



DETERMINATION

Case reference:	ADA2833
Referrer:	The Accord Coalition
Admission Authority:	The governing body of Bury Church of England High School, Bury
Date of decision:	2 June 2015

Determination

In accordance with section 88I(5) of the School Standards and Framework Act 1998, I have considered the admission arrangements determined by the governing body of Bury Church of England High School, Bury for admissions in September 2015. I determine that the arrangements conform with the requirements relating to admission arrangements.

The referral

1. The admission arrangements (the arrangements) of Bury Church of England High School (the school), a voluntary aided (VA) school in Bury with a Church of England religious character for pupils from 11 – 16 years of age, for September 2015, have been brought to the attention of the Office of the Schools Adjudicator (OSA) by the Accord Coalition (the referrer) in a letter from the solicitors acting for the referrer dated 12 November 2014. The referral argues that the school's faith-based oversubscription criteria amount to indirect discrimination on the grounds of race contrary to section 85 of the Equality Act 2010 (the Equality Act).

Jurisdiction

2. These arrangements were determined under section 88C of the School Standards and Framework Act 1998 (the Act) by the school's governing body, which is the admission authority for the school. An objection had previously been made by the Fair Admissions Campaign to the arrangements and a determination (ADA2601) published in response to that objection. Solicitors acting for the referrer issued a letter on 12 November 2014 in accordance with the pre-action protocol for judicial review. Having considered the matter raised and the remedies proposed by the referrer's solicitors, the OSA decided to consider the specific matter referred under section 88I of the Act. I am satisfied that it is within my jurisdiction to consider the arrangements.

Procedure

3. In considering this matter I have had regard to all relevant legislation and the School Admissions Code (the Code). The documents and material I have considered in reaching my decision include:
 - a. the letter sent by solicitors acting for the referrer dated 12 November 2014 and further submissions from the referrer;
 - b. the determination ADA2601 for the school published by the OSA on 25 September 2014 and the documents listed in paragraph 5 of that determination;
 - c. the school's comments on the referral;
 - d. information provided by Bury Metropolitan Council which is the local authority (LA) for the area;
 - e. the most recent Ofsted reports for the school and for Derby High School, Bury;
 - f. the comments on the referral of the Diocese of Manchester (the diocese) which is the body representing the Church of England and which is the school's religious authority;
 - g. the LA's composite prospectus for parents seeking admission to schools in the area in September 2015;
 - h. the Department for Education (DfE) publication "*The Equality Act 2010 and Schools*";
 - i. guidance on the Equality Act for schools published by the Equality and Human Rights Commission (EHRC);
 - j. a copy of the minutes of the meeting of the governing body at which the arrangements for 2015 were determined;
 - k. the determined arrangements for 2015;
 - l. the school's prospectus for 2015 and for 2013;
 - m. information about the allocation of places at Bury secondary schools for September 2015 taken from the LA's website;
 - n. information taken from the DfE publication "*Schools, Pupils and their characteristics, January 2014*"; and
 - o. the determined arrangements for 2016.

Background

4. The school is designated by the Secretary of State under section 69(3) of the Act as a school having a Church of England religious character. It has a published admission number (PAN) of 156 for Year 7 (Y7). I have summarised the school's oversubscription criteria below and I have set out criterion 3 in full as that is the criterion with which the referrer is concerned.
 1. *All looked after and previously looked after children.*
 2. *Children whose social and medical needs can only be met at the school.*
 3. *Children who attend public worship regularly with their parent(s) at a Church belonging to Churches Together in Britain and Ireland (CBTI) or a local grouping of Churches Together. Points will be given based on information supplied by parents and confirmed by the Church minister/official to enable prioritisation with priority being given to those having the higher attendance. Where a single place remains and there is more than one applicant with similar points, score priority will be given first to the applicant who has an older sibling in Year 8 at the time of admission with a lower priority being given to applicants with siblings in Years 9, 10 and 11. If more than one applicant satisfies the requirement the place will be awarded on the basis of home to school distance. Sibling includes step, half, foster and adopted brothers or sisters living at the same address and full brother or sister living apart.*
 4. *Children who attend a Church primary school.*
 5. *Any other children, firstly those with brothers or sisters on the school in the September for which admission is sought, secondly on the basis of home to school distance.*
5. The adjudicator's determination ADA2601 found that the priority given to children who attended a Church primary school did not conform with the Code. The school has removed this criterion from its determined arrangements for admissions for 2016.

Consideration of Factors

6. The referrer argues that the school's arrangements amount to indirect discrimination on the grounds of race. Section 19 of the Equality Act deals with indirect discrimination and provides as follows:

"(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 protected characteristic of B's if-

- (a) A applies, or would apply, it to persons with whom B does not share the characteristics,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage 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.”

7. Race is one of the relevant protected characteristics for the purposes of section 19. The DfE guidance document: “The Equality Act and Schools” published in 2014 explains that:

“Indirect discrimination occurs when a “provision, criterion or practice” is applied generally but has the effect of putting people with a particular characteristic at a disadvantage when compared to people without that characteristic....

It is a defence against a claim of indirect discrimination if it can be shown to be “a proportionate means of achieving a legitimate aim”. This means both that the reason for the rule or practice is legitimate, and that it could not reasonably be achieved in a different way which did not discriminate.”

8. Schedule 11 to the Equality Act exempts schools designated with a religious character from the requirement in section 85 of the Equality Act not to discriminate on the grounds of religion in terms of the admission of pupils to the school. Paragraph 1.36 of the Code allows a school designated with a religious character to use faith-based oversubscription criteria and allocate places by reference to faith when it is oversubscribed. There is no exemption in the Equality Act on the basis of race in relation to admission of pupils to schools. The DfE guidance makes this clear where it says:

“This exception [on the grounds of religion] does not allow you to discriminate on any other of the prohibited grounds, such as sex, race or sexual orientation.

A Muslim school may give priority to Muslim pupils when choosing between applicants for admission. However, the school may not discriminate between pupils based on other protected characteristics, such as by refusing to admit a child of the school’s own faith because she is of African origin or a lesbian.”

9. The referrer has pointed out that the school is located close to the centre of Bury where a significant proportion of the population is of South Asian and particularly Pakistani descent. The referrer gives figures for people aged 10 – 17 resident in the Office for National Statistics Middle Super Output Area (MSOA) in which the school is located plus the MSOA for that area combined with the adjacent areas. These show that for the school’s MSOA, 32 per cent of 10 – 17 year olds are of South Asian descent and for the school’s MSOA and adjacent areas 20.2 per cent are of South Asian descent. The referrer notes that people of South Asian heritage are less likely than the population of England as a whole to be Christian and more likely to be Muslim. The referrer

argues that Muslims are less likely than Christians to attend Christian worship. The referrer cites data from the 2011 census which shows that the great majority of Bury's South Asian (particularly Pakistani) heritage population are Muslim.

10. The school's admission arrangements are applied "generally" as they apply to all applicants, but, the referrer considers, put people who are of South Asian heritage at a disadvantage as they are less likely than the wider population to attend a Christian place of worship and hence less likely to satisfy the school's faith-based criterion. The referrer points to the fact that there are only one or two pupils of such heritage at the school, whereas over half of the children attending Derby High School which is located immediately adjacent to the school are of Pakistani heritage.
11. The school accepts that its population does not reflect that of the immediate area in which it is located in terms of ethnic profile. However, the school argues that it does not exist to serve the immediate area. It says that it does not have a catchment area and that, as the only Church of England secondary school in Bury, it exists to serve the whole of the LA area and surrounding areas of Greater Manchester. The school says that since its establishment in 1748 it has had several locations around the town of Bury. Its foundation governors include representatives of deanery synods across Bury and two from deaneries in neighbouring Rochdale and its prospectus says that children come from across the Greater Manchester area and beyond. The referrer had queried the extent to which the school served a wider area, noting that of the parents who had put the school as their first preference only six named schools outside Bury as a second preference. In order to ensure that I – and the referrer – had accurate information, I asked the school for data on the home postcodes of each of those children who joined Year 7 (Y7) in 2014. This shows that in that year children did indeed come from homes across the LA area and just under 20 per cent from in neighbouring LAs, mainly from homes in parts of those LAs relatively close to the school.
12. I find that the school serves the whole of Bury and parts of some neighbouring LA areas, although not the whole Greater Manchester area or beyond. I consider it appropriate to compare the school's pupil characteristics with those of the whole of the LA as well as with those of the immediate area in which it is located. Figures published by the DfE show that in January 2014 (the latest available) a total of 10,780 pupils were educated in state-funded secondary schools in Bury. Of these, 1,013 (9.4 per cent) were of Pakistani heritage; 94 (0.9 per cent) were of Indian heritage and 16 (0.1 per cent) were of Bangladeshi heritage. Thus the proportion of the secondary school age population in the whole of Bury which is of South Asian (mainly Pakistani) heritage is significantly lower than the proportion in the immediate area in which the school is located. To put it another way, the population of South Asian descent in Bury is predominantly of Pakistani heritage and is concentrated in the area in which the school is located rather than being evenly spread across the LA. It remains the case that the school has a smaller proportion of pupils of South Asian and, within that, Pakistani heritage than can be found in the population of Bury state-funded secondary schools as a whole.

If the population of the school reflected the secondary school aged population of Bury, then it might be expected that 10 per cent or around 78 of its pupils would be of South Asian heritage. The actual figure at January 2014 was only one or two and this had risen to four by September 2014.

13. The referrer states that the “*admissions arrangements.... Prioritise children who attend public worship regularly with their parent(s) at a Church belonging to Churches Together in Britain and Ireland (CTBI).*” In fact, the school gives the highest priority in its arrangements to all looked after and previously looked after children without reference to faith. In doing so, it is following the guidance of its diocese and is exceeding the minimum requirement in the Code that in a school with a religious character highest priority be given to looked after and previously looked after children of the faith. Second highest priority is given to children whose medical and social needs can only be met at the school, again without reference to faith. There are relatively few looked after and previously looked children and children whose medical and social needs can only be met at a particular school. In any given year, therefore, the next highest priority will be given to applicants who attend worship at a Christian church, with greater priority being given to those who have attended for longer and do so more frequently. The referrer has underestimated the number of places actually allocated at the school without reference to faith, by stating that only 61 (or 9.8 per cent) of children admitted to Y7 at the school in 2011 – 2014 combined “*did not meet the school’s church criteria.*” This is not correct. The referrer has failed to take account of the children admitted to the school as they had statements of special educational needs (SEN) or were looked after or previously looked after children. The school’s faith based criteria do not apply to these groups. Since the referrer made this claim, data for 2015 have become available and I have calculated that, on average over the five years up to and including 2015, around 18 percent of those joining the school in Y7 have been admitted without regard to faith. For 2015, the school has provided a more detailed breakdown which shows that of the total of 45 children (29 per cent) offered places not on the basis of Church attendance, 34 were offered a place on the basis of having a sibling at the school (three) or on the basis of distance from the school (31). The referrer has overestimated both the proportion of places for which priority is given on the basis of attendance at Church and the proportion actually allocated on that basis over the past few years. The referrer also drew attention to the use of a criterion which gave priority after those who had attended Christian worship to those who had attended a Church primary school. This was first included in the school’s admission arrangements for 2013 and, as noted above, has been removed with effect from 2016 following determination ADA2601.
14. The referrer notes (and provides evidence) that the majority of the South Asian heritage population living in the area in which the school is located are Muslim. The referrer argues that many Muslims will face significant social, cultural and religious barriers to attending Church services. While the referrer has not provided any evidence to support this argument, it is entirely understandable that adherents of one faith may well not feel able to attend the religious services of another. Thus the school’s oversubscription criteria will be harder to satisfy for some people who follow a faith other than Christianity. Because a

significant proportion of those who live in the school's area who are members of another faith (the Muslim faith) are of South Asian heritage, I conclude that it is harder for people of South Asian heritage than for others who live in the area to satisfy the school's oversubscription criteria. The school's oversubscription criteria are being applied to all regardless of race. However, those who are of South Asian heritage are at a disadvantage compared to those of other ethnic heritages as the latter are less likely to be Muslim and more likely to be Christian. This means that the oversubscription criteria would amount to indirect discrimination on the grounds of race if they are not a proportionate means of achieving a legitimate aim.

The aim of the admissions policy and whether it is a legitimate aim

15. In order to determine whether the school's arrangements do or do not constitute indirect discrimination on the grounds of race, I must first consider whether the aim of the admissions arrangements is legitimate. In order to do this, I must be clear as to what is the "aim" in question. The objector in ADA2601 had stated in a submission dated 5 June 2014 that *"Although the school does not expressly state what legitimate aim it is seeking to pursue, we assume ...that it is to advance a (so far yet undefined) commitment to a "school ethos". It is of course for the Adjudicator to decide whether or not the school continuing to help preserve some sort of "school ethos" in the way of its current admission policy is a legitimate aim."* and *"Nothing that we have seen in the school's response indicates that this discrimination is a proportionate means of achieving a legitimate aim. Indeed, the school's lack of understanding that its admissions criteria does indirectly discriminate on the grounds of race appears a very good indication that its policy has not been crafted as proportionate [sic] means of achieving a legitimate aim, whatever that aim may be [my underlining]."*
16. In its letter of 24 June 2014, the school said *"Our admission policy is not intended to preserve our ethos. Our ethos is established by the school through its policies, practices and procedures and is independent of the pupils who attend the school. The challenge we face is to clearly communicate to prospective families through attendance at Public Worship (open to all, including families of South Asian heritage) or attendance at a church Primary school (many church Primary schools have South Asian families who attend) our prospectus, our open evenings (to which all are invited including South Asian Families) and our offer of visits (again open to all), what that ethos is all about so they are able to make an informed choice about whether they want to apply to us or not."*
17. On the basis of the comments from the school that the aim of the admissions policy is not to preserve the school's ethos and its statements about the desire to ensure that parents understand that ethos, the referrer argues in the letter of 12 November 2014 that the referrer *"does not dispute that the professed aim (ensuring prospective parents/pupils understand the school's ethos) could be seen as a legitimate one given the current state of the law. However, the means used are not proportionate and necessary to achieving that aim"*. I return to the questions of proportion and necessity below. First, I

consider whether I accept that what the referrer thinks is the aim is indeed the aim or the only or whole aim and whether the aim or aims are legitimate.

18. The school has not said in terms in its various submissions on this matter what the aim of its admission policy is. Schools are required to have admissions arrangements and to include as part of those arrangements their oversubscription criteria. They are not required to set out an overarching aim for their admissions policy or arrangements. I accept the school's argument that the aim is not to preserve its ethos and that its ethos exists independently of the children who at any given time attend the school. Indeed, some Church of England schools have very few children from practising Anglican families; however, they all have a Church of England ethos. I shall return later to the point that the ethos of one Church of England school might be different from another, notwithstanding that they will have important elements in common. The school has said that it wants to ensure that people understand its ethos so they can make an informed choice about whether they wish to apply to the school, but I do not consider that is the entire aim of the admissions policy.

19. The school's prospectus which is published on its website and is also available in printed form includes a page which is headed: "Admissions Policy". The printed version of the 2015 prospectus says:

"Bury CE High School is a Diocese of Manchester comprehensive Voluntary Aided secondary school for children aged 11 to 16. It seeks to serve parents from Christian families and other families who wish their children to receive secondary education in a school whose principles and daily life are based on Christianity in the Anglican tradition. The school does not have a catchment area. Currently pupils come from all over the Manchester area and beyond."

20. The words "*and other families*" have been added via an erratum slip. The version on the school's website does not include this amendment and I observe that it is unfortunate and not helpful for parents for different and contradictory versions of documents to exist.

21. The letter from the Chair of Governors of the school which prefaces the school's admissions package says "*Please read our Prospectuscarefully, to satisfy yourselves that our school is appropriate for your child...*". The 2015 prospectus was published in July 2014. I have also reviewed the 2013 edition as I wished to know whether the policy pre-dated the initial objection made to the school's arrangements in April 2014 which was the subject of determination ADA2601. The 2013 prospectus is the same other than the fact it does not include the words "*and other families*". The referrer has not mentioned the prospectus. The school for its part has said in correspondence with the OSA that the parent/guardian is requested to read the prospectus carefully, but has not specifically drawn the referrer's attention to the admissions policy set out in the prospectus. As noted above, the prospectus is easy to find from the school's website and is reached via a tab headed "Applications". I consider that the statement in the prospectus is an aim of the admissions policy as well as an aim of the school. I conclude this on the basis that it is under a heading "Admission Policy" and because it talks about

those whom it seeks to “serve” which will primarily be those who attend the school and their parents/guardians. Against this background, I have decided to test against the requirements of the Equality Act:

- a. the aim set out in the prospectus (that the school is seeking to serve Christian families and other families seeking a Christian based education); and
- b. the aim advanced by the referrer (that the school is seeking to ensure that prospective parents and pupils understand its ethos).

22. As noted above, the referrer has accepted that an aim of ensuring that prospective parents and pupils understand the school’s ethos could be legitimate for the purposes of the Equality Act. I consider that this is right. I also consider it a legitimate aim for a Church of England school to seek to educate children of the faith concerned and other families who wish to have an education based on the principles of that faith. Paragraph 1.36 of the Code allows schools with a religious character to have faith-based oversubscription criteria, but this provision has to be read in the context of the Code as a whole and, in particular, in conjunction with paragraph 1.9i. This provides that while priority on the basis of children’s or parents’ hobbies or activities is generally prohibited, schools with a religious character “*may take account of religious activities, as laid out by the body or person representing the religion or religious denomination*”. The diocese has provided guidance which lays out attendance at acts of worship and which includes the following statements: “*Where faith commitment is used as a criterion to use regular attendance at worship as the measure of faith commitment. Worship attendance should be public worship on Sundays or other days of the week*” and “*schools are encouraged to be inclusive of the wider Christian community. Thismust be definable in terms of a national or local list such as Churches Together in Britain and Ireland.*” The school is taking account of religious activities which have been laid out by its religious authority and the school is acting in accordance with paragraph 1.9i of the Code.

23. I have also considered paragraph 1.8 of the Code which provides that admission arrangements **must not** disadvantage unfairly a child from a particular racial or social group. I do not consider that the school’s arrangements disadvantage unfairly a child from a particular social group. This is because the religious criteria are not demanding to the extent that it would be difficult for families in different circumstances, such as single parent families or those with particular caring responsibilities or from lower socio-economic groups to meet the school’s oversubscription criteria. I deal below with the question of the effect of the school’s arrangements on children from particular racial groups.

24. Lastly in this section, I deal with the matter of the school’s relationship with its neighbour – Derby High School – which has been raised by the referrer. In the context of the referrer’s noting that many Church of England schools give some priority to children who live close to the school without regard to faith, the school has explained that a few years ago consideration was given to

reserving a proportion of places for children who lived in the immediate area. This idea was opposed by Derby High School and was not taken forward. I have been provided with copy of a letter from the headteacher of Derby High School to the Chairman of Governors of the school dated 16 June 2014 stating that Derby High School would “*strenuously oppose*” any change to the school’s admission arrangements to reserve a proportion of places for local children. The referrer has argued that it cannot be a legitimate aim of the school’s admission arrangements to “*avoid upsetting the head teacher of a neighbouring school by taking “their” children*”. I agree that this could not be a legitimate aim, but I do not consider that it is the aim of the school’s admission policy. It is rather part of the context in which the school has considered, consulted on and determined its admission arrangements.

25. I conclude that the aim advanced by the referrer and the alternate aim I have identified are both legitimate for the purposes of the Equality Act and the requirements relating to admissions.

The proportionality of the aim

26. I turn now to the question of whether the school’s approach is proportionate. As pointed out by the referrer and as highlighted in the DfE guidance on the Equality Act, the pursuit of a legitimate aim can still amount to indirect discrimination. This will be the case if there is disadvantage (in this case to those of South Asian descent as they are less likely to be able to satisfy the school’s faith-based criterion) and the school cannot show that the means chosen to pursue the aim is proportionate. The DfE guidance says the reason for the rule or practice has to be legitimate and that it must be the case that “*it could not reasonably be achieved in a different way which did not discriminate.*” The ECHR guidance explains that for the purposes of the Equality Act, “proportionate” means “appropriate and necessary” but “necessary” does not mean that the provision, criterion is the only possible way of achieving the legitimate aim. The guidance also says that: “*The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the justification must be.*” I have accordingly considered whether the school could achieve its aims by other means and the extent of the disadvantage caused to pupils of South Asian heritage.

27. I consider first the referrer’s argument that it is not proportionate to give priority on the basis of attendance at Christian worship in order to ensure that prospective parents and pupils understand the school’s ethos. The referrer argues that there are many other ways to achieve this, including through the name of the school, information on its website, its mission statement and information given out at meetings and points out that the school uses these means alongside attendance at worship. The referrer also notes that these other approaches to making a school’s ethos clear are used by other schools with a religious character but without any requirement for attendance at worship. In the view of the referrer, there can be no doubt that the school is a Christian school, based on the Anglican tradition and that it places importance on worship. Hence the referrer argues there is no need for attendance at worship to make that ethos clear to prospective parents and pupils. The

referrer argues that the other ways of informing prospective parents and pupils about the school's ethos are not discriminatory on the basis of race. The referrer argues that South Asian Muslim parents may wish to send their children to a Church of England school in the full understanding of its nature and ethos but will not for religious, social and cultural reasons attend Church. The referrer cites in this context a local Church of England primary school which does not have faith-based admission arrangements at which some 70 percent of children are of Pakistani heritage and makes the wider point that many Church of England schools have significant numbers of pupils who come from other faith backgrounds.

28. The school has explained its view that *“The requirement to attend public worship ensures that parents and prospective pupils understand the ethos of our school and can make an informed choice as to whether they wish to play their part in that ethos by choosing our school.”* Paragraph 1.9 of the Code states that it is for admission authorities to formulate their admission arrangements and this school has decided that attending worship is an important way in which prospective parents and pupils can understand the ethos of the school. I consider that attendance at worship is likely to give prospective parents and pupils a clearer and deeper understanding of the school's ethos than can be gained from reading the prospectus and other material and attending open evenings and other meetings. This is particularly relevant for this school because of the emphasis it places on participation in Christian worship in the Anglican tradition and on seeking to be a “worshipping community.” Attending Christian worship will give a much better sense of this than reading or hearing about it can do. Those who are willing to attend Christian worship in a Church are likely to be willing for their children to participate in the religious life of the school. I add that the school's prospectus properly recognises the right of parents to withdraw their children from collective worship and religious education.
29. The referrer has drawn attention to other Church of England schools in neighbouring LAs, drawing attention to the fact that a number of them either give priority for only some places on the basis of faith or do not have faith-based oversubscription criteria. The referrer argues that as all of these schools have a Church of England ethos, it cannot be necessary for the school to give priority for all places on the basis of faith. It is the case that different Church of England schools have different approaches to admissions and different approaches to manifesting their ethos. The school has also made the point that it is the only Church of England secondary school in Bury and thus the only school in the LA that can provide a Church of England education at secondary level.
30. I move on to consider the aim expressed in the school's prospectus of seeking to provide for children of Christian families or who wish their children to have a Christian education. In one submission, the school explained its concern that if it could not give priority on the basis of attendance at Christian worship this would lead to people who had attended being *“shut out in favour of those with no allegiance or affiliation to our school ethos.”* The same submission also recognised that many attend worship: *“not because they are particularly*

religious or Christian but because they want to secure a place [at the school] for their child.” This statement by the school has led the referrer to argue that the school “does not profess to be interested in whether or not those who worship are Christian or not, it is merely interested in whether or not they attend church whatever their religious persuasion may be (or none)”.

Oversubscription criteria for schools - whether or not faith-based - are required to be clear and objective. In the case of faith-based criteria this rules out approaches based on what people may or may not believe as this cannot be objectively assessed; for the purposes of faith-based criteria people can be judged only on what they do. The school has based its approach on attendance at worship in line with the guidance of its diocese. It may be the case that some South Asian parents (particularly in the view of the referrer those who are Muslim) may be unwilling to attend Christian worship in a church. The school wishes to have a faith-based oversubscription criterion. The only such criteria open to it (taking account of the requirements of paragraph 1.9i which limits activities to those laid out by the diocese and the wider requirements of the Code for criteria to be objective and clear) are baptism or attendance at worship or some combination thereof. The school has explained that it has chosen attendance at worship as this does not require membership (while the Church of England is not a membership organisation, membership would generally be signified by an individual's having been baptised) and is open to all. The school has also made clear that it takes account only of attendance rather than activities which might connote more active involvement such as attendance at services of communion or having a child baptised.

31. The ECHR and the DfE guidance on the Equality Act explain that the more serious the disadvantage to a particular group caused by a practice, criterion or provision, the more convincing must be the justification for the approach taken. I must therefore consider how great the disadvantage is in this case before I can conclude whether or not the school's approach is proportionate. The referrer has drawn attention in this context to the school's Ofsted rating and its academic results. The school was found at its last Ofsted inspection to be a good school. Derby High School which is the neighbouring school and to which the referrer has drawn attention as having a high proportion of pupils of South Asian heritage has the same Ofsted grading. So far as academic results are concerned, the school has outperformed Derby High School on the measure of five or more GCSEs including English and Mathematics at Grade C or above for three out of the past four years, but it did not do so in 2014. Five of Bury's 13 state-funded schools have outperformed the school on this measure in at least two of the past four years. It is not the case that the school's results are so much better than those of other local schools that a child who did not gain a place there could be said to suffer serious disadvantage - in the sense of not being able to attend a good school - as a result. In addition, the school is not responsible for the performance of other schools.
32. Irrespective of the performance of different schools, I accept that there can also be disadvantage where a parent is not able to obtain a place at the school he or she most wishes his or her child to attend. Where a school is

oversubscribed, some who would like to go there will not be able to do so. The greater the extent of oversubscription, the larger the number who will be disappointed. The referrer has stated, in this context, that the school is heavily oversubscribed. I have accordingly looked at the extent to which the school is oversubscribed and the extent to which it is able to meet demand for places. There is no standard definition of “heavily” oversubscribed. The school receives each year more applications than it has places for and so has to apply its oversubscription criteria. However, parents can express a preference for up to three secondary schools, so many of the preferences expressed for any particular school may well be second or third preferences and thus not represent the school parents most wish their child to attend. Many parents who put the school second or third will be offered a place at a higher preference school. For 2015, the school received 156 first preference applications, 138 second preference applications and 132 third preference applications. This year was not untypical – the corresponding numbers for first preference applications for 2013 and 2012 respectively were 187 and 140. The PAN in each case was 156. Bury has 13 secondary schools. According to information published on the LA’s website, as of national offer date of 2 March 2015 for September 2015, eight of the schools were unable to offer places to all who would like one and a further three were able to do so only by admitting in excess of their PAN. The school is not the only oversubscribed school in the LA or, indeed, the most oversubscribed.

33. In a letter of 30 March 2015, the referrer said: *“given that in many recent years all places are allocated on the basis of church attendance, and none on distance, we would assume that this would be likely to have depressed the number parents [sic] of South Asian/Pakistani heritage applying for a place (as it could be seen as a wasted preference due to the perception that they would have no or little chance of getting in).”* If this argument were true, then there could be more parents who would prefer this school to any other than the preference figures I have set out suggest. I have no evidence about the reasons parents in Bury may have for not applying for places at the school. I have sought to test whether it is likely that parents would consider a preference for the school to be a “wasted preference”. First, I have already found that the referrer has underestimated the number of places allocated on the basis of distance and without regard to attendance at worship. As there is in fact a higher chance of securing a place on the basis of distance than the referrer might think, it is perhaps less likely that a parent would consider he or she had little chance of securing a place at the school. Second, the equal preference system which is a requirement of all admission schemes across England is designed to ensure that parents can express their true preferences without feeling that any preference is wasted, even if they also feel that they have relatively little chance of securing a place at the school they would most like. For example, suppose a family live in the catchment area of Derby School and very close to it and, by extension, to Bury Church of England High School. The parents would most like their child to attend Bury Church of England High School. Their second highest preference is for Broad Oak School and their third is for Derby School. They do not attend Christian worship so know that they will not have high priority under the school’s faith-based criterion. If a place could be offered at all of the schools because the

child scores highly enough against the oversubscription criteria of each, then a place will be offered at Bury Church of England High School. If a place could not be offered there, but could be offered at Broad Oak and at Derby, then a place will be offered at Broad Oak. A similar family with the same preferences but living further from Bury Church of England High School would have less of a chance of securing a place there. However, I have already established that the South Asian population in Bury is concentrated in the area in which the school is located. The document published by the LA "Transferring to secondary Schools" contains four clearly expressed and helpful examples of how the system of preferences works. The school's admission arrangements also set out the number of places allocated under each oversubscription criterion in the previous year.

34. As I acknowledge, it is particularly challenging to know the reasons why parents may not have applied for particular schools. Having looked at the information which is available to parents in Bury, however, I do not believe that a reasonably well informed parent would be reluctant to apply for the school on the grounds that this would be a wasted preference. Such a parent would know both that they had two other preferences and they could, in any event, be offered only one place. I am not persuaded that there is significant desire for places at the school which is not being expressed in the form of preferences on application forms. If I am wrong in this conclusion, and there are significant numbers of parents who are put off from applying on the basis that this would be a wasted preference, I do not consider that the disadvantage caused is great enough to necessitate a change to the school's arrangements. Moreover, as I have stated, I think that the LA makes clear in information it provides how the admissions system works.
35. I need to address the issue of information which the referrer has provided to me about the second preferences of those parents who put the school as their first preference for admission in 2014. The referrer draws attention to the fact that few of these second preferences were for other Church of England secondary schools. The referrer goes on to infer from this that parents may be applying to the school not because it is a school with a religious character but because it has a good Ofsted report and has good GCSE results. The referrer also suggests that the school might be attractive to some parents because it has few children from poor socio-economic groups and even because it has very few South Asian children. I am covering this issue in this determination in the interests of being seen to deal with all the information which has been put before me. In fact, schools do not know what other preferences are expressed by parents. The role of the school is to apply its admissions arrangements and no school is responsible for the reasons parents may have for wishing to express a second preference for another school. Furthermore, as the Code makes clear at paragraph 1.9a, admission authorities are specifically prohibited from taking account of other preferences expressed.
36. The referrer argues that South Asian Muslim parents would like their child to attend this particular Church of England school but are not likely to be willing to attend worship at a Christian Church. I have not been given any evidence to support this argument, but, as I have said, I accept that many people with a

strong religious faith would not be willing to attend the religious services of another faith but would still like their children to attend a school with a religious character of that other faith. As the referrer notes, it is quite likely that such parents would value the moral and spiritual values of such a school. I have already stated that there are few children of South Asian heritage at the school and I have concluded that the school's faith-based oversubscription criterion puts those of South Asian heritage at a disadvantage. There are other Church of England schools in neighbouring LAs which are not oversubscribed and at which parents can gain places without needing to attend Church.

37. Taking account of all the information available to me, I am not persuaded that the disadvantage to South Asian heritage children whose parents would like them to attend the school is great either in terms of the quality of education being better at the school than at other schools or in terms simply of the extent of potential unmet demand for places at the school. In reaching this conclusion, I accept that no other school may offer to parents living in Bury the exact combination of proximity, results and religious character offered by the school. However, I consider that the school's approach of giving priority on the basis of attendance at Christian worship is a proportionate means of ensuring that prospective parents and pupils fully understand its ethos. It is also a proportionate means of seeking to serve Christian families and those who wish to have an education based on the Christian faith. I conclude also on the same basis that there is no breach of paragraph 1.8 of the Code in relation to race as the arrangements do not unfairly disadvantage a child from any particular racial group.
38. Finally, the referrer has also argued that the school has failed to meet the Public Sector Equality Duty (PSED) in section 149 of the Equality Act. This requires public authorities (which include the governing bodies of VA schools) to consider and identify the equality implications of their policies and actions, as well as proactively to consider how to address equality issues arising. The duty includes having due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between persons who do and do not share a relevant protected characteristic, which includes race and religion or belief. The referrer argues that the school has failed to have due regard to its PSED because it has failed to recognise that South Asian children are disadvantaged by its admissions criteria and, the referrer argues, this means that any analysis the school may have conducted must be flawed. It is important to note that the PSED placed on the governing body of the school is much broader than admissions and covers matters such as the way pupils are educated within the school, the links the school may have with other schools and organisations and the way the school works with other organisations. Those wider aspects of the duty are outside my jurisdiction and I cannot and therefore have not considered them. The two protected characteristics which I consider relevant in this case are race and religion or belief and I shall deal first with religion or belief.
39. So far as admissions and the PSED are concerned, I consider that a school with a religious character can be considered to be in a similar position to a single sex school. Single sex schools have an exemption from the

requirements of the Equality Act relating to gender so that they can educate only boys or girls as the case may be. It has to have due regard to those matters covered in the PSED in relation to gender but this does not mean that it must admit pupils of the other gender. Similarly, I do not believe that the school must give priority for places other than on the basis of faith in order to meet the PSED in relation to religion or belief. So far as race is concerned, the reasons I have given above for my finding that the school's approach is a proportionate means of achieving its legitimate aim, apply also in relation to the school's compliance with the PSED in relation to race. I do not accordingly find that the school has failed – in its admission arrangements - to have due regard to the need to eliminate discrimination and the other components of the PSED.

Conclusion

40. On the basis of all the information available to me and the arguments put to me, I have concluded that the school's arrangements do not amount to indirect discrimination on the basis of race and that they are in conformity with the requirements relating to admissions.

Determination

41. In accordance with section 88(5) of the School Standards and Framework Act 1998, I have considered the admission arrangements determined by the governing body of Bury Church of England High School Bury for admissions in September 2015. I determine that the arrangements conform with the requirements relating to admission arrangements.

Dated: 2 June 2015

Signed:

Schools Adjudicator: Shan Scott