TRANS CHILDREN IN SCHOOLS

ADVICE

INTRODUCTION

1. I am asked to provide an advice for Good Law Project ("**GLP**") on the law applicable to trans children in schools. I understand that GLP has been contacted by schools and parents who have been concerned to understand the law as it applies to trans children who are pupils, or prospective pupils, at schools in England & Wales. The law in this area is undoubtedly difficult, and largely untested, and there is little guidance available. I have therefore been asked for my views on a number of legal questions to assist schools.

2. The questions are as follows:
   (1) Can a mixed school refuse to admit or exclude a child because they are trans?
   (2) Is a school required, as a matter of law, to treat a child as being of the gender with which they identify? If so, what are the main practical components of this obligation? If not, what obligations, if any, does the school have to that child?
   (3) Can a girls' (or boys') school admit a trans girl (or boy)? If it does so, will it lose its single-sex status?
   (4) Can a girls' (or boys') school exclude a trans boy (or girl) who is a current pupil on the basis that they are a girls' (or boys') school and the pupil identifies as male (or female)?
   (5) Can a girls' (or boys') school refuse to admit a trans boy (or girl) on the basis that they are a girls' (or boys') school and the pupil identifies as male (or female)?
   (6) Can a girls' (or boys') school refuse to consider admitting a trans girl (or boy) on the basis that she (or he) is legally male (or female)?
   (7) Will the answers differ for different types of schools?

3. I set out below the applicable legal framework and the terms I will be using. I then give my views on the above questions.

LEGAL FRAMEWORK

4. The key legal provision that is relevant to the questions I am asked is the Equality Act 2010 ("**EA 2010**"). I set out below the parts of the EA 2010 relevant to trans children in schools.

"Protected characteristics"

5. Part 2 Chapter 1 of the EA 2010 sets out a series of "*protected characteristic*" for the purposes of the Act. The "*protected characteristics*" are listed in EA 2010 s 4 and are "*age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation*." Not all protected characteristics apply to schools and "*age*" and "*marriage and civil partnership*" are expressly excluded in relation to education (see EA 2010 s 84). For present purposes the relevant protected characteristics are "*gender reassignment*" and "*sex*", and both apply to schools.

Gender reassignment

6. The protected characteristic of "*gender reassignment*" is defined in EA 2010 s 7. It is as follows:

> *(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*
>
> *(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.*

7. As will be appreciated, the protected characteristic of "*gender reassignment*" is broadly defined. There is no requirement in order for a person to have the protected characteristic that they have a "*gender recognition certificate*" (see further below), or that they have undergone any form of physical transition. It is sufficient to have the protected characteristic of "*gender reassignment*", and therefore that the individual is defined as a "*transsexual person*" for the purposes of the EA 2010, that they are "*proposing to undergo*" or "*undergoing or ha[ve] undergone*" a process of reassigning their sex by any form of "*changing physiological or other attributes of sex.*"

8. There has been some discussion as to whether individuals who are non-binary or otherwise have fluid gender identities are covered by EA 2010 s 7. The language of the section appears to envisage protecting only those who are proposing, undergoing or

who have undergone "*a process … for the purpose of reassigning … sex*". That might suggest it only covers someone who is moving from one sex to another, and not someone who identifies with neither. It is, however, hard to see why those who are non-binary / gender fluid should not be protected by the EA 2010 as a matter of policy, and an Employment Tribunal in *Taylor v Land Rover* (14 September 2020, Case No: 1304471/2018) ruled that "*a non-binary, gender fluid person*" had the protected characteristic of "*gender reassignment*". The Tribunal concluded at §178 that Parliament intended gender reassignment to be a "*spectrum moving away from birth sex, and that a person could be at any point on that spectrum*". "*The wording of section 7(1)*", the Tribunal held (ibid), "*accommodates that interpretation without any violence to the statutory language*". The Tribunal was clear that the characteristic of "*gender reassignment*" would apply to those describing themselves as "'*non-binary' i.e. not at point A or point Z, 'gender fluid' i.e. at different places between point A and point Z at different times, or 'transitioning' i.e. moving from point A, but not necessarily ending at point Z, where A and Z are biological sex*" (ibid).

9. The issue has not been considered by the higher courts, but at present the safest view is probably that those who are non-binary / gender fluid are protected by the EA 2010. More generally, and although gender identity is not itself a protected characteristic, it is also probably safest for a school to proceed on the basis that a child that identifies and presents in ways not generally associated with his or her "*birth sex*" will have the protected characteristic of "*gender reassignment*" and will be defined as "*transsexual*" for the purpose of EA 2010 s 7(2).

Sex

10. The protected characteristic of "sex" is dealt with in EA 2010 s 11 as follows:

> *In relation to the protected characteristic of sex –*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;*
> *(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.*

11. Prior to the enactment of the EA 2010, and in the context of the legal requirement applicable at the time that parties to a marriage be "*male*" and "*female*", the courts held that "*sex*" was biologically determined and "*fixed at birth*" by reference to

chromosomal, gonadal and genital tests (see Corbett v Corbett [1971] PR 83, 104-D-E and 106B-F and Bellinger v Bellinger [2003] AC 467 §6-49, 56-8, 62-65, 71, 77, 80-83). There has been some discussion about whether that applies universally in the law and to other legislation. In a number of cases, in order to secure compliance with EU law, the courts have interpreted legislation dealing with "*sex*" as not restricted to a purely biological understanding of sex and recognised that a trans person might have a "sex" different from that assigned to them at birth (see for example P v S & Cornwall CC [1996] ICR 795, Chief Constable of the West Yorkshire Police v A (No 2) [2005] 1 AC 51, and MB v Secretary of State for Work and Pensions Case C-451/16 [2019] 1 CMLR 4).

12. Should the EA 2010 definition of "*sex*" in s 11 be understood as being based on a "*biological*" understanding of sex, with sex fixed at birth, or does it have some broader meaning? In my view the narrower "*biological*" meaning is likely to be applied by the courts. That is because:

    (i) Outside of the EU context, the UK courts have continued to apply a binary and biological understanding of sex. This has been stated in, or been the premise of, a number of judgments (see Green v Ministry of Justice [2013] EWHC 3491; R (Fair Play for Women Ltd) v UK Statistics Authority [2021] EWHC 940 (Admin); R (Authentic Equality Alliance (AEA)) v Equality and Human Rights Commission [2021] EWHC 1623; and R (FDJ) v Secretary of State for Justice [2021] EWHC 1746).

    (ii) In A (No 2), one of the key authorities applying a wider interpretation of "sex" in order to secure compliance with EU law, the House of Lords explained that the EU Equal Treatment Directive required Member States to recognise people in an "*acquired gender*", but explained that that can be done by national legislation which can determine "*demarcation questions*" as to how an acquired gender is to be recognised (see §60). At the time the case was decided, the Gender Recognition Act 2004 ("**the GRA 2004**") was not yet in force, but the House of Lords considered that the Gender Recognition Bill, as it then was, would "*provide a definition and a mechanism*" for resolving question as to when a person could be legally recognised in an "*acquired gender*" (ibid). The GRA 2004 is now in force and sets out a process by which an individual can change their legal sex. Individuals can apply for a Gender Recognition Certificate (**"GRC"**) if they have been living in "*the other gender*" (s 1(1)), and the gender in which they are living

is described as the person's "*acquired gender*" (s 1(2)). If prescribed conditions are satisfied, a person may then obtain a GRC. The effect of a GRC is that "*the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)*" (s 9(1)). In the GRA 2004 the UK has thus passed national legislation which seeks to answer the "*demarcation question*", as the House of Lords said was required, and which sets out when a person's legal sex can be changed to their "*acquired gender*" (i.e. when they obtain a GRC). Now that has occurred, in my view, the courts are likely to proceed on the basis that a person can change their legal "*sex*", but only as prescribed in the GRA 2004. Otherwise, the person's sex will be "*fixed at birth*".

(iii) The GRA 2004 is itself premised on individuals being born with a legal "*sex*" that is "*male*" or "*female*", but who may be "*living in the other gender*". They can thereby obtain a GRC so that their legal "*sex becomes [that of their] acquired gender*". That suggests that "*sex*" is binary and biological, and that a person only "*acquires*" a different "*sex*" as a matter of law if they have a GRC. Indeed, the GRA 2004 would make little sense if a person could change their legal sex without satisfying the requirements in the GRA. Since the enactment of the GRA 2004 the courts have made clear that, unless an alternative interpretation is needed to avoid a breach of EU law, "*sex*" should be interpreted as being determined as ascribed at birth or by reference to a GRC, and not otherwise by reference to the way a person identifies, lives or presents (see eg *P v P (Transgender Applicant for Declaration of Valid Marriage)* [2020] 1 FLR 807 limiting the application of EU law in this area).

13. The leading text on the EA 2010, Monaghan on Equality Law (2nd edn 2013) at §5.136-5.137, states that, subject to a person obtaining a GRC, the EA 2010 treats sex as "*immutable and … biologically determined*". For the reasons set out above, I consider that to be the way in which the UK courts are likely to interpret the EA 2010. That is significant for schools. A GRC cannot be obtained until a person is aged 18 (GRA 2004 s 1(1)), and obtaining a certificate is a lengthy process. It is thus unlikely that a school will be dealing with many, if any, pupils or prospective pupils with a GRC, and the legal "sex" of the vast majority, if not all, of the pupils and prospective pupils at a school will be that "*fixed at birth*". It will be set by "*biological*" tests irrespective of how

the pupil identifies or presents in terms of gender. As set out below, that does not mean that trans pupils are not protected by the EA 2010. They will be protected by reference to their protected characteristic of "*gender reassignment*", i.e. by reason of their being trans, but not because they have acquired a legal "*sex*" different from that ascribed to them at birth.

Obligations imposed on schools

14. EA 2010 s 85 deals with admission and treatment of pupils and prospective pupils. The section applies in England & Wales to local authority maintained schools, independent schools and academies (s 85(7)). It imposes obligations on the "*responsible body*" of a school, which is defined in s 85(8) as the "*proprietor*" of an "*independent school*" or "*alternative provision Academy*". For a school maintained by a local authority school, the "*responsible body*" is the local authority or governing body (ibid).

15. Section 85 (1) and (2) provide:

> *(1) The responsible body of a school to which this section applies must not discriminate against a person –*
>
> *(a) in the arrangements it makes for deciding who is offered admission as a pupil;*
> *(b) as to the terms on which it offers to admit the person as a pupil;*
> *(c) by not admitting the person as a pupil.*
>
> *(2) The responsible body of such a school must not discriminate against a pupil –*
>
> *(a) in the way it provides education for the pupil;*
> *(b) in the way it affords the pupil access to a benefit, facility or service;*
> *(c) by not providing education for the pupil;*
> *(d) by not affording the pupil access to a benefit, facility or service;*
> *(e) by excluding the pupil from the school;*
> *(f) by subjecting the pupil to any other detriment.*

Section 85(3) provides that a "*responsible body must not harass*" a pupil or prospective pupil. The provision does not, however, apply in relation to the protected characteristics of "*gender reassignment, religion or belief, [and], sexual orientation*" (see s 85(10)). Section 85(10) only applies to "*harassment*", and not to the other provisions in section 85. Sections 85(4) and 85(5) prohibit the victimisation of pupils or prospective pupils who have sought to bring proceedings under the EA 2010 or taken other protected steps.

16. As will be apparent from the above, section 85(1) prohibits discrimination in relation to admission of pupils to a school. It is self-explanatory and prohibits discrimination in determining who to admit to a school and in the arrangements for, and terms of, admission. Section 85(2) applies to the treatment of children once they are pupils at the school. Section 85(2) prohibits discrimination in relation to the way education is provided, discrimination in access to any benefit, facility or service, or discrimination in exclusion. It is thus very broad and is likely to cover discrimination in almost any aspect of school life, not simply in relation to teaching but all services, facilities or benefits offered to pupils (see *R (Al-Hijrah School) v OFSTED* [2017] EWCA Civ 1426). In addition, schools cannot discriminate by subjecting a pupil to "*any other detriment*". The suffering of a "*detriment*" is a broad concept. It is not limited to detriment of some particular kind and is examined from the point of view of the alleged victim. In *MOD v Jeremiah* [1980] 1 QB 87 the Court of Appeal held at 104E that "*if a reasonable worker would take the view that the treatment was to his detriment*" it will be sufficient. That applies to the perspective of the "*reasonable pupil*" in the school context (see *Al-Hijrah School* at §61). It must, however, be shown that the alleged "*detriment*" is capable of being objectively regarded as such (see *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, applying *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was held at §35 that "*an unjustified sense of grievance cannot amount to 'detriment'*"). Thus, any treatment that is considered by the pupil to be a "*detriment*", provided that is not an unjustified sense of grievance, is capable of falling within EA 2010 s 85. Its application to trans children is considered below.

17. As set out further below, s 85(1) and (2) are subject to exceptions applicable to single-sex schools (see EA 2010 s 89(12) and Schedule 11).

Definition of discrimination

18. "*Discrimination*", prohibited by EA 2010 ss 84(1) and 85(1), includes "*direct discrimination*" defined in EA 2010 s 13 and "*indirect discrimination*" defined in s 19.

19. Direct discrimination arises "*if, because of a protected characteristic, [a school] treats [a pupil or prospective pupil] less favourably than [the school] treats or would treat others*." Thus if a school refused to admit a pupil, or treated them less favourably in any of the ways listed in s 85(2) once admitted, "*because of*" their race or religion or because they are

trans, that would be direct discrimination. Unless a school has a statutory defence, treating a pupil less favourably because of a protected characteristic is unlawful, and that is so irrespective of whether the school believes that the treatment in question was justified or pursued some wider goal. As the Supreme Court made clear in R(E) v JFS [2009] UKSC 15 at §71, if a school is guilty of direct discrimination "*however justifiable it might have been, however benign the motives of the people involved, the law admits of no defence*" unless expressly contained in statute. I discuss in more detail below the sorts of conduct by a school that are capable of being directly discriminatory in this context.

20. Indirect discrimination pursuant to EA 2010 s 19 arises 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 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.*

21. If a school were to apply an apparently neutral "*provision, criterion or practice*" ("**PCP**"), in terms of school admission or other matters, which it applies generally but which disadvantages a disproportionate number of children of one particular race or sexual orientation or other protected characteristic, that would be unlawful unless the school could show the PCP was a "*proportionate means of achieving a legitimate aim*" (see EA 2010 s 19(2)(d)). Thus, for example, if a school had admission criteria that it was disproportionately more difficult for trans children to meet, the school would need to be able to justify the criteria. It would not matter if not all trans children were disadvantaged by the criteria, or that some non-trans children could also not satisfy the criteria. Provided a disproportionate number of trans children were disadvantaged, the criteria would need to be shown to be justified if it was to be lawful.

22. The critical difference between direct and indirect discrimination is that, save for a number of specific statutory exceptions, if treatment constitutes "*direct discrimination*" it cannot be justified. It will be unlawful even if a school might be able to show that the

treatment in question was considered to be in a child's best interests or for what the school considered to be some other good reason. By contrast, conduct that would otherwise constitute indirect discrimination can be justified. I discuss in more detail below the sorts of conduct by a school that are capable of being indirectly discriminatory.

Statutory exemptions for single-sex schools

23. As will be appreciated, without a statutory exemption, single-sex schools would be unlawful. A "*boy's school*" that refuses to admit a girl is treating the girl less favourably because of her sex (and vice versa for a girl's school refusing to admit a boy). That would constitute direct discrimination on grounds of sex and would be unlawful pursuant to EA 2010 s 85(1) in the absence of an express statutory exemption. The reason single-sex schools are lawful is the provision contained in EA 2010 Schedule 11 para 1. It provides:

> *(1) Section 85(1), so far as relating to sex, does not apply in relation to a single-sex school.*
>
> *(2) A single-sex school is a school which –*
>
> *(a) admits pupils of one sex only, or*
>
> *(b) on the basis of the assumption in sub-paragraph (3), would be taken to admit pupils of one sex only.*
>
> *(3) That assumption is that pupils of the opposite sex are to be disregarded if –*
>
> *(a) their admission to the school is exceptional, or*
>
> *(b) their numbers are comparatively small and their admission is confined to particular courses or classes.*
>
> *(4) In the case of a school which is a single-sex school by virtue of sub-paragraph (3)(b), section 85(2)(a) to (d), so far as relating to sex, does not prohibit confining pupils of the same sex to particular courses or classes.*

24. The application of Schedule 11 to trans children is dealt with further below. A number of points, however, should be noted:

(i) First, the provision only exempts schools from claims of sex discrimination. It does not permit other forms of discrimination including gender reassignment discrimination.

(ii) Second, Schedule 11 para 1(1) only exempts schools from EA 2010 s 85(1) and not s 85(2). Thus it only disapplies provisions relating to sex discrimination in relation to admission. The only disapplication of discrimination provisions in relation to s 85(2) (i.e. the prohibition on discriminating against current pupils) arises in narrow circumstances. It applies in relation to the provision of education and access to benefits, facilities or services where a comparatively small number of pupils of the opposite sex are admitted to particular courses or classes at an otherwise single-sex school (see Schedule 11 para 1(3)(b)). The school will not thereby discriminate against those children by confining them to those particular courses or classes (see Schedule 11 para 1(4)). Otherwise there is no defence to the discriminatory treatment of pupils currently in a school.

(iii) Third, Schedule 11 para 1(2) and 1(3) defines a "single-sex school". As set out below, that will be important in considering admission of trans pupils.

TERMS USED

25. Before turning to the questions on which I am asked to advise, I define the terms I will be using below.

26. As set out above, the "*sex*" of a child, as defined by the EA 2010, will be the sex ascribed to him or her at birth and determined by biological considerations. As a child cannot apply for a GRC, that will apply irrespective of how the child identifies or presents. I will use the phrase "*legal sex*," and describe a child as "*legally male*" or "*legally female*", when referring to the "*sex*" that the EA 2010 considers the child to have.

27. Where a child has a gender identity that is different from his / her legal sex, I will describe the child as a "*trans child*" or as a "*trans boy*" or "*trans girl*." Thus a "*trans boy*" is a child whose "*legal sex*" is "*female*", but who identifies as male. A "*trans girl*" is a child whose "*legal sex*" is male, but who identifies as female. I will use the term "*non-binary*" as an umbrella term to cover a child who does not identify as male or female (or does not do so all the time).

LEGAL ISSUES APPLICABLE TO TRANS CHILDREN IN SCHOOLS

Issue 1: Can a mixed school refuse to admit or exclude a child because they are trans?

28. The answer to the question is "no". EA 2010 s 85(1)(c) prohibits a school from discriminating against a person by not admitting them as a pupil to a school, and s 85(2)(e) prohibits a school from discriminating against a pupil by excluding them. A trans child has the "*protected characteristic*" of "*gender reassignment*." A refusal to admit a child, or their exclusion, because they are trans is "*less favourable treatment because of a protected characteristic*". It is thus direct discrimination pursuant to EA 2010 s 13, and there is no statutory defence applicable. Schedule 11 para 1 only provides a defence in relation to single-sex schools and only in relation to sex discrimination. It would thus not protect a mixed school from a claim of gender reassignment discrimination in admission or exclusion. As set out above, and unlike indirect discrimination, in the absence of a statutory defence, direct discrimination is unlawful. It would not matter if the school considered that the refusal of admission or the exclusion was justified in some way. It will be unlawful.

Issue 2: Is a school required, as a matter of law, to treat a child as being of the gender with which they identify? If so, what are the main practical components of this obligation? If not, what obligations, if any, does the school have to that child?

29. A school must not "*discriminate*" against a pupil "*in the way it affords [them] access to a benefit, facility or service*" or by "*subjecting [them] to any other detriment*" (see EA 2010 s 85(2)(b) and (f)). How does that apply, for example, to a trans girl at a mixed school wishing to be treated consistently with the gender with which she identifies? Is she entitled to use a female name, different from that in which she is registered at the school, or use female changing facilities or wear the "girls' uniform" (if different for that of boys) or play in the girls' sports team? Similarly, is a trans boy entitled to use a male name, access male changing facilities, play in the boys' sports team? As indicated above, EA 2010 s 85(2) is a very broad provision. A refusal by a school to allow a child to change their name, access a changing facility, play in a sports team of their choice or wear a particular uniform is likely to concern access to a "*benefit*", "*facility*" or "*service*" and/or to constitute a "*detriment*". It therefore falls within the scope of s 85(2). The question will be whether the refusal is discriminatory.

Direct discrimination

30. EA 2010 s 13 read with s 85(2) prohibits subjecting a child to less favourable treatment in access to a benefit, facility or service, or subjecting the child to a detriment, because of a protected characteristic. Thus, if a school denied a trans child access to a facility or service, or subjected them to some detriment, because they were trans, that would be unlawful.

31. Direct discrimination in this context might arise as follows. Suppose other children at a school are permitted, if they comply with certain formalities, to be identified in the classroom by a name different from their name registered with the school. Suppose that is, however, denied to a trans child who complies with the same formalities because the school wishes to discourage the child expressing a gender identity that is not regarded as consistent with their legal sex. That would be direct gender reassignment discrimination. The child has been treated less favourably than other children are, or would be, treated, because of the protected characteristic of gender reassignment. There is no applicable statutory defence, and it will not be open to the school, even if it considers it has some basis for its actions, to argue that it is justified.

Indirect discrimination

32. Suppose, however, that the school argues that it is not treating trans children less favourably than other children, but has a policy, applied to all children, of not allowing children to change name, or a policy insisting that children use the communal changing area or the uniform of their legal sex. That will not constitute direct discrimination because all children are treated the same under the policy. It may, however, constitute unlawful indirect discrimination. That will be so if: (i) the policy or practice disproportionately disadvantages trans children when compared to non-trans children (see EA 2010 s 19(2)(a)-(c)); and (ii) if the school cannot show that the policy or practice is justified (see s 19(2)(d)). I will consider each stage in turn.

Disadvantage

33. The first question is whether the policy or practice in question disadvantages trans children to a greater extent than non-trans children, and that will depend on carefully considering the particular policy or practice in issue.

34. If, for example, a school has a policy of refusing to allow a child to be known by any name other than that registered with the school, is that likely to disproportionately disadvantage trans children? The answer is almost certainly yes. There will, no doubt, be some children who wish to be known by a different name at school from their registered name for reasons unrelated to their gender identity, and there may be children who are trans who would be unaffected by a policy refusing name changes and are content to be known by their registered name. It is, however, likely that a greater proportion of trans children than non-trans children will wish to change the name by which they are addressed at some point during their time at school. For many trans children it is important to alter the name they were given at birth from one that is identifiably male or female to one associated with the opposite gender, or a gender-neutral name. They will therefore be disproportionately disadvantaged by a policy that does not permit such a change.

35. Similarly, policies requiring children to use the communal changing facilities of their legal sex will very likely disadvantage trans children to a greater extent than non-trans children. In *R (Authentic Equality Alliance ("AEA")) v Equality and Human Rights Commission ("EHRC")* [2021] EWHC 1623, the High Court considered a judicial review seeking to challenge the section of the EHRC's Statutory Code of Practice on "*Services Public Functions and Associations*" dealing with single-sex services. The Court accepted at §8 that the exclusion of a "*trans woman [from a] single-sex service provided to birth women*" was likely to create a "*disadvantage*" for trans women and "*thus require justification*". The same applies for trans men and boys excluded from a single-sex male facility. The reason is obvious, and it applies equally to schools that require children to use the changing rooms or other facilities of their legal sex. There may be non-trans children who feel uncomfortable using communal changing facilities of their legal sex, but that is much more likely to be the case for trans children. A policy of requiring children to use the communal changing facility of their legal sex is thus very likely to disadvantage a significantly greater proportion of trans children as compared to non-trans children. The same is true of a policy that pupils must wear a "boys" or "girls" uniform or play in a sports team depending on their legal sex.

Justification

36. Establishing that a policy or practice disproportionately disadvantages trans children does not necessarily mean that it is unlawful. If it can be shown by the school to be a "*proportionate means of achieving a legitimate aim*," the policy or practice will be permissible even if it imposes a relative disadvantage on trans children.

37. The first question is whether the school can show the policy or practice pursues a "*legitimate aim*". That means it pursues some wider benefit of sufficient importance to justify limiting an individual's rights, and that the policy or practice is rationally connected to that aim (see *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293; [2006] 1 WLR 3213 §164). Protecting the safety, dignity and privacy of children at school, for example, will be legitimate aims but the school will need to show that there is a proper basis for concluding that excluding trans children from a service or facility of the gender with which they identify supports those aims, and is rationally connected to fulfilling them. Similarly having the school ethos reflected in a mandatory uniform may be a legitimate aim, but the school will need to show that requiring trans children to wear the uniform of their legal sex supports that aim and is rationally connected to its pursuit.

38. If the school is pursuing a "*legitimate aim*", it will then need to show that its policy or practice is a proportionate means of pursuing it. That requires "*weigh[ing] the need [of the policy or practice] against the seriousness of the disadvantage to the disadvantaged group*" (*Elias* at §151). The school will need to consider the impact on trans children of the policy or practice. What, for example, is the impact on a trans child of refusing to allow them to alter the name by which they are known or insisting they use a changing area or wear a uniform that is inconsistent with their gender identity? Conversely what would be the detrimental impact on other children, or on school administration, if the trans child is allowed to use a different changing facility from that of their legal sex or wear a different uniform or adopt a different name? Is the impact on trans children outweighed by the importance of the aim being pursued? In that regard the school will need to consider whether there are other ways to pursue particular aims while lessening the disadvantage for trans children. If a school is pursuing a legitimate aim, but it can be pursued in ways that have a less harmful impact on trans children, it will not be proportionate.

39. Ultimately, proportionality will depend on the facts of a particular case. If, for example, a school has cubicles in a changing area, it may be more difficult to justify refusing to allow a trans girl to use the girls' changing facilities. On the other hand, and depending on the children's age, it may be easier to justify the exclusion if the facilities are open, but then it may be necessary for the school to provide additional gender-neutral facilities that trans children or others who feel uncomfortable with a communal facility can use. Or if a school has a policy or practice in relation to changes of name, it may be possible to justify refusing to allow a child to be known by the name of their choice in formal matters such as external examinations, but not proportionate to refuse to allow them to be addressed as they wish by teachers in the classroom. The question in each case will be whether the disadvantage imposed on the trans child will be justified by the wider aim the policy is seeking to pursue.

40. If schools want to avoid the risk of acting unlawfully, I would advise them to review their policies and practices carefully to see which might disproportionately disadvantage trans children, and then consider why those policies or practices are being pursued and whether they are really necessary, or whether different measures could be put in place without compromising others' rights or interests. I would also advise documenting those considerations. Provided a school can show they have conscientiously carried out the balancing exercise, thought carefully about the needs of different children and the school community as a whole, and can explain why the particular position they have taken is thought through and justified, rather than a result of stereotypes or unsupported assumptions, a court is likely to accord significant weight to schools' judgments. While responding to the needs of trans children raises particular concerns, some of which schools may not have confronted before, the issues remain at their core how best to ensure children in a school, both trans and non-trans, can be educated in a safe, supportive and respectful environment in which they can all flourish. That is a question in which schools, provided they have conscientiously and carefully considered the issues, have particular expertise, and that is likely to be recognised by the courts.

Issue 3: Can a girls' (or boys') school admit a trans girl (or boy)? If it does so, will it lose its single-sex status?

41. Pursuant to EA 2010 s 85(1) it is generally unlawful to discriminate against a child by not admitting them as a pupil to a school. EA 2010 Schedule 11 para 1, however,

provides a defence applicable to a "*single-sex school*". Schedule 11 para 1(1) provides: "*Section 85(1), so far as relating to sex, does not apply in relation to a single-sex school.*" Schedule 11 thus allows a girls' school to refuse to admit a boy and a boys' school to refuse to admit a girl without being guilty of sex discrimination. If a school is not a "*single-sex school*", or loses its single-sex status, however, the defence will not be open to it. It will therefore not be permitted to discriminate on grounds of sex. Thus if a "*girls' school*" ceases to be a single-sex school, it can no longer refuse to admit boys on the grounds of their sex, and a boys' school will be unable to refuse to admit girls.

42. The question that arises is whether a school ceases to be a "*single-sex school*" (and thus loses the protection of EA 2010 Schedule 11 para 1) if it admits trans children? In other words, could an otherwise all-girls school admit a trans girl (whose legal sex is male) without thereby ceasing to be a single-sex school (and thus being required to admit any boy that wished to attend)? Could a boys' school admit a trans boy while remaining a "*boys' school*" and still be able to refuse to admit non-trans girls who apply?

43. These are not straightforward questions. The EA 2010 is not explicit on the point and there has not been any relevant caselaw considering it. It depends on the correct interpretation of EA 2010 Schedule 11 paras 1(2) and 1(3) which define a "*single-sex school*". Schedule 11 para 1(2) provides "*A single-sex school is a school which – (a) admits pupils of one sex only, or (b) on the basis of the assumption in sub-paragraph (3), would be taken to admit pupils of one sex only.*" Schedule 11 para 1(3) provides: "*That assumption [pursuant to para 1(2)(b)] is that pupils of the opposite sex are to be disregarded if – (a) their admission to the school is exceptional, or (b) their numbers are comparatively small and their admission is confined to particular courses or classes.*" A single-sex school which admits trans children is no longer a school that "*admits pupils of one sex only*". It will be a school which, as a matter of law, admits children of both sexes. The school cannot therefore rely on para 1(2)(a). The question will be whether the school can, nevertheless, remain "*single-sex*" pursuant to para 1(2)(b) on the basis of the assumption set out in para 1(3)(a), namely that the admission of the trans child is "*exceptional*" within the meaning of para 1(3)(a) and the school therefore "*would [still] be taken to admit pupils of one sex only*" pursuant to para 1(2).

44. The word "*exceptional*" in EA 2010 Schedule 11 para 1(3) is not defined. The Explanatory Notes to the EA 2010 give the following example of a boys' school that admits a limited number of girls but nevertheless remains a "*boys' school*": "*If the daughters of certain members of staff at a boys' school are allowed to attend, it is still regarded as a single-sex school*" (§862). The admission of the girls is "*exceptional*" (in the sense that only a small number are admitted and their admission is an exception to the general rule that only boys are permitted to attend the school). In my view a single-sex school could argue that the same applies if it admits trans children. If a small number of trans boys (who are legally female) were admitted to a boys' school, that could be regarded as "*exceptional*" and not altering the school's status as single-sex. Indeed, in some ways the admission of a small number of trans boys is less obviously inconsistent with a school's single-sex status than admission of the non-trans daughters of teachers. The trans boys may be legally female, but if they present and identify as male, their place in a boys' school may be less incongruous, and more in keeping with the school's character and ethos as a boys' school, than the admission of the teachers' daughters. I thus cannot see why a school should be precluded from admitting trans children on an "*exceptional*" basis within the meaning of EA 2010 Schedule 11 para 1(3)(a) while retaining their single-sex status. The school could then continue to rely on Schedule 11 para 1 to refuse to admit non-trans children without being liable for sex discrimination.

Issue 4: Can a girls' (or boys') school exclude a trans boy (or girl) who is a current pupil on the basis that they are a girls' (or boys') school and the pupil identifies as male (or female)?

45. Suppose a child at an all-girls school comes to identify, in some or in all aspects of his life, as male. Can the school exclude him (and vice versa with a trans girl at an all-boys school) because the school considers the child's attendance to be inconsistent with the school being "*single-sex*"? The short answer is no.

46. EA 2010 s 85(2)(e) precludes a school from discriminating by "*excluding [a] pupil from [the] school*". If a trans boy is excluded from a girls' school because of his gender identity, that is direct discrimination on the grounds of a protected characteristic. One can compare two pupils ("A" and "B") at a girls' school with the same grades and the same behaviour and the same legal sex (i.e. both are legally female). If A is excluded because he identifies as a boy while B is not excluded as she identifies as a girl, the

difference in treatment will be because A has the protected characteristic of gender reassignment, but B does not. Exclusion of A because he is trans is less favourable treatment because of a protected characteristic within the meaning of EA 2010 s 13. There is no statutory defence available. As set out above, EA 2010 Schedule 11 para 1 provides a statutory defence to single-sex schools, but it only applies to discrimination "*so far as relating to sex*" and not gender reassignment discrimination. Furthermore, Schedule 11 para 1 provides defences only in relation to claims under s 85(1), and, in limited circumstances, under s 85(2((a)-(d). It does not provide a defence in relation to the "*excluding [of a] pupil*" pursuant to s 85(2)(e).

Issue 5: Can a girls' (or boys') school refuse to admit a trans boy (or girl) on the basis that they are a girls' (or boys') school and the pupil identifies as male (or female)?

47. The answer to this question is similar to the one above. If a trans girl applies to a boys' school, or a trans boy to a girls' school, and they are refused admission because they are trans, that is direct discrimination on grounds of gender reassignment. If pupils A and B apply to a girls' school with the same grades and both are legally female, but A has been admitted because she lives and identifies as a girl while B is not admitted as he lives and identifies as a boy, B has been subject to less favourable treatment because he is trans. That is discrimination on the grounds of the protected characteristic of gender reassignment. Again there is no statutory defence. Schedule 11 para 1(1) permits discrimination in relation to admission to single-sex schools, but only "*so far as relating to sex*". It does not allow gender reassignment discrimination. It is therefore unlawful to refuse to admit a child to a single-sex school of the child's legal sex because the child is trans and has a different gender identity from other children at the school. If the child was not admitted for some other reason, or because of the application of some particular admission criteria, that will not be direct discrimination, but may be indirect discrimination if it is the result of a policy or practice that disproportionately disadvantages trans children and is not justified.

Issue 6: Can a girls' (or boys') school refuse to consider admitting a trans girl (or boy) on the basis that she (or he) is legally male (or female)?

48. If, as set out above, a single-sex school is permitted, if it wished, to admit trans children while retaining its single-sex status (on the basis that the admission is "*exceptional*" within the meaning of EA 2010 Schedule 11 para 1(3)), can the school nevertheless refuse to consider admitting a trans child? If a trans girl applies to a girls'

school could the school nevertheless refuse to consider her application on the basis that she is legally male and the school is an "*all-girls school*"? If a trans boy, who is legally female, applied to a boys' school, could the school similarly refuse to consider his application?

49. The refusal to admit a trans girl to an all-girls school would, in principle, be direct sex discrimination. She has not been admitted because she is legally male. That, however, is permitted by EA 2010 Schedule 11 para 1(1) which disapplies to 85(1) for single-sex schools. It is thus permitted to discriminate in admission "*so far as related to sex*". The refusal will also not be direct gender reassignment discrimination. The trans girl has been refused admission, not because she is trans but because she is legally male. That is not less favourable treatment because of the protected characteristic of gender reassignment but because of her legal sex. The question is whether the refusal to consider admission of the trans child is capable of being indirect gender reassignment discrimination? That is not a straightforward question. It has not been considered directly by the courts and arguments on the correct interpretation of the EA 2010 can be made both ways. That said, and for the reasons set out below, my view is that the refusal to consider admission of the trans child is at least capable of being indirect discrimination.

50. The argument that the refusal to consider admission of the trans child is indirect gender reassignment discrimination is as follows.

51. A policy or practice of refusing to admit trans girls and boys to an otherwise single-sex school is a "*provision, criterion or practice*" within the meaning of EA 2010 s 19. It is also a policy or practice that almost certainly disproportionately disadvantages trans children (see EA 2010 s 19(2)(a)-(c)). There may be some relatively small number of non-trans boys who would wish to attend an all-girls school, but a far higher proportion of trans girls are likely to wish to do so. Trans girls refused entry to a girls' school because they are legally male have been denied entry to a school that reflects their gender identity. That places them at a "*particular disadvantage*" as compared to other legally male children who cannot attend the school. The disadvantage may be particularly acute if one considers an area in which the two best schools are a single-sex boys' school and a single-sex girls' school. If a trans child wished to attend one of those schools, they would need to attend the school of their legal sex (i.e. a trans

girl attending the boys' school and a trans boy the girls' school). That could mean "*outing*" themselves as well as being at a school where all the other children may identify as a different gender to them. That is an obvious disadvantage which non-trans children do not experience.

52. That does not mean the refusal to admit the trans child is necessarily unlawful, but the school will need to show it is "*a proportionate means of achieving a legitimate aim*" pursuant to s 19(2)(d). If the girls' school has an objective justification for refusing to consider admitting trans girls it will be acting lawfully. If, however, it had no good reason, that would constitute indirect discrimination in breach of EA 2010 s 85(1) read with s 19.

53. A counter-argument can be made. It is as follows. Single-sex schools are specifically permitted by the EA 2010, and Schedule 11 para 1 protects a girls' schools from a sex discrimination claim if they refuse to admit a boy, and vice versa for a boys' school. The argument would be that a girls' school that is refusing to admit a trans girl is simply refusing to admit a boy (as far as their legal sex is concerned), and as that is expressly permitted by the EA 2010 it must necessarily be justified.

54. The difficulty with that argument is that Schedule 11 para 1 permits discrimination in admission "*so far as relating to sex*". It says nothing about gender reassignment discrimination. This issue arose in the *AEA* case. EA 2010 Schedule 3 paras 26-27 provide defences to sex discrimination claims for the providers of single-sex services. An argument was made by the claimant in *AEA* that if discrimination on grounds of sex in the provision of a single-sex service was permitted by the EA 2010, it must follow that gender reassignment discrimination was permitted. It was thus argued that if it was lawful to exclude men from a single-sex service for women (and it was thus not sex discrimination) it must inevitably be justified to exclude trans women (and could not be gender reassignment discrimination). That argument was rejected by the High Court. It held that a refusal to admit trans women to a women's single-sex service was a PCP which disproportionately disadvantaged those with the protected characteristic of gender reassignment and thus needed to be justified. The High Court continued at §16:

> *In deciding whether a PCP is a proportionate way of achieving a legitimate end, it is inevitable that regard must be had to its impact on persons with the protected characteristic in question. It is clearly wrong to assume, as a matter of law, or as a matter*

> *of obvious practice, that the answer will necessarily be the same whether one assesses a PCP as applied to birth males in general or whether one assesses it as applied vis-à-vis birth males who are transsexual women.*

The Court thus held that the EHRC was not acting unlawfully in promulgating a Code of Practice stating that the refusal to admit a trans person into the single-sex service of the gender in which they present required justification from the service provider. It would not suffice for the service provider to show that it is generally justified to have a single-sex service. It would need to show that it is specifically justified to exclude a trans person from the service of the gender in which they present. Applied to schools, that suggests that a policy of refusing to admit trans children to the single-sex school of the gender in which they present requires some form of justification.

55. It should be noted that *AEA* was a permission decision and so not binding authority (though it is significant that in refusing permission Henshaw J not only rejected AEA's claim, but held it to be unarguable). It is also true that the provision regarding single-sex service provision is not identical to that applicable to single-sex schooling. The provision on single-sex services has a separate provision permitting discrimination on grounds of gender reassignment (see EA 2010 Schedule 3 para 28), while the schools provisions do not. In addition, while a service provider needs to justify making single-sex provisions and needs to satisfy particular criteria before it is permitted to refuse to offer services on grounds of sex (see Schedule 3 paras 26-27), a school does not need to justify its decision to be single-sex. It simply asserts its single-sex status. It might be said that in those circumstances a girls' school should not be required to justify its decision to operate a single-sex admission policy, and thus exclude anyone whose legal sex is not female, including trans girls, and a boys' school does not need to justify its decision to operate as a boys' school and exclude trans boys. That is simply the consequence of being a single-sex school.

56. The issue is undoubtedly difficult, but my view is that, on balance, the argument that excluding trans children from a single-sex school requires justification is the better one. It is difficult to see why refusing to consider admitting trans children is not capable of being a PCP within the meaning of EA 2010 s 19, and it is plainly one that disproportionately disadvantages those who share the protected characteristic of gender reassignment. It is also not clear why it should inevitably be justified to exclude trans children from a single-sex school pursuant to s 19(2)(d). As set out above, in my

view single-sex schools can retain their single-sex status while admitting trans children, the disadvantage for trans children of refusing to admit them could, depending on the circumstances, be significant, and it may be that a trans child could be accommodated with little difficulty by the single-sex school of the gender in which they identify. If the school can justify the refusal to admit the trans child, that will, of course, be permitted pursuant to s 19(2)(d). But if the refusal cannot be justified, it is difficult to see why it should be lawful, and difficult to see why a school should not at least be required to consider the admission of trans children.

Issue 7: Will the answers above differ for different types of schools?

57. There are a number of different types of school: single-sex and mixed; faith and non-faith; independent and publicly funded. Does the analysis above differ depending on which of the categories a school falls within?

(i) There are obviously potential differences between single-sex and mixed schools in relation to admission or exclusion of trans children. They are discussed above under Issues 3-6.

(ii) There are provisions specifically relating to faith schools in EA 2010 Schedule 11 paras 5-7. They have no application in the present context, however, and do not permit a faith school to discriminate in relation to gender reassignment. Faith schools will therefore be treated like non-faith schools in terms of the legal framework set out above.

(iii) The substantive provisions prohibiting discrimination under EA 2010 s 85, as well as the defence in Schedule 11 para 1 for single-sex schools, apply in the same way whether a school is independent or publicly funded.

58. The one area where there may be a difference between state and independent schools is in the application of the public sector equality duty ("**PSED")** contained in EA 2010 s 149. The duty applies to the governing bodies of maintained schools (see EA 2010 s 150 and Schedule 19) but not to independent schools. The duty requires those subject to it, in the exercise of their functions, to have "*due regard*" to the need to "*eliminate discrimination*", "*advance equality of opportunity*" and "*foster good relations between persons who share a relevant protected characteristic and persons who do not share it*" (see s 149(1)).

The duty does not require schools to achieve particular outcomes, but those schools subject to the duty must give due consideration to the matters set out in s 149 when they discharge their functions. That will include when the school sets its admission arrangements (see *R (E) v Governing Body of JFS* [2010] 2 AC 728 for a school found to have breached the PSED in relation to its admission arrangements) as well as when setting other school policies. Thus when a school formulates its admissions policy, or applies other policies or practices on uniforms, changing areas etc, it will need to consider the impact on those with different protected characteristics, including trans children, and whether any disadvantages imposed on them can be justified. If the school gives the required matters "*due regard*" it will not breach the PSED. If it does not consider them, it will be acting in breach of s 149.

59. The fact that a school subject to the PSED failed to consider the impact on trans children of some policy or practice, does not mean that the school has necessarily breached a substantive obligation not to discriminate set out in EA 2010 s 85. There is, however, a connection between a breach of the PSED and substantive discrimination obligations. That is because a failure to comply with the PSED makes it more difficult for a defendant to show it is acting proportionately in an indirect discrimination claim (see eg *JFS* at §100 and §211-214 and *R (Coll) v SSJ* [2017] 1 WLR 2093 at §42). Pursuant to the PSED, a school will be required to consider how its policies might affect those with protected characteristics, including children who are trans. If it has failed to do so, and one of its policies does, in fact, disadvantage trans children, it will be difficult for the school to establish that the policy is proportionate. The burden of establishing justification is on the school, and where the school has not directed its mind to the potential discriminatory impact of a measure, and has not considered alternatives with a lesser impact on trans children, it will be difficult to show that the measure is justified.

CONCLUSION

60. If any questions arise from the above advice, or if GLP is aware of schools or parents with specific concerns about a particular matter, I am happy to advise further.

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MATRIX CHAMBERS

8 FEBRUARY 2022