

DETERMINATION – parental objection

Case reference: ADA/002199

Objector: An Eligible Parent

Admission Authority: Governors of the John Fisher School

Date of decision: 28 September 2011

Determination

In accordance with section 88H(4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the Governors of the John Fisher School.

The referral

1. An objection has been referred to the Adjudicator by an eligible parent about the admission arrangements for The John Fisher School (the School), a Voluntary Aided Roman Catholic boys' secondary school for September 2012. The objection is that the use of the applicant's baptismal date within the arrangements constitutes discrimination against British Catholic children born abroad.

Jurisdiction

2. These arrangements were determined under section 88C of the School Standards and Framework Act 1998 (the Act) by the governing body, which is the admissions authority for the school. The parents submitted their objections to these determined arrangements on 12th July 2011. I am satisfied this objection has been properly referred to me in accordance with section 88H of the Act and that it falls within my jurisdiction.

Procedure

3. In considering this matter I have had regard to all relevant legislation, guidance and the School Admissions Code. The documents I have considered in reaching my decision include:
 - The parental letter of objection of 12th July 2011 and supporting documents relating to a previous admissions appeal;
 - Comments from the Archdiocese of Southwark Commission For Schools & Colleges (the Diocese) in a letter dated 26th July
 - Comments from the London Borough of Sutton (the LA) on the objection dated 11th August 2011;
 - The School's response to the objection and supporting papers dated 31st August;

- The Council's booklet for parents seeking admission to schools in the area in September 2011.
4. In addition to investigating the matters raised by the objector(s) I have also reviewed the admissions arrangements as a whole and considered whether I should use my power under section 88J(2)(b) of the Act. I am not using my powers under the Act to make changes to the arrangements.

The Objection

5. The Parent sought a place at the school for his son which was refused in March 2011. He exercised his right of appeal but that was unsuccessful. Following notification of the appeal committee's decision (28th June) the parent consulted his MP who advised approaching the OSA. Although the parent understands that an Adjudicator cannot affect the outcome of the 2010/11 admissions round, he has pursued the referral for the benefit of future applicants because he believes the policy is discriminatory.
6. The position is complicated by the fact that the school's admissions arrangements for September 2012 have been modified since 2011 (for reasons unconnected with this case) and one of the issues raised in the individual appeal (the effect of the feeder-school criterion previously used) will not apply for the coming round. However another aspect of the arrangements (the use of baptismal dates to distinguish between otherwise similarly qualified applicants) remains in place and the parent believes this would still have militated against his son's admission had the application been submitted for entry in 2012.
7. The admission arrangements operated by the School in 2011 firstly subdivided all applicants on the basis of their membership of the Roman Catholic Church (or otherwise) into category A and B respectively. Within category A the oversubscription criteria included, as might be expected, Catholic Looked After Children (LAC) and siblings of boys already at the school as the first and second priorities. The third criterion was subdivided into 14 subcategories according to a matrix based on three characteristics: whether baptism had taken place before or after the boy's first birthday; regularity of attendance at mass and the primary school attended. Higher priority being accorded to baptism before the first birthday, more regular mass attendance and having previously attended a named feeder school.
8. For oversubscription within one of these subcategories the tiebreaker was proximity to the school and the drawing of lots if there was a tie on distance. Priorities within category B were simply LAC followed by proximity.
9. The admissions appeal was predicated on the grounds that the strict application of these criteria placed the son at a disadvantage because the circumstances of his birth and upbringing meant he could not reasonably have been expected to fulfil them.

10. These circumstances were that the parents were married in a Catholic Church in Moscow (in Russia) but by the time their son was born the family was living in the north of Burundi where his mother was then working. However the father was working in the west of the country and the family's early baptism plan was delayed. This was because, within the religious and cultural traditions operating in Burundi, baptism is regarded as a very significant event where all extended family members are expected to congregate. The family left Burundi when their son was only 6 months old and took up residence in Glasgow, (Scotland). This made the large family baptism event impossible to organise until an opportunity arose for them to travel to Burundi several years later and the baptism took place in the presence of over 100 extended family members.
11. The parents say that this delay was known to, and supported by, their Parish priest in Glasgow who recognised the importance of their cultural traditions. Whilst they do not dispute the content of Canon 867 (the church ordinance which says children should be baptised as soon as possible) the father argues that despite having *"spent 7 years at the seminary, I was not taught about this"* and that *"in Burundi we have different considerations with regards to baptism."*
12. The parents also challenged the feeder school criterion. Their son attended a Catholic Nursery/preschool, in Glasgow and was due to transfer to a RC Primary school but the family moved again, this time to Gloucestershire, shortly before he was due to start. He did attend a RC Primary School in Bristol for 6 months until the family moved again to London. But on arrival in London, firstly in Tooting and subsequently in Sutton where they now live, despite their best efforts the family were unable to find a place in a Catholic primary school. Their appeal letter concluded:

"You understand [their son] is not in a Feeder school not by his choice but by the system failure to place him. This criterion should not be applied to him as it would be punishing a child for none of the catholic school being able to place him and for parents having the profession that keeps them on the move."
13. As indicated above the School's determined admission arrangements for 2012 were changed. This was partly as a result of decisions by the Adjudicator in respect of other Catholic Boys Secondary schools in South West London (Wimbledon College and Richard Challoner RC Boys School - see case references ADA/001980 and ADA/001981 respectively.) The new arrangements adopt a similar overall structure but the matrix of sub-categories within criterion A3 has been changed. The distinction between feeder and non-feeder primary schools has been dropped; but an additional level of significance has been added to the date of baptism. Greater priority is now accorded to baptism within six months of birth than within a year, which in turn is given greater priority than those baptised after the first birthday.

14. These changes mean the inability of the parents to find a Catholic primary school place after their latest move would not have been an obstacle to their son's admission; but the 'late baptism' issue would have remained and possibly been exacerbated. The objection was therefore lodged against this aspect of the arrangements.

The School's Response

15. The School provided a full (if delayed) response which begins by confirming the facts outlined above and providing the additional information that the parent has sought a review of the admissions appeal decision which is currently being considered by the Local Government Ombudsman (the LGO). The letter goes on to set out the school's view that it is not in breach of the Code. There are several references to the views of the LA and the Diocese which are confirmed in their letters (see below) and which the School Governors will have seen before completing their response. The letter continues:

"The John Fisher School consulted on the September 2012 admissions entry arrangements. Sutton LA considered that the admissions policy conforms to the mandatory provisions of the Code. The Local Authority recognised that in making the new arrangements the Governing Body had complied with the advice contained within an objection to Wimbledon College in 2010 (ADA/001980) and had complied with the adjudication of Richard Challoner School (ADA/001981) by removing its feeder school arrangements. The Governors had also worked with the Diocese to try and secure a coherent approach to oversubscription criteria for Catholic Schools in South West London."

"The admissions policy would be discriminatory if it applied the admissions criteria differently to different ethnic or cultural groups or if it was clear that those from a particular background were unable to comply with the criteria in a way that did not apply to children born in Britain."

"The view of the LEA was that using criteria based upon the date of baptism is not discriminatory and does not breach paragraphs 2.48 or 2.52 of the Code. Canon Law states that: "parents are obliged to take care that infants are baptised in the first few weeks. As soon as possible after the birth, indeed even before it, they are to approach the parish priest to ask for the sacrament for their child, and to be themselves duly prepared for it" (Canon 867). The Schools' Admission Code allows for bona fide exception to be taken in to account. Hence, the explanatory notes relating to this section do refer only to Governors giving consideration 'where a child has been baptised as a result of Catechumen initiation and has followed a RCIC course'."

16. The next paragraphs refer back to the specific circumstances of the objector's 2011 application and appeal which are, strictly, irrelevant to my consideration of the 2012 arrangements. It continues:

"The use of Faith based criteria is permissible under the Admission Code for recognised Faith Schools. Keith Burleton [the diocesan officer] states that there are no specific sanctions for contravention of Canon 867. Nevertheless, this rule applies to the Universal Church and stresses the importance of the sacrament of baptism which is the basis of Church membership. Whilst illness of the mother might under some circumstances lead to delay in baptism, sickness of the child would make baptism all the more urgent, particularly if there was a risk that the child might not survive. The sacramental nature and importance of baptism normally requires the consent of the parent(s) but does not require the presence of other family members, however desirable. Nevertheless, it is possible to celebrate the christening after the baptism. In the present instance, baptism was delayed for several years.

"Finally, we do not consider that this objection fulfils the criteria in 4.17 (d) namely that "admission arrangements contain practices or oversubscription criteria that are unlawful or do not comply with the mandatory provisions set out in this Code". We do not accept that the admission arrangements are either unlawful nor contravene the mandatory provisions set out in the Admissions Code."

Comments from the LA

17. The response from the LA said the arrangements had been considered compliant with the mandatory provisions of the Code and no comments had been made during the consultation or determination process. It also confirmed that in consulting for 2012 entry, the School complied with the advice the 2010 Wimbledon College determination (ADA/001980 paragraph 49) quoted above.
18. The LA officer went on to set out an analysis of the position in very similar terms to that subsequently used by the school. He recognises that there may be valid reasons why baptism is delayed but notes that, the School's supplementary information form (SIF) allows space for applicants to give details of circumstances which might persuade governors to make an exception.

Comments from the Diocese

19. In response to the OSA request for comment the Diocesan officer wrote as follows:
- The Diocesan guidance defines membership of the Catholic Church as baptism or reception into the Church. It goes on to state that 'The definition of Catholic practice for the purpose of admission to voluntary aided schools in the Diocese is membership of the Catholic Church (Roman Catholics or those*

of other Catholic Churches in union with Rome) and attendance at Sunday Mass'. The guidance makes no reference to Canon Law which expects Catholic parents to baptise their children in the first few weeks after birth and there are no sanctions in Canon Law for those who do not follow this instruction. There are many and varied reasons why a child may be baptised after the first few weeks of birth including illness of the child or the mother, objections where one of the parents is not a Catholic, lapses in commitment. However, it is relatively unusual for children not to be baptised before their first birthday unless the children are baptised or received into the Church when a parent converts to the faith. The John Fisher governors recognise the latter in appendix II of the admission arrangements. We feel that the wording of this section could be amended to include those who could provide an acceptable reason, supported by documentary evidence from a priest, for the delay in baptism. Without this caveat the criterion could be seen as unfair and could give rise to the perception that some parents or children are better Catholics because they were baptised earlier than others.

20. A copy of the guidance the Diocese offers its schools was enclosed and the key passage on faith based oversubscription criteria (alluded to in the letter) reads as follows:

"The Code states that in determining 'faith-based' oversubscription criteria, admission authorities for faith schools should only use the methods and definitions agreed by their faith provider or religious authority (2.48). The definition of membership of the Catholic Church is baptism or reception into the Church. The definition of Catholic practice for the purpose of admission to voluntary aided schools and academies in the Diocese is membership of the Catholic Church (Roman Catholics or those of other Catholic Churches in union with Rome) and attendance at Sunday Mass.

Where there are schools oversubscribed with Catholic children, governing bodies may give a higher priority to children from families who are able to demonstrate their commitment to the faith by their frequency of attendance at Sunday Mass.

Governing bodies using this criterion should only seek information which can reasonably be obtained. They should ask the priest to confirm one of the following:

- Regular attendance at Sunday Mass (i.e. weekly)*
- Occasional attendance at Sunday Mass (i.e. once or twice a month)*
- Irregular attendance at Mass (i.e. less than once a month)*
- Family/child not known to priest*

Governing bodies may also ask the priest to say how long the family/child has been attending Mass at his church.

The priest may state that there are circumstances preventing the family attending Mass, but that in normal circumstances there would be attendance (as described in one of the attendance categories). Governing bodies should treat such an application as fulfilling the criterion.”

Consideration of Factors

Jurisdiction

21. In the last quoted paragraph of its response, the school implies that the objection should be ruled out on the procedural grounds that it does not fall within paragraph 4.17(d) of the Code; which gives parents the right only to object on the grounds that arrangements . . . *“are unlawful or do not comply with the mandatory provisions set out in this Code”*. It is true that there is no explicit statement in the Code saying that schools **must not** use baptismal dates as part of their admission arrangements. However paragraph 1.71(e) of the Code says admission authorities **must** comply with “all relevant legislation”; and paragraph 1.14 says “Admission authorities **must** also comply with other legislation relevant to school admissions” and refers to Appendix 1 which includes the Race Relations Acts (which have been substantively repealed and replaced by the Equality Act 2010) amongst the list of ‘relevant legislation’. The summary terms of the objection which refers to discrimination against *“British Catholic children born abroad”* would not, strictly, fall within the protected characteristic of race for the purposes of the Equality Act; and discrimination on this basis would not therefore be prohibited under that Act. However the more detailed account outlined in the objection could be construed as a claim of indirect racial discrimination on the basis of ethnicity which would be. The objection does, therefore, fall within paragraph 4.17(d). By the same token it would also fall within paragraph 1.72 of the Code which says that: *“Admission authorities and governing bodies **must** ensure that their admission arrangements and other school policies are fair and do not unfairly disadvantage, either directly or indirectly, a child from a particular social or racial group, or a child with a disability or special educational needs.”*

Possible Unlawful Discrimination

22. By definition, the oversubscription criteria of a popular school are ‘discriminatory’ because they are used to decide amongst all applicants which are offered places and which are not. The key questions are therefore: is the form of discrimination used ‘lawful’ in terms of relevant legislation and ‘fair’ in terms of the Code?

23. The concept ‘indirect racial discrimination’ was articulated in section 1 of the, repealed, Race Relations Act 1976 (RRA). The equivalent provisions now appear in sections 9 and 19 of the Equalities Act 2010 (EQA 2010) and provide that:

9. Race

- (1) *Race includes--*
 - (a) *colour;*
 - (b) *nationality;*
 - (c) *ethnic or national origins.*
- (2) *In relation to the protected characteristic of race--*
 - (a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;*
 - (b) *a reference to persons who share a protected characteristic is a reference to persons of the same racial group.*
- (3) *A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.*
- (4) *The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.*
- (5) *A Minister of the Crown may by order--*
 - (a) *amend this section so as to provide for caste to be an aspect of race;*
 - (b) *amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.*
- (6) *The power under section 207(4)(b), in its application to subsection (5), includes power to amend this Act.*

19 Indirect discrimination

- (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--*
 - (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
 - (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
 - (c) *it puts, or would put, B at that disadvantage, and*
 - (d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*
- (3) *The relevant protected characteristics are--*
 - age;*
 - disability;*
 - gender reassignment;*
 - marriage and civil partnership;*
 - race;*
 - religion or belief;*
 - sex;*
 - sexual orientation.*

There is no suggestion that direct discrimination might be in play here. However it is possible to construct an argument that indirect discrimination, now set out in section 19 of the EQA 2010 quoted above, may occur in the circumstances of an applicant similar to those outlined by the objector. I should make it clear at this point that it is not my role to determine whether or not the objector's son was in fact the

victim of indirect discrimination. That is a matter for the LGO and, ultimately, the courts. It is for me to consider whether circumstances might reasonably arise where this or another applicant could suffer indirect discrimination. If so the arrangements would be unlawful and I would be compelled to uphold the objection.

24. The EQA 2010 requires three conditions to be met for indirect discrimination to be established. Under section 19(2)(c) the effect of the test applied by the alleged discriminator must be detrimental. Clearly refusal of a desired school place would meet this condition. Indeed, section 85(1) EQA 2010 specifically prohibits discrimination in the arrangements a governing body makes for deciding who is offered admission as a pupil.
25. Section 19(2)(a)&(b) contains the core of the concept that an otherwise consistent test has a disproportionate effect on some racial groups. The argument here turns on the application of Canon 867. It is not in dispute that this places a clear obligation on parents to take care that infants are baptised “in the first few weeks” or “as soon as possible after the birth.” It is also generally accepted that this rule of the Church applies, at least formally, across the worldwide Catholic communion. However it is suggested that the way it is understood, its importance, and the extent to which it is observed, differs between cultures. Specifically the strong familial culture prevalent in central Africa means that Catholics in that part of the world will naturally and automatically regard the need to gather the extended family together for the ceremony as more important than the need to act with expedition, Canon 867 notwithstanding.
26. In response to this the school has suggested that it would be possible to secure an early ‘baptism’ and then organise a celebratory ‘christening’ at a later date. With hindsight this clearly would have been possible; but it is unreasonable to expect parents to predict that the decision to delay baptism would have a decisive impact on their son’s education in a different country ten years later. This is particularly so if they were not at the time being encouraged to fulfil Canon 867. The objector was, by his own account, unaware of it despite his Catholic upbringing. It would also seem, if his account is reliable, that at least one member of the clergy in Scotland also judged the continued delay to have been reasonable and did not press them to expedite baptism when they arrived in his parish with an un-baptised child of some six months.
27. Section 19(2)(d) allows a defence of justification - that the action is “*a proportionate means of achieving a legitimate aim*” - even if the other two conditions are met. Clearly it is necessary for an oversubscribed school to distinguish between applicants in order to allocate a limited number of places. However, given the availability of a range of criteria which do not involve a risk of indirect discrimination, it might be difficult to construct a justification for using one that did.

28. I am not sufficiently knowledgeable about the application of Canon law in different parts of the world to judge the extent to which it might be susceptible to national and regional variation. It seems to me that there is at least a risk that this particular oversubscription criterion could be successfully challenged on grounds of indirect discrimination. Analysis of the way this element of Canon law is in fact applied by different representatives of the Catholic Church at different times and places would be important in coming to such a view.
29. I deal with the comments made by the local Diocese in the next section. However in 2009 another West London Catholic Boys school (Cardinal Vaughan Memorial School - CVMS - see ADA/001720) was subject to objection by the Diocese of Westminster; which collaborates with Southwark to produce joint guidance for all Catholic schools in London. In that case a major issue was the departure of the school from diocesan guidance (see below) one specific point of objection (which was upheld) related to a requirement that applicants had made their first confession and received their first Holy Communion before their ninth birthday. It was argued that, whilst it is generally expected that the sacraments should have been taken by the age of nine in this country, different traditions operate elsewhere. The criterion was therefore unsatisfactory because it was potentially discriminatory against ethnic minorities. It is fair to say that CVMS also required baptism within one year of birth (except for those later received into the faith) which was not challenged. But Church authorities in London are clearly cognisant of the possible impact of different traditions in other countries.

Fairness under the Code and Previous Adjudications

30. Even if the 'date of baptism' requirement is not deemed to constitute legally enforceable indirect discrimination it must still comply with paragraphs 1.71 and 1.72 of the Code; which contain a number of mandatory requirements related to clarity, objectivity and fairness.
31. I note here that the school has been subject to objection and adjudication on a number of occasions in recent years (see ADA/001598 in 2009 and ADA/001815 in 2010). Those objections were based on different arguments and, although some elements are the same, the oversubscription criteria were also different. Nevertheless general considerations of fairness did come into play in my colleagues' decision making. I have reviewed those decisions before coming to my own conclusions. Both of these cases were substantially concerned with the feeder school criterion - which has now been dropped and is not therefore pertinent to this determination.
32. ADA/001598 did touch briefly (at paragraph 22) on the school's use of baptismal date, which was bracketed with the requirement for regular church attendance. The Adjudicator was not persuaded that either of these criteria were contrary to the Code because they were concerned with giving "*due recognition to the child's practice of his faith.*" However the question is not discussed in great detail and that objector

apparently did not invite the Adjudicator to give consideration to the possibilities that have been raised in this case.

33. I also note that in both of these cases the Adjudicators considered the complexity of the arrangements (ADA/001598 at paragraph 16; and ADA/001815 at paragraph 14). Neither decided that a case had been made out for the matrix of sub criteria in category 3 to be ruled incompatible with the Code on these grounds; but there are indications that both felt this aspect was not entirely unproblematic. ADA/001815 goes as far as to say: *“I advise the School in its annual review of its arrangement to keep this matter under review.”*
34. One aspect of the objection, that it was harder for the parents to fulfil the oversubscription criteria because of their itinerant lifestyle, was not relevant to the racial discrimination question but is pertinent to more general considerations of fairness. This argument was made mainly to challenge the ‘feeder school’ requirement which is not now at issue. However periods of working abroad and separation within the home country dictated by the parents’ jobs seems also to have been a contributory factor to the delayed baptism. Again it may be felt to be unfair that families are disadvantaged by decisions prompted by circumstances beyond their control in ways that they could not reasonably be expected to have predicted.
35. The views of the diocesan authorities are significant because faith school admission authorities are required to have regard to any advice that they offer. Whilst the diocese in this case has not expressly objected to the arrangements, the letter (quoted in full at paragraph 19) does suggest that they should be amended to achieve greater fairness. It also expresses discomfort about criteria that *“could give rise to the perception that some parents or children are better Catholics because they were baptised earlier than others.”* The use of the formulation *“... there are no sanctions in Canon Law for those who do not follow this instruction”* also implies a lack of enthusiasm for the idea that disadvantage might result later in life.
36. Paragraph 2.46 of the Code says that faith schools are *“permitted to use faith-based oversubscription criteria in order to give higher priority in admissions to children who are members of, or who practise, their faith or denomination.”* The distinction between membership (conferred by baptism) and ‘practice’ (demonstrated, amongst other things, by regular attendance at Mass) is clear. However the Code does not explicitly sanction finer distinctions between the extent, or quality, of practice exhibited by ‘practising members’. Although they are not expressly forbidden I consider that such distinctions can be problematic. The framing of the Code implies that this should be a ‘threshold’ decision. That is to say it should be possible to establish as a matter of fact, using objective criteria, whether any particular individual meets the published criteria for ‘membership’ or ‘practice’ of the faith.

37. The matrix of frequency of attendance at mass and the new ‘three tier’ division by baptismal date can be established as a matter of objective fact; and the thirteen step hierarchy it produces certainly eases the governors task of finding a cut-off point for allocating places. However, like previous adjudicators, I believe it edges towards a level of complexity that is discouraged by Code paragraphs 2.12 and 2.13. It is also debatable whether the distinctions made according to different baptismal dates are entirely fair or indeed whether those towards the top of the list are in any real or valid sense ‘better Catholics’ than those lower down. Arguably, approaches such as these will tend to favour those with a more settled lifestyle and might be expected to produce a more socially advantaged intake –an outcome that the Code generally seeks to avoid.
38. There was some suggestion, both by the School and the Diocese that governors should exercise discretion to make exceptions for those with genuine difficulties meeting the requirements. However it is questionable whether this would be permissible under paragraphs 1.34, 1.35 and 1.71(b) of the Code. Attempts to ameliorate any unfairness that might be intrinsic to objective criteria can serve only to increase the element of subjectivity. On balance it is better to use criteria that are unproblematic in the first place.

Diocesan Advice

39. All admission authorities are generally required to follow non-mandatory provisions of the Code unless they have justification for not doing so. This is clear from paragraph 15 in the introduction to the Code. It is further reinforced by the requirement on admission authorities at paragraph 4.5 of the Code to refer an objection to the Schools Adjudicator *“if the admission arrangements contravene admissions law, do not comply with the mandatory provisions of this Code or fail to follow its guidelines without justification”*(my emphasis). As well as following these general requirements, faith schools must also consult their designated religious authority on their arrangements and take account of any guidance offered (see paragraphs 2.46 to 2.54.)
40. In a previous adjudication (see CVMS ADA/001720) I was required to decide a question of the extent to which advice on matters of “membership and practice” of the faith given by a designated religious authority might be deemed to be binding on school governors. On that occasion I had the benefit of learned input from both sides and considered the arguments very carefully. I found the correct construction of the relevant paragraphs (2.48 & 2.52) to be that, whilst religious authorities do not have an unfettered right to dictate to governing bodies, considerable weight needs to be given to their guidance. A faith school admissions authority would therefore need to have very good reasons for departing from it. It is clear from paragraphs 19 and 20 that the school has stepped some way outside the advice offered by the Diocese.

41. I therefore take the view that to give full and proper consideration to the case before me I should consider whether the school has sufficient justification for its departure from the proper guidance they have been given. The response provided by the school appears to me to amount to an argument that their chosen approach to oversubscription was not expressly forbidden by the Code. As outlined above I was not entirely persuaded by that argument. However there was no attempt to offer any compelling positive reasons for preferring their own approach to distinguishing between different levels of religious practice to that recommended as permissible by the Diocese.

Conclusions

42. For the reasons set out in paragraphs 22 to 29 I conclude that there is a small risk that the school's use of baptismal date as a discriminator within its oversubscription criteria is vulnerable to challenge on grounds of indirect racial discrimination. I therefore recommend that the school carefully consider the issue of indirect discrimination in order to ensure that the arrangements are not flawed in this respect.

43. For the reasons set out in paragraphs 30 to 38 I conclude that, taken as a whole, the oversubscription criteria fall short of the standard of fairness expected under the Code. In amending them to achieve fairness, the school should avoid attempting to use subjective discretion to ameliorate intrinsically problematic criteria.

44. For the reasons set out in paragraphs 39 to 41 I conclude that the school has departed from the advice of the designated religious authority without sufficient justification.

45. For all these reasons I uphold the objection and so determine.

46. Having upheld the objection it falls to me to decide whether, and in what way, the admission arrangements should be amended to comply with the Code. After careful consideration I have decided not to make any changes to the 2012 criteria for the following reasons:

- The 2011 arrangements were modified voluntarily by the governors, in the light of other adjudication findings and with the advice of the Diocese, in order to secure a degree of consistency with other Catholic Boys schools in South and West London. I believe that modifications for admissions in 2013, taking the analysis in this determination into account, should be introduced in a similarly coordinated way.
- The 2012 admissions round is already getting underway and any significant modifications to oversubscription criteria could be disruptive and confusing for parents in a way that could undermine or defeat the benefits that otherwise would accrue from achieving compliant arrangements.

- Baptismal date has been used, albeit in a slightly different way, for a number of years and is to an extent understood and accepted locally. The cost of allowing it to persist for one further year is small compared with the benefit of allowing time for the governors to devise and consult on a suitable alternative approach.

Determination

47. In accordance with section 88H (4) of the School Standards and Framework Act 1998, I uphold the objection to the admission arrangements determined by the Governors of the John Fisher School.

Dated: 28 September 2011

Signed:

Schools Adjudicator: Alan Parker