

Kemi Badenoch
Secretary of State for Women and Equalities

9th August 2023

Dear Kemi Badenoch

Thank you for meeting with us to discuss the forthcoming schools guidance.

As we discussed, and as we outline in our document “**Keeping children safe when it comes to recognising their sex**”, the guidance should be in line with existing legislation. Nothing in the Equality Act takes precedence over other statutory duties that schools have, including their duty of care and safeguarding responsibilities for all pupils.

We understand there have been questions about whether the Equality Act 2010 should be amended to remove the protected characteristic of “gender reassignment” from education in order to allow schools to act in compliance with their responsibilities for safeguarding and respecting other pupils’ rights. We think this is neither necessary nor advisable.

However, we think that the 2014 Technical Guidance on the Equality Act produced by the EHRC is wrong in how it interprets the implications of the protected characteristic.

The Technical Guidance has been influential, as it represents the apparent longstanding interpretation of the Equality Act by the statutory regulator, and states that it “may be used as evidence in legal proceedings” and may help schools “to avoid the court making an adverse decision in such proceedings”. It is likely that it continues to be influential on the Department for Education in developing the guidance.

The EHRC now states on its website: “This guidance is out of date. The policy areas covered are evolving and the guidance is under review.” We understand this review is to be completed by the end of the summer.

We think it would be helpful to write to the Equality and Human Rights Commission and ask it to clarify explicitly whether it still believes that the interpretation of the protected characteristic of

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gender reassignment as set out in the Technical Guidance is correct. Specifically:

- Is it “**inappropriate**” and **potential indirect discrimination**, as set out at 3.20, to insist that a male child uses the male changing room, or a female child uses the female changing room, if that child has the protected characteristic of gender reassignment?
- Is it **direct discrimination**, as set out at 4.35, to refer to a girl as a girl or a boy as a boy if they have the protected characteristic of gender reassignment?
- Is it **direct discrimination**, as set out under 5.19, to explain to a child that there are school-uniform rules that are differentiated by sex, and they are expected to comply with those rules?

We think that, in each of these cases, in 2014 the EHRC wrongly interpreted the Equality Act. The source of this misinterpretation can be seen at 4.35, where it refers to a “**previously female pupil**”. In reality, it is not possible for a female pupil to become a “previously female pupil” by, for example, changing their clothing, hairstyle or name (and similarly for a male pupil), or via medical treatment.¹

The EHRC has since clarified that “A trans person who does not have a Gender Recognition Certificate retains the sex recorded on their birth certificate for legal purposes.”² No child under 18 can have a GRC. This means that it should be simple for schools to recognise that all pupils have a sex, and to keep accurate records and communicate and apply clear rules which are justified, for example for health and safety, dignity and privacy.

We think that in falling for the confusion that the protected characteristic of gender reassignment means that a child has changed sex (or “gender”, as the Technical Guidance states), the EHRC failed to consider a very important potential risk of direct discrimination based on gender reassignment: namely, in relation to the duty of care to take reasonable steps to protect a child from foreseeable harms.

Sex-based rules, record-keeping and day-to-day risk assessment are all part of that duty of care, which schools must apply to all pupils. We would suggest asking the EHRC to consider whether misrecording and misstating sex of pupils in relation to day-to-day risk assessment and communication of rules designed to keep children safe would in fact be a case of **direct discrimination** based on gender reassignment.

Yours sincerely



Maya Forstater
Executive Director



Helen Joyce
Director of Advocacy

cc: Kishwer Falkner, Hilary Cass

¹ <https://sex-matters.org/posts/updates/ehrc2/>

² <https://www.equalityhumanrights.com/en/our-work/news/protecting-people-sex-and-gender-reassignment-discrimination>