in reaching their potential at school, and
- often do not perform as well as their peers.

94. The pupil premium grant is designed to allow schools to help disadvantaged pupils by improving their progress and the exam results they achieve.

95. The pupil premium is additional funding given to state funded schools in England to raise the attainment of disadvantaged pupils and close the gap between them and their peers. Pupil premium funding is available to both mainstream and non-mainstream schools, such as special schools and pupil referral units. It is paid to schools according to the number of pupils who have:

- been registered for free school meals (FSM) at any point in the last 6 years;
- been looked after by the local authority (in care or accommodated) for one day or more; or
- ceased to be looked after through adoption, or via a Special Guardianship, Residence or Child Arrangements Order.

96. When pupil premium funding was introduced, schools were given the opportunity to give priority in their admission arrangements to children who are eligible. Schools are able to:

- choose from which group or groups (early years pupil premium (EYPP), pupil premium (PP) or service premium (SP) recipients) to give priority:
- specify a number or percentage of their published admission number of PP pupils who will be given priority. For example, this can be representative of the number of disadvantaged children resident in the school's local area; or they can prioritise a certain percentage of local eligible children;
- limit priority to specific eligible sub-groups. For example, restrict the admissions priority to children currently in receipt of free school meals or children eligible for PP in the school's catchment area;

- decide the ranking given to the priority (after looked after and previously looked after children); and

- choose to give higher priority to EYPP/PP/SP eligible children of the relevant faith than those not of that faith, if they have a faith designation.

97. In May 2018 the DfE published a Memorandum of Understanding (MoU) between the DfE and the Grammar School Heads Association. (GSHA) This was updated in March 2020. In this MoU both parties have a shared ambition to see more pupils from lower income backgrounds applying to, passing the test for, and being admitted to selective schools.

98. It was agreed specifically that admission authorities can consider lowering the selection test pass mark for children eligible for the pupil premium. The MoU stated that "this is a decision for the individual school's admission authority. A number of grammar schools already set a lower pass mark for disadvantaged children. Any authorities who take this approach should ensure this still provides sufficient rigour to ensure those children can thrive within the highly academic environment of a grammar school."

99. The DfE and GSHA agreed to report on progress in admitting more disadvantaged children to grammar schools against the following success measures:

- increased number of selective schools effectively prioritising disadvantaged children in their admissions arrangements, with a view to all GSHA member schools doing so by the scheduled end of the Parliament.

- an upwards trend of numbers of disadvantaged children applying to selective schools.

- an upwards trend of numbers of disadvantaged children being admitted to selective schools.

100. In May 2018 the DfE launched the SSEF. The stated purposes of this scheme are to support the expansion of selective schools where there is a need for additional places, both in terms of a shortfall of secondary places in the local area and a demand from parents for more selective places; and for selective schools to have ambitious but deliverable plans for increasing access for disadvantaged pupils (namely pupils eligible for the pupil premium). In this scheme selective schools are encouraged to increase the proportion of disadvantaged children being admitted to the school. Successful schools in this scheme have used the oversubscription criteria within their admission arrangements to support this aim. Some schools have set new, greater proportions or numbers of PP children to be admitted and many have lowered the standard mark or pass mark for PP pupils so that more may be offered places.

101. There is a significant body of research which demonstrates the existence and extent of the attainment gap between disadvantaged pupils and others up to and including the age of sixteen. A great deal of work on the factors which affect the gap and how it can be reduced has been undertaken, much of this research is from the Education Policy Institute.

102. It is clear that Government policy is to encourage improved access to grammar schools for disadvantaged pupils, and that schools are encouraged to give priority to disadvantaged pupils in their admission arrangements' oversubscription criteria. Any

priority given to PP pupils in oversubscription criteria means that others, lower down the criteria, have a lower priority. The purpose of introducing oversubscription criteria is to ensure that some groups of children are given higher priority than others where a school has more applications than there are places available. The Code makes clear that schools are able to include reasonable oversubscription criteria, and that this of itself is not unreasonable. There are no suggested or limited proportions required in the Code for the number or proportion of pupils who are prioritised under this criterion. We are of the view that the proportion of PP pupils identified in the admission arrangements is fair and complies with the Code.

103. In the case of PP pupils' inclusion in the oversubscription criteria we are of the view that prioritising PP pupils who achieve the pass mark over those who are not PP pupils is reasonable. Indeed, it is a practice which is encouraged by Government policy and Guidance and is compliant with the Code. Paragraph 1.39A of the Code expressly permits schools to give priority to PP pupils. It states "Admission authorities may give priority in their oversubscription criteria to children eligible for the…. pupil premium….".

104. We do not therefore uphold this element of the objection

Feeder Primary Schools

105. The admission arrangements at oversubscription criteria b), give priority to no more than 30 per cent of the available places to those children who are eligible for the pupil premium and who have achieved the qualifying score. If the number of applicants exceeds the number of places available, the arrangements state that priority will be given to "those students attending a primary school (at the time of the test) which is listed in Walsall Children's Services Directory for the academic year 2021/22". The objector believes this to be unlawful. He says it is "attempting to consider all Walsall primary schools as feeder schools without reasonable reason." He goes on to say that this is "unacceptable and discriminates against home-schooled children living in Walsall and all children not educated in Walsall primary schools as well as discriminating against privately educated children. It appears akin to "local apartheid". It is not reasonable and amounts to indirect discrimination". He asks: "What can be the justification given schools are funded by national taxation and not local taxation and funding follows the child?"

106. The local authority supports this element of the admission arrangements and says that the provision of admission priority for children who are attending Walsall primary schools is a means of promoting inclusion and equality of opportunity for children and young people in Walsall. The solicitor acting on behalf of the school quotes paragraph 1.15 of the code which says that "admission authorities may wish to name a primary or middle school as a feeder school. The selection of a feeder school or schools as an oversubscription criterion **must** be transparent and made on reasonable grounds". He says that it is clear that the feeder schools will include any primary school listed in the local authority's directory and that if applicants have any queries, then they are directed to the school's website. He goes on to say it is reasonable on the grounds that in accordance with the school's delivery of its fair access and partnership plan, it is obliged to prioritise pupils qualifying for pupil premium and who also attend a primary school in Walsall.

107. As part of the school's successful bid for extra funding under the SSEF it has agreed to include pupil premium pupils who achieve the qualifying score, one of the key elements of its bid was to prioritise local children and this is why all Walsall primary schools are

identified in the arrangements. We agree that it is reasonable and transparent to identify local primary schools in this way as part of the implementation of the SSEF bid. The school is required to prioritise pupils from Walsall primary schools in its arrangements as part of the SSEF process approved by the Department for Education (DfE). If there are insufficient numbers of pupils who are in receipt of the pupil premium and who have achieved the qualifying score who attend Walsall primary schools, then the next priority is for those who do not attend a Walsall primary school by rank order of score in the tests. These children are admitted as the next priority and could include home or privately educated children living in Walsall or children who do not live in the local authority.

108. The Code makes it clear that any feeder primary school must be named and, in the arrangements, applicants are directed to the school website for this information. At the time of writing this determination (August 2021) the link in the arrangements to the Walsall information is for secondary schools and there is therefore no list of named feeder schools in the arrangements, and this renders them non-compliant with paragraph 1.15 of the Code. A link to the primary schools brochure for the year which includes a list of the schools in the local authority would be sufficient to comply with the Code and this link is a required amendment to the arrangements.

Comparison of different tests

109. In the section entitled Late Applications in the arrangements there is a definition of what constitutes “late applications”; those received after the closing date but where there are exceptional circumstances and those received after the closing date but where there are no exceptional circumstances. In both cases, the arrangements say that arrangements will be made for those candidates to be tested (though not necessarily on the same papers as were taken on the appointed day of the test).

110. As we said above, if a school chooses to use a different test of the same type for late sitters, people could not abuse the process by cheating in the way the objector suggests is widespread, although the practice might lead to arguments or complaints about lack of parity and objectivity which could be raised on appeal. However, as we have already made clear, it is not our function to suggest that one method or process might be ”better” than another, and we cannot require an admission authority to adopt a particular form of test or procedure for conducting a test. Our role is confined to determining whether the admission arrangements comply with the Code.

111. The objector says that CEM state clearly that they cannot compare different tests and questions the school’s ability to do so. He reminds us that he believes that the reuse of the same test is unfair and that CEM claim their test cannot be compared and yet this is what the school intends to do.

112. .The school decides which tests to use for different groups of children, at different times and under different circumstances. All schools do this all the time; tests to determine which ability sets the pupils are placed in for different subjects, tests to determine option choices, predicted grades and relative achievement. For late entries the school will make the decision about which test to use and will ensure that the test complies with paragraph 1.31 because it is an 11 plus test. It must be clear, objective and give an accurate reflection of the child’s ability. The school will decide on the qualifying score from these tests which are taken by late applicants in order to ensure that the pupils who are successful will be of

the required ability to attend this selective school. We do not therefore uphold this element of the objection.

Summary of Findings

113. We cannot comment on the objector's assertion that CEM is a disreputable company. The Code is clear that it is up to individual admission authorities to determine their arrangements and in doing so this school chooses to use CEM. The school is satisfied that the tests it uses can adequately provide a list of pupils who are capable of succeeding in a grammar school and we are of the view that the school's admission arrangements comply with paragraph 1.31 of the Code. We do not therefore uphold this element of the objection

114. We do not consider it unfair that the school does not share test results with other schools.

115. Paragraph 1.8 of the Code requires a suitable tie breaker to be included in the arrangements and these arrangements do not include this. We therefore uphold this element of the objection and the school is required to amend its arrangements accordingly.

116. We do not consider it unfair to use the same test paper in late testing.

117. We do not consider that the way in which the qualifying score is established is unfair.

118. We find that the arrangements are sufficiently clear that the tests results are standardised by age. We are of the view that age standardisation does not create an unfairness to older applicants and that its use remains necessary albeit that some applicants are coached.

119. We do not consider it unfair to give priority to 30 per cent of the intake from pupils eligible for the pupil premium.

120. Although we are of the view that the choice of feeder schools is transparent and reasonable this element of the arrangements does not conform with the Code as the schools themselves are not named; this requires amendment.

121. We are of the view that the way in which the school tests late applications is reasonable and compliant with the Code.

Determination

122. In accordance with section 88H(4) of the School Standards and Framework Act 1998, Dr Vallely and I partially uphold the objection to the admission arrangements for September 2022 determined by the Mercian Trust on behalf of Queen Mary's High School, Walsall.

123. 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 revise its admission arrangements within two months of the date of the determination unless an alternative timescale is specified by the adjudicators. In this case we determine that the arrangements must be revised by 31 October 2021.

Dated: 11 October 2021

Signed:

Schools Adjudicator: Ann Talboys

Schools Adjudicator: Marisa Vallely