



Keeping children safe as girls and boys in education

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Sex Matters is a human rights organisation campaigning
for clarity about sex in law, policy and language

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Introduction

The Secretary of State for Education has been working with the Minister for Women and Equalities on guidance for schools and colleges in England on what to do when a child is “questioning their gender”. On 20th July 2023 it was announced that the guidance is being delayed.¹

“It is vital that the guidance we publish gives clarity for schools and colleges and reassurance for parents. So, we have made the decision to allow more time – to speak to teachers, parents, lawyers and other stakeholders – in order to ensure this guidance meets the high expectations that these groups rightly have for it.”

This paper considers the legal framework under which schools operate and whether schools can accommodate “social transition”, such as meeting a child’s wish to:

- be referred to as if they were the opposite sex (with words such as “boy”, “girl”, “he” and “she”)
- be allowed to use opposite-sex facilities
- be able to participate or compete in opposite-sex sports (in particular boys in girls’ sports)
- be treated as if they were the opposite sex for sex-based rules such as uniform
- attend school in “stealth” – presented as being the opposite sex.

There are some who argue that schools should undertake these steps routinely on demand, or are obliged to by the Equality Act. Others say this should happen only with great caution, or not at all. Our analysis of the legislation, developed in discussion with safeguarding, education and equality lawyers, teachers, parents and safeguarding practitioners, finds that **social transition in mainstream schools is not consistent with statutory obligations, including safeguarding, or with respect for other people’s human rights.**

Schools in England and Wales are part of a statutory education system as set out in the Education Act 1996(1) and are subject to a wide range of legal responsibilities. The way that schools treat boys and girls, keep records and make decisions is governed by requirements already set out in a considerable body of law and regulation. These include the statutory safeguarding responsibilities to work together with parents and with other agencies to protect children from harm, as set out in the statutory guidance *Keeping Children Safe in Education* and *Working Together to Safeguard Children*.

Social transition – treating a boy as if he is a girl, or a girl as if she is a boy – is not compatible with schools’ statutory responsibilities, and the Department for Education’s guidance should reflect this.

¹ UK Parliament (2023). ‘Schools update: statement made on 20 July 2023’ (Statement UIN HCWS983). *Written questions, answers and statements*.

Legal and regulatory requirements

This analysis relates to schools in England. It covers both state and independent schools, although some parts (such as the Public Sector Equality Duty) apply only to state schools or only to independent schools.

Relevant laws and regulations include the:

- Education Act 1996
- Education Act 1998
- Education Act 2002
- Education and Inspections Act 2006
- Education and Skills Act 2008
- Children Act 1989
- Children and Families Act 2014
- Human Rights Act 1998
- Equality Act 2010, including, for state schools, the Public Sector Equality Duty
- School Standards and Framework Act 1998, including the Admissions Code
- Pupil Registration (England) Regulations 2006
- School Premises (England) Regulations 2012
- Education (Independent School Standards) Regulations 2014
- Education (Pupil Information) (England) Regulations
- Education (Information About Individual Pupils) (England) Regulations 2013
- Early Years Foundation Stage (Learning and Development Requirements) Order 2007 (S.I. 2007/1772), as amended
- Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (S.I. 2012/938), as amended
- Special Educational Needs and Disability Regulations 2014
- Special educational needs and disability code of practice
- National Curriculum
- statutory guidance *Keeping Children Safe in Education 2023* and *Working Together to Safeguard Children*
- Teachers' Standards

In some cases, legislation and guidance uses “gender” in place of sex (such as the terms “gender affected activity” and “gender of entry”, or “gender” in the pupil census data). This is merely conventional language and does not imply a different meaning than sex.

Registration

Every school must know the name and sex of every pupil, record these accurately in the registers and pass them on to the next school. There is no flexibility in this.

For all schools, the information to be contained in a school admissions register is statutory and is set out in **section 434 of the Education Act 1996** and subsequent regulations.

- **The Pupil Registration (England) Regulations 2006** – sets out that the school is required to register each pupil’s sex (along with their name, date of birth and other details).
- **The Education (Pupil Information) (England) Regulations 2005** – provides that when a pupil moves from one school to another, this information must be transferred as part of a “common transfer file”. Schedule 2 states that this includes “gender”, but here this word means “sex”.
- **The Education (Information About Individual Pupils) (England) Regulations 2013** state that schools must provide information on each child annually to the DfE. This information includes the child’s “gender”, but it is clear that this means sex. Completing the school census is a statutory requirement under section 537A of the Education Act 1996. ²

The law treats all those under 18 according to their biological sex. No minors have gender-recognition certificates, so all children are legally considered to be male or female according to their biological sex.

The **Pupil Registration (England) Regulations 2006** require that the school registers each pupil’s legal name. This is usually the name on their birth certificate. A child’s name can be changed at any time before the age of 16 via a deed poll, subject to the consent of everyone with parental responsibility. After the age of 16 a child can change their name without their parents’ consent, and their parents cannot change the child’s name without the child’s consent.

As the Independent School Standards explains in relation to the Education (Pupil Registration) (England) Regulations 2006, recording this information accurately is not a mere matter of routine administration:

[“Failure to abide by the requirements of the regulations or contravening them is a criminal offence under s.434\(6\) of the Education Act 1996. It is also a serious safeguarding issue.”](#)

² Department for Education (2022). *Data Operations – request for change form for CBDS RFC 1233*.

Admissions to single-sex schools

Girls' schools admit female pupils; boys' schools admit male pupils. There is very limited flexibility in this. There is no provision to admit a child of the opposite sex to a single-sex school and record (and treat) the child as being the sex that they are not.

Single-sex schools have admissions rules that admit only male children or only female children. This is a lawful form of sex discrimination. It is provided for in **Schedule 11 of the Equality Act**.

The Equality Act allows single-sex schools to admit children of the opposite sex exceptionally without losing their status as a single-sex school. This does not mean that the law anticipates admitting children of the opposite sex and treating them as if they were the same sex.

Examples of exceptional circumstance given in the notes to the Equality Act³ are:

“the daughters of certain members of staff at a boys' school are allowed to attend”

“a boys' school admits some girls to the Sixth Form”.

There is no obligation under the Equality Act for a single-sex school to consider admitting a child of the opposite sex.

For state schools, admissions are governed by the **Admissions Code issued under Section 84 of the School Standards and Framework Act 1998**. The code requires that places are allocated in an open and fair way rather than by ad hoc selection:

“In drawing up their admission arrangements, admission authorities must ensure that the practices and the criteria used to decide the allocation of school places are fair, clear, and objective. Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated.”

A maintained school that admits a child of the opposite sex on an ad-hoc basis (allocating a space for a girl to a boy or vice versa) is likely to be in breach of the Admissions Code.

A private single-sex school might admit a child of the opposite sex, but would need to register the child in their actual sex. Becoming co-educational is a material change which would need to be notified to the Secretary of State for Education.⁴

³ Equality Act 2010 Explanatory Notes.

⁴ Department for Education (2023). *Independent schools: making a material change*.

Data protection

Schools must record children's sex accurately wherever it is recorded. All those who process other people's personal data have to follow strict rules set by the **UK General Data Protection Regulation (UK GDPR)** and the **Data Protection Act 2018 (DPA)**.

One of the principles of data protection is accuracy. It is not accurate to record a male child as female or a female child as male, or to record a male child as a "girl" or a female child as a "boy". A child's sex is not "special category" (sensitive) data.

Duty of care

Knowing a child's sex is often relevant to the school's duty of care, whether under health and safety or safeguarding legislation. This is routine information which all staff should be able to refer to clearly.

All schools have a duty of care towards all the children who attend. This means that by law they must make arrangements to ensure the safety of all children and promote their welfare. All staff have a responsibility to provide a safe environment in which children can learn. So all staff must know or be able to find an accurate record of a child's sex in order to meet safeguarding obligations when making decisions involving students.

As the Independent School Standards explains, risk assessments should be routine:

"Well-run schools have proper risk assessment across the whole range of their activities affecting pupils. Risk assessment should not be an afterthought or confined to the most obvious dangers for pupils. This standard requires schools to consider risk in relation to all activities which could place pupils in serious jeopardy, and during inspections evidence will be sought that this has been done systematically in order to inform the written risk assessment policy required by this standard, and that appropriate action has been taken to reduce any risks that are identified."

It is often necessary to know and act on a child's sex in order to protect them or others from harm and to assess risks in real time. This is not information that can be limited to a few people or lied about. Keeping a child's sex secret ("stealth") or confusing people about it undermines this.

For example:

- Boys are not allowed to go into the girls' toilets (and vice versa) in order to protect all children's reasonable privacy, to protect the girls in particular from the potential harms of sexual harassment, exposure, voyeurism, and to protect the boys from being accused of such behaviour.

- In allocating sleeping arrangements such as dormitories, tents or shared rooms for school trips, every child's sex is relevant.
- If a ten-year-old child has a blood stain on their crotch, a teacher's assessment of the situation will differ, according to whether the teacher knows they are a girl (most likely experiencing a period unexpectedly) or a boy (this could be a medical emergency).
- If a child needs to be searched while at school, this must be done by a member of staff of the same sex as the child.

The Department for Education's **guidance on section 162 of the Education Act 2002** emphasises that switching from single sex to mixed sex is a material change that will require inspection related to quality of education (including PHSE) welfare, health and safety of pupils, and premises and accommodation. Schools that change from single sex to mixed sex are required to provide:

"a copy of the written risk assessment policy or policies ... which will be implemented if the Department approve the proposed change. A change in relation to the sex of pupils who will attend a school will always require changes to pre-existing risk assessment policies and if they are needed, proprietors are responsible for ensuring that appropriate changes are made and will want to ensure that any changes which are needed are contained in the written risk assessment policies they submit with their application."⁵

Sex matters in risk assessment and misrepresenting some children's sex (for example by considering a boy to be a "girl") is not compatible with robust risk assessment. This obligation cannot be circumvented by saying this refers to gender identity and not sex. Sex matters for safeguarding obligations regardless of any additional issues relating to gender distress or dysphoria.

Facilities

Schools must provide sex-separated toilets (over age eight) and changing rooms (over age 11) unless they are in separate fully enclosed rooms.

The **School Premises (England) Regulations 2012** and **Independent School Standards** impose statutory requirements for both maintained and independent schools to provide sex-separated toilets for pupils aged eight or over (apart from individual toilets in fully enclosed rooms), and sex-separated changing accommodation and showers for pupils who are aged 11 years or over at the start of the school year and who receive physical education.

⁵ Department for Education (2023). *Material change: applying for approval to change the registered details of an independent school.*

Even where toilets are provided as enclosed rooms, it is not appropriate behaviour for boys to use girls' toilets or vice versa.

Behaviour policy

Rules should be expressed clearly so that all children know what is expected of them in terms of behaviour. This includes rules that relate to boys and girls and same-sex/opposite-sex situations.

Under the **Education and Inspections Act 2006** it is the responsibility of the governing body to ensure that policies designed to promote good behaviour and discipline on the part of its pupils are pursued at the school.

Schools should have policies which are clear, transparent and easy to understand for staff, pupils, students, parents, and carers.⁶

Keeping Children Safe in Education 2023 emphasises the need for behaviour policies, including rules that prevent child-on-child abuse and inappropriate behaviour. It states:

“It is essential that all staff understand the importance of challenging inappropriate behaviours between children...that are abusive in nature. Downplaying certain behaviours, for example dismissing sexual harassment as “just banter”, “just having a laugh”, “part of growing up” or “boys being boys” can lead to a culture of unacceptable behaviours, an unsafe environment for children and in worst case scenarios a culture that normalises abuse leading to children accepting it as normal and not coming forward to report it.”⁷

It should be clearly understood and communicated to all children that it is unacceptable behaviour for a boy to enter the girls' toilets, showers or changing rooms and vice versa.

Safeguarding

Under Section 175 of the Education Act 2002, the governing body of a maintained school must make arrangements for ensuring that their functions relating to the conduct of the school are exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school.

Schools and colleges must have regard to ***Keeping Children Safe in Education 2023***. This is statutory guidance from the Department for Education. Schools must work together with others,

⁶ Department for Education (2022). *Behaviour in schools: Advice for headteachers and school staff*.

⁷ Department for Education (2023). *Keeping children safe in education 2023: Statutory guidance for schools and colleges*.

primarily parents and statutory services that have responsibilities to safeguard and promote the welfare of children, as set out in the **Children's Act 2004** and **Working Together to Safeguard Children 2023** (currently under consultation).

Schools should consider, at all times, what is in the best interests of the child.

Safeguarding and promoting the welfare of children is defined as:

- protecting children from maltreatment
- preventing the impairment of children's mental and physical health or development
- ensuring that children grow up in circumstances consistent with the provision of safe and effective care
- taking action to enable all children to have the best outcomes.

Under the "best interest" principles, schools should seek individualised child-centred approaches to ensure pupils can remain engaged in their learning journey notwithstanding any difficulties they are experiencing.

Lying to children, keeping secrets with them or waiving rules that exist for their protection is not consistent with the best interests of the child. Parents should not generally be excluded from information about their child.

Schools may need to be sensitive to any psychological distress that telling the truth about a child's sex might cause to a gender-distressed child. But that that distress cannot override obligations the school has to that child, and to that child's peers, to maintain safeguarding and clear sex-based rules.

Key principles of working with parents are to build positive, trusting and cooperative relationships, to use language that is clear and respectful, to enable parents to participate in decision-making and to create a culture of "no surprises" by providing relevant information.

This means that schools must be clear with parents that male children are boys and female children are girls, and share with parents any concerns about their child's mental health or about potential harm or abuse, unless to do so would place the child at risk of harm.

Children experiencing gender distress may have comorbidities and welfare issues such as mental-health issues, autism, Attention Deficit Hyperactivity Disorder (ADHD), learning difficulties or looked-after status, or unmet needs such as grief, trauma or abuse. These will also need to be addressed. They may come under the provisions for a "child in need" supported by children's social care, including:

- children on child-in-need plans
- children on child-protection plans

- looked-after children
- disabled children.

All of these children have needs identified through a children's social-care assessment or because of their disability, meaning they are expected to need services and support in order to have the same health and development opportunities as other children.

Delivering education

The purpose of schooling is education. This includes language and literacy, knowledge of the world and personal, social and health education and physical education. In each of these areas, sex matters.

The **Early Years Foundation Stage statutory framework** (for both public and private providers) includes communication, language and literacy as key components. Providers are required to advance the development of children's spoken language, reading, writing, use of vocabulary and language structures by modelling everyday language.

*"Children's back-and-forth interactions from an early age form the foundations for language and cognitive development. The number and quality of the conversations they have with adults and peers throughout the day in a language-rich environment is crucial."*⁸

The **national curriculum** for England is to be taught in all local-authority-maintained schools. Independent schools are required to provide a curriculum which covers "linguistic, mathematical, scientific, technological, human and social, physical and aesthetic and creative education".

In English the third-person personal pronouns she, her, hers, herself and he, him, his, himself relate to the two sexes, while they, them, theirs, themselves are the plural forms (or singular if the person's sex is not known).

In biology and PSHE it is important to understand that sex – female/woman/girl and male/man/boy– relates to reproductive role and is binary and immutable in humans.

The **Education Act 1996** strictly forbids political indoctrination. Schools may not promote partisan political views and must secure a balanced treatment of political issues. Teachers must not express personal beliefs in ways that exploit pupils' vulnerabilities.

⁸ Department for Education (2023). *Statutory framework for the early years foundation stage: Setting the standards for learning, development and care for children from birth to five.*

Sport

Schools must provide equal sporting opportunities for girls and boys. For older children, this will usually require offering female-only sporting activities and competition.

Physical education is compulsory at all key stages of the National Curriculum. Local-authority-maintained schools are required to follow the national curriculum. Academies and free schools do not have to teach it, but are required to provide a broad and balanced curriculum that “promotes the spiritual, moral, cultural, mental and physical development of pupils”.

The **Equality Act 2010** provides an exception to prohibitions against sex discrimination in relation to participation as a competitor in a “gender affected activity” (note that “gender” is used here to mean “sex”).

Section 195 (3): “A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.”

This means that schools may provide sex-separated sporting activities. It is appropriate for schools to take account of the age and stage of development of children in considering whether an activity is gender-affected.

Schools should allow girls and boys equal opportunities to participate in comparable sporting activities.⁹ As children get older and the size, speed and strength of boys and girls begin to diverge significantly, schools that *do not* provide separate sports for girls are unlikely to be offering them equal opportunities to boys (and for some sports they will be putting girls at undue risk of injury if they have to play on and against mixed teams).

Uniform

Schools determine their own uniform rules and should enforce them fairly. They should consider impacts on pupils with protected characteristics in developing the rules.

Schools and their governors decide on their school-uniform rules. Schools that have uniforms adopt them for reasons that include:

- promoting the ethos of a school
- providing a sense of belonging and identity
- setting an appropriate tone for education.

⁹ Department for Education (2018). *Gender separation in mixed schools: Non-statutory guidance*.

Although it is not obligatory for a school to have a uniform, or any particular type of uniform, it is obligatory for schools to have behaviour policies, to treat pupils fairly and to not discriminate in relation to protected characteristics. Therefore, if a school has a uniform its requirements should be clear, and should be enforced fairly and equally. Schools may choose different uniform or dress-code requirements, but signalling that some pupils do not need to follow the rules is likely to encourage bad behaviour and poor discipline.

Some schools have different uniform requirements for girls and for boys (including requirements about hair). This is lawful as long as the rules for the two sexes are of a similar standard. A dress code that stipulates that pupils must have their hair styled in a “smart and conventional way” can require, for example, hair for boys to be above the collar. A “smart, conventional” uniform may include trousers or skirts for girls, but not skirts for boys. (Similarly, a mixed school that adopted a “gender neutral” uniform could choose to require all children to wear trousers, but not to require all to wear skirts. It is socially conventional for girls to wear trousers, but not for boys to wear skirts, and it would be humiliating to force boys to do so.)

Special needs

Under **Section 20 Children and Families Act 2014** a child is defined as having Special Educational Needs (SEN) if he or she “has a learning difficulty or disability which calls for special education provision to be made for him or her”.

A child is considered to have a learning difficulty if she or he:

- has a significantly greater difficulty in learning than the majority of others of the same age
- has a disability which prevents or hinders them from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

Gender distress can be associated with other conditions, such as emotional and behavioural difficulties, autism, Attention Deficit (Hyperactivity) Disorder (ADD/ADHD), anxiety and mood disorders, or may if severe enough constitute a special educational need in its own right.

There is a well-established statutory assessment procedure for children with special educational needs. Under paragraph 6.2 of the Special educational needs and disability code of practice, each school must:

- use their best endeavours to make sure that a child with SEN gets the support they need – this means doing everything they can to meet children and young people’s SEN
- ensure that children and young people with SEN engage in the activities of the school alongside pupils who do not have SEN
- designate a teacher to be responsible for coordinating SEN provision – the SEN co-ordinator, or ‘SENCO’ (not applicable to 16 to 19 academies)

- inform parents when they are making special educational provision for a child
- prepare a SEN information report and setting out:
 - their arrangements for the admission of disabled children
 - the steps being taken to prevent disabled children from being treated less favourably than others
 - the facilities provided to enable access to the school for disabled children
 - their accessibility plan showing how they plan to improve access progressively over time.

If a child is identified as struggling at school it may be necessary for a school to intervene to provide additional support, remove barriers the child has to learning and put in place provision that will enable that child to benefit fully from their education.

This support should be provided through a continuously repeated cycle of assessment, planning, action (including any adjustments and interventions) and review to ensure that the child continues to make progress at school and that the desired outcomes are reached.

If the school has taken relevant and purposeful action but a child or young person is still not making the expected progress, then the school or the parents can pursue an Education, Health and Care Plan (EHCP) based on a statutory assessment of the educational, health care and social care needs of the child or young person.

The purpose of an EHCP is:

- to make special educational provision to meet the SEN of the child or young person
- so as to secure the best possible outcomes for them across education, health and social care, and
- to prepare them for adulthood, as they grow older.

The EHCP, if granted, should establish and record the views, interests and aspirations of the parents and child or young person, provide a full description of the child or young person's SEN and any health and social-care needs, establish outcomes across education, health and social care based on the child or young person's needs and aspirations, and specify the provision required and how education, health and care services will work together to meet the child or young person's needs and support the achievement of the agreed outcomes.

An EHCP is legally binding – the support detailed in the plan must be provided by the Local Authority. It is generated by the specific needs of the child or young person in question and does not vary as a result of any protected characteristic. However, schools cannot be required to undertake adjustments to their policies which put them in breach of their statutory obligations, including those relating to children with protected characteristics.

The Equality Act

Schools must not discriminate against or harass children in relation to the protected characteristic of **sex**. For children aged under 18 this can only mean their sex as understood in common law. Boys are male. Girls are female.

They must also not discriminate against a child who has or is perceived to have the protected characteristic of **gender reassignment**. A child who is distressed about their sex, or who identifies as transgender, is therefore protected against discrimination based on their sex and may also be covered by the protected characteristic of gender reassignment. It has been found by the High Court that children can be covered by the protected characteristic, and this does not depend on a medical diagnosis.¹⁰

Possessing the protected characteristic of gender reassignment does not mean that a person's sex has changed, or that they must be treated as if they are the opposite sex.

It should not be assumed that because a child has or might have the protected characteristic of gender reassignment that it is in their best interest to encourage them to feel unhappy about their sexed body or have unrealistic expectations that other people will accept them as the opposite sex.

If gender dysphoria (distress at the fact of one's sex) is sufficiently severe, it may come under the protected characteristic of **disability**. This can justify "reasonable adjustments" to ensure that dysphoric pupils are not denied equal access to education. But it is not a reasonable adjustment for a school to treat a child as the opposite sex or to obscure their sex, as this is information that is needed at all times for the school to fulfil its duty of care in respect of both this child and all other children.

Also relevant is the protected characteristic of **religion or belief**. This covers both belief and non-belief in the construct of gender identity. "Gender-critical belief" – that sex is real, binary, immutable and important – is also covered. So are a wide variety of religions, some of which require adherents to take particular account of sex, such as Orthodox Judaism and most strands of Islam.

Children are similarly covered by the protected characteristic of **sexual orientation**.

Direct and indirect discrimination

Direct discrimination is when one person is treated worse than another person because they have a protected characteristic, are perceived to have a protected characteristic or are

¹⁰ *AA, AK and others v NHS England [2023] EWHC 43 (Admin)*.

associated with someone with a protected characteristic. There can be no justification for direct discrimination unless it is permitted by an exception in the Equality Act.

Section 85 (1) provides that the responsible body of a school 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.”

Section 85 (2) provides that the responsible body of 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.”

The Equality Act contains provisions that expressly allow clear sex-based rules:

- single-sex school admissions (Schedule 11)
- sports (Section 195)
- toilets, showers and changing rooms (Schedule 3 Part 7)
- communal accommodation (Schedule 23)
- a requirement of an enactment (Schedule 22).

Indirect discrimination occurs when a policy applies in the same way to everybody but indirectly disadvantages a group of people who share a protected characteristic. It may be justified as a proportionate means to a legitimate aim, or mitigated in ways that do not undermine that aim.

Harassment

Section 26 of the Equality Act provides that:

- (1) A person (A) harasses another (B) if –
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of –

- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Section 85 (3) provides that the responsible body of such a school must not harass –

- (a) a pupil;
- (b) a person who has applied for admission as a pupil.

Section 85 (10) sets out that for the purpose of 85 (3), gender reassignment, religion or belief and sexual orientation are not relevant protected characteristics.

It is unlawful to harass a pupil in relation to the protected characteristic of sex or disability, but there is no similar provision in relation to “gender reassignment” in schools. However, a school that fails to protect a child from bullying based on the perceived characteristic of sexual orientation or gender reassignment may potentially be liable for discrimination.

The Public Sector Equality Duty

Schools maintained by the local authority and academies are subject to the public sector equality duty (PSED). Compliance with the PSED also helps them to justify what may otherwise be unlawful indirect discrimination.

It comprises three limbs, as set out in **section 149(1) of the 2010 Act**:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to –

eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”

Section 149(3) elaborates: due regard, in particular, is the need to

remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”

When making a decision, taking an action or developing a policy, a school must consciously consider what the implications would be for pupils with all relevant protected characteristics. This includes current pupils and those who apply to attend the school. It does not mean that schools have to consider separately waiving the rules for each individual pupil who may have that characteristic. A school should not wait until after it has taken an action, made a decision or implemented a policy: it should consider equality implications before and during the process.

Responsibility for children with the protected characteristic of gender reassignment

What is a school's responsibility for these children? In general schools should only apply rules that treat boys and girls differently where this is lawful, such as to meet a statutory obligation or where this is a proportionate means to a legitimate aim. A boy who identifies as transgender (who may be described as a "trans girl") or a girl who identifies as transgender (who may be described as a "trans boy") is no different from any other boy or girl. Having the protected characteristic of gender reassignment does not mean schools should apply rules and policies to them differently.

To avoid gender-reassignment discrimination, schools should seek to ensure that children experiencing gender distress are able to access education in the same way as other children. They should be protected from bullying and covered by normal safeguarding procedures.

A school should not apply its rules differently to a child because the child says they are trans or is experiencing distress about their sex.

Pupils experiencing gender-related distress are not a homogeneous group and schools do not need to have a policy for "trans children". Many of these children may grow up to be gay, or may have autism or other special needs; some may have unresolved trauma or other issues.

If a child is severely distressed or there are safeguarding concerns, the school should work with parents, pupils, counsellors and psychologists, and if necessary children's services, medical professionals and so on to make a plan for what is best for the particular pupil to ensure they are safe and able to access education and remain engaged. This may reach the level of a child needing a statutory Child in Need plan or an Education, Health and Care Plan (EHCP).

Adjustments made as a result of these plans must not cut across the duty of care and safeguarding that the school has for other pupils or its statutory responsibilities.

Can schools accommodate "social transition"?

"Social transition" is a term used to refer to a range of actions that a child may take to appear more like the opposite sex, accompanied by an expectation that they will be treated as if they actually are that sex from that point forward.

As outlined above, all schools have a set of rules, safeguards and protections for pupils that they are required to apply by law (to protect each pupil's data and their person, and to provide access to education and associated benefits, facilities and services, and so on). To disapply these rules and safeguards for a child risks safeguarding failure. **Putting a child at a**

disadvantage by disapplying rules that keep them safe because the child says they are trans would be direct discrimination on the basis of gender reassignment.

Many of the individual elements in a hoped-for “social transition” therefore simply cannot be accommodated within the school system:

- A school may not register a child as the opposite sex.
- A school may not misrecord a child’s sex anywhere in its records.
- A school must have clear, fair rules about the situations in which girls and boys are treated differently, explain those rules clearly and enforce them fairly (for instance on sport and changing-rooms).
- A school must accurately recognise every child’s sex in order to carry out its duty of care.
- A school cannot lie to other pupils, parents or teachers about any child’s sex.
- A school must teach all pupils language, literacy, science and PSHE.

Thus the basic position is that a boy will be known as a boy for his whole school career (and a girl as a girl for her whole school career). All the rules that apply to boys (or girls) will continue to apply to them. To do otherwise would be **direct gender-reassignment discrimination** and would also undermine the school’s ability to undertake its duty of care towards other children. **No meaningful “social transition” is lawfully possible in schools.**

Schools do not need to consider whether to waive a particular sex-based rule for a particular child at a particular moment (for example allowing a boy to use the girl’s changing room when no girls are in it). Schools need to be able to have clear rules that are not up for constant negotiation.

Any provision made under an EHCP should be reviewed annually. Measures that take the child out of mainstream provision or rules should be time-limited for a period to meet a pupil’s individual needs, with the aim of reintegrating them into the normal life of the school, rather than encouraging them to opt out of ordinary rules and facilities at school for the long term.

It is not in the best interests of a child who has a desire to be the opposite sex, or who feels uncomfortable about their sex, to allow that child to imagine that they may not need to comply with sex-based rules during the whole of their school career.

It is in the best interests of all pupils that rules are clear, fair and communicated without ambiguity.

Can a child demand to be known by alternative pronouns?

The legal obligations around pupil registration, data protection and duty of care mean that a school should not misrepresent that a girl is a “boy” or “male”, or that a boy is a “girl” or “female”.

There are no specific laws about pronouns, but in standard English third-person singular pronouns relate to a person’s sex: “she”, “her” and “hers” are words that stand in for a female person, and “he”, “him” and “his” are words that stand in for a male person. Where the sex of a person is unknown, the third-person plural is used as singular (as in “Someone has left their bag here; whoever it is should come and get it”).

Requiring teachers and pupils to call a girl “he” or a boy “she” (or a child of either sex “they” or something else such as “zie” or “per”) is confusing, undermines teaching and learning of language, and infringes on teachers’ and pupils’ freedom of belief and speech. Using words that imply a child is the opposite sex undermines schools’ ability to communicate clear rules that relate to the sexes.

A rule that forbids other children and teachers from referring to a child by ordinary pronouns, or that requires them to use alternative pronouns, would not stand up to challenge in relation to other people’s human rights (articles 8 and 10).

Schools can simply decline a request to “change a child’s pronouns”. They do not need to specify which third-person singular pronouns need to be used about each pupil, as this is simply a matter of standard English. A boy remains a boy and a girl remains a girl.

Can a child change their name?

Schools must record a child’s legal name. They may allow pupils to change their informal (“known as”) name if they believe it is in the best interests of the child to do so.

Schools often provide the option to register an informal “known as” name in a separate field to their legal name. This can be for many social, cultural or personal reasons.

The school is under no legal obligation to make any informal name change and is entitled to refuse to do so. It should always act in the best interests of the child. Where the informal name change is accepted by the school, any other person with parental responsibility who disagrees with this action may choose to apply to court for a Prohibited Steps Order. The court will consider what is in the best interests of the child.

Schools cannot have a blanket ban on children changing their name to one that is gender-neutral or incongruent with their sex. A boy may be named Sue. But when a child changes their

“known as” name the school should be clear this is not a change of status or a change of sex. Nothing follows from the informal name change, or from a legal name change.

Schools should consider any indications that an informal change of name is not in the best interests of the child. These are likely to include: the child wants to keep the name secret from parents; the parents do not know about the name or do not agree to it; there are concerns about bullying or radicalisation (for example homophobic bullying); there are concerns about mental health.

Can a child be allowed to use opposite-sex facilities?

It is not appropriate for a child to be told that they can use opposite-sex facilities.

A school might also consider providing access to a unisex option for a child experiencing gender distress. However, it should be clear that the aim of any such mitigation is to ensure that a child who is feeling acute anxiety about using same-sex facilities is able to access education, not to allow them to “transition” to being treated as opposite sex within the school system.

The response to a child who is distressed about using ordinary single-sex facilities should be managed in the same way as broader school refusal. That is, the underlying issues should be investigated and a refusal may be mitigated by temporary provisions. However, the ultimate aim is for the child to reintegrate with their peers. Any provisions under an EHCP should be reviewed annually. Decisions about the content of an EHCP should be made openly and collaboratively with parents, children and young people.

While a school may be able to offer single-user facilities in some situations (depending on the bricks and mortar of the school), it will not be able to promise that this will always be available (for example on school trips, future schooling, work experience or adult life). It is not in children’s long-term interests to be encouraged to feel uncomfortable in the correct single-sex facilities that are provided for the privacy and safety of all, or to always expect special treatment. There are detriments to children if they are encouraged to opt out of everyday life.

Must a child be allowed to wear the opposite-sex uniform?

School dress codes differ. The most liberal may simply require an unbroken line of clothing from shoulders to lower thighs. Some have a single option (such as trousers and a sweatshirt), while others have a range (such as “black knee-length permanent pleated skirt or plain black tailored trousers”). Some specify which uniform items are for girls and which are for boys, and some have hairstyle rules which differ by sex.

A child who identifies as trans, is gender questioning or suffers from gender dysphoria should be held to the same uniform standards as other children of their sex at their school.

This means that the degree of gender non-conformity they will be able to express at school will depend on the general rules of that school. In some schools boys can have long hair; in others they cannot. In some schools anyone can wear a skirt; in others only girls can.

In most schools, girls can wear trousers and have short hair. This reflects the fact that short hair and trousers are within the range of conventional attire for women and girls: this is not a girl “transitioning” or “wearing a boys’ uniform”. Similarly, in schools which do not restrict skirts to girls, a boy wearing a skirt is simply a boy wearing a skirt.

The reason that schools should follow their own rules is that they are rules. In a school where only girls are allowed to have long hair or wear the school-uniform summer dress, allowing one boy to have long hair and wear the dress signals that this is a child to whom the girls’ rules apply (or no rules apply). It will be difficult for teachers and other staff (including supply teachers, parent volunteers and so on) to enforce clear rules, for example about which toilets that child should use, if there are different boys’ and girls’ uniforms but some children are allowed to dress in the wrong one.

Safeguarding concerns

Schools have a duty to protect children from harm, including drugs, gangs, neglect, sexual exploitation and radicalisation, whether these come from within their family or are the product of outside influences (including online influences). Influences that encourage children to feel that they cannot live within ordinary sex-based rules or that their body is wrong are also safeguarding concerns.

Safeguarding concerns relating to a child who develops a cross-sex identity might include:

- significant changes in behaviour, performance or attitude
- struggles with the changes of puberty
- mental-health difficulties which require attention, such as anxiety, depression, eating disorders, obsessive-compulsive disorder (OCD)
- disapproval of homosexuality within their home, culture or religion
- internalised homophobia
- unmet needs, such as autistic spectrum disorder
- undisclosed child sexual abuse or other abuse
- social contagion and radicalisation
- whether the child is being influenced to focus on the narrow issue of gender as a solution for wider, deeper problems at the expense of their longer-term well-being

- vulnerability to grooming: relationships that may put them in danger, for example if the child is talking about intimate issues with strangers on the internet
- that the child is psychologically vulnerable and being encouraged to feel dysphoric about their body
- that the child is being encouraged to want to break sex-based rules and boundaries which are there to protect the privacy and safety of other pupils and themselves
- that the child is being given unrealistic expectations and encouraged to self-harm if those expectations are not fulfilled
- that the child is being alienated from their parents
- that the child is self-medicating with drugs such as puberty blockers and hormones
- that the child is binding their breasts or taping their penis.

Any staff member who has any concerns about a child's welfare should follow the processes set out in *Keeping Children Safe in Education*. That is, they should follow their own school's child-protection policy and speak to the designated safeguarding lead. The school should work with parents as far as possible, as *Working Together to Safeguard Children 2023* states:

"All practitioners should work in partnership with parents and carers as far as possible. Parents and carers need to understand what is happening and need to be supported to say what they think. This is particularly important when there is reasonable cause to suspect that a child is suffering or is likely to suffer significant harm. Working collaboratively will mean parents have the best chance of making changes and practitioners can make fair and accurate decisions about how to support children and keep them safe."

Complying with the Equality Act

Indirect discrimination

It has been suggested that not agreeing to a child's demands to undertake a "social transition" – which involves waiving sex-based rules and policies at school – might be indirect discrimination on the basis of gender reassignment. This will not be the case if the rules and policies are justified as a proportionate means to a legitimate aim, or mitigated in ways that do not undermine that aim.

The school policies that we are referring to – accurately recording a child's sex throughout their records and applying the same sex-based rules, duty of care and safeguarding to all pupils – are justified because they are a direct statutory requirement or are proportionate means to a legitimate aim, or both.

A school cannot be required to *directly* discriminate against a pupil based on a characteristic (by putting them outside the rules that keep them safe) in order to avoid *indirectly* discriminating against them based on the same characteristic (because, for example, the rule makes the child feel uncomfortable).

What a school can do to mitigate the risk of unlawful gender-reassignment discrimination is to use sex-based rules only where justified (such as for dignity and privacy) and to avoid them when they are simply based on tradition or stereotype. For example:

- Avoid traditional sex-based distinctions in the subjects pupils study or the games they play.
- Avoid conventional sex-based rules at proms, dances and other social events about what girls or boys can wear (or expectations about who they partner).
- Consider having more gender-neutral uniform rules.
- Reduce situations and rules where children's sex is emphasised, for example girl-boy seating.¹¹

These steps make it easier to accommodate children who chafe at the traditional social norms for their sex.

Replacing all single-sex facilities with unisex closed rooms (for example, during a building refurbishment) is a change that is likely to disadvantage girls, who particularly value privacy during puberty and in relation to menstruation. It should be subject to equality-impact assessment. Sensitivity to children with gender-related distress does not justify removing all single-sex facilities.

¹¹ Department for Education (2018). *Gender separation in mixed schools: Non-statutory guidance*.

The kindest and fairest approach to children experiencing gender issues is to explain that the school uses sex-based rules only where these are justified or required by law. This may be to preserve the privacy and dignity of everyone, or to promote equality (particularly for girls, such as in sport). Children will also encounter these rules in the outside world, and in adult life. These rules cannot be waived for them. Other children also have rights.

This does not mean that children are required to conform with outdated gender stereotypes such as those concerning the interests and temperaments of girls and boys.

Any other approach holds out hope that intransigence and prolonged negotiation (or ambiguity about rules) will lead to some children being treated as exceptions to sex-based rules.

Disability: reasonable adjustments

If gender dysphoria reaches the level of a mental impairment that has a “substantial” and “long-term negative effect on a child’s ability to do normal daily activities, it can be classified as a disability. Separately, it may be a compounding factor in a disability such as anxiety disorder.

Under the Equality Act, schools have a legal obligation to make reasonable adjustments to support pupils who are disabled, ensuring they can benefit from what the school offers in the same way as a pupil who is not disabled.

The duty to make reasonable adjustments does not extend to breaking or ignoring the law. Schools must always work within the applicable legal envelope of their other statutory duties

It is not a **reasonable** adjustment to allow a child to use opposite-sex facilities, since this undermines the safety and education of other children. As outlined above, a school with a strict uniform code can argue that it is not a reasonable adjustment to allow a boy to wear the girls’ uniform as this is likely to lead to a general undermining of communication and enforcement of other sex-based rules such as those concerning facilities.

Schools should think about how all aspects of the school day, including attendance and behaviour, could be adjusted to meet the needs of the disabled child. For example, if using the correct single-sex facilities causes a child with gender dysphoria severe anxiety, that child may be able to use alternative unisex facilities.

However, as mentioned above, if these are not facilities that are generally available to any child in a particular building but are by special arrangement, it should be clear that the aim of any such arrangement is to mitigate the discomfort a child feels at that time, to enable them to access education. It is not a long-term promise that unisex facilities will always or generally be available. It is not in children’s interests that they expect alternative provision, and this promise should not be made.

Some specific conditions are not considered to be impairments under the Equality Act 2010. These include a tendency to sexual abuse of other persons, exhibitionism, and voyeurism.

Schools can and should explain to all children that it is not appropriate for boys to enter the girls' facilities and vice versa.

Balancing rights under the Public Sector Equality Duty

Schools in the public sector must comply with the PSED. They should subject their policies to an equality-impact assessment that considers impacts on people with all protected characteristics. This is good practice for independent schools too.

Having a policy of allowing some pupils (with the protected characteristic of gender reassignment) to use opposite-sex facilities would undermine equality of opportunity for children based on sex, since it would make these facilities a hostile and humiliating environment for children of the sex they are intended for. It would also undermine equality of opportunity for children based on religion or belief, since it would require telling children and their parents that they can expect male children in the girls' changing rooms and vice versa, and they must pretend that those children have changed sex.

A requirement on children to refer to a boy as "she" or a girl as "he" (that is, a ban on "misgendering") is likely to constitute belief discrimination against those children (and parents) who hold gender-critical beliefs (that gender identity is not more important than sex, and that humans cannot change sex).

Once a school has decided on a rule or policy, it should be communicated clearly. This also supports the school's responsibility to foster good relations across all protected characteristics. If everyone knows what the rules are and what to expect, there is less likely to be conflict.

Schools must be clear that a boy who identifies as a "trans girl" is not a girl, and a girl who identifies as a "trans boy" is not a boy. They should not make the mistake of concluding that a policy that meets a male child's wish to use girls' facilities is good for girls because "trans girls are girls".

While schools cannot delegate responsibility for carrying out the PSED to anyone else, the DfE guidance should give schools a "safe harbour" by setting out policies that are consistent with legislation and balance the needs of those different protected characteristics.

What if a child has an EHCP?

Many children who are experiencing gender distress may also have comorbidities, such as autism and mood and anxiety disorders, that result in special educational needs. They may have an Education Health and Care Plan (EHCP) – a legal document issued under the Children and Families Act 2014 that describes the special education, health and care needs of the pupil and the extra help and support they will need to overcome barriers to learning. The Act imposes an absolute duty on the local authority generated by the specific needs of the child or young person in question. The EHCP will specify “**any health care provision reasonably required** by the learning difficulties and disabilities which result in him or her having special educational needs” (CAFA S37 (2)(d)).

“Social transition” is often assumed by doctors to be something that a school can accommodate, or that a child may pursue without medical assessment. Dr Hilary Cass, in her ongoing review of the medical treatment of gender-questioning children, has said:

“It is important to view [social transition] as an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning.”¹²

However, it was not within the mandate of Dr Cass’s review to consider whether social transition in school (involving staff misrepresenting a child’s sex, allowing a child to break sex-based rules, expecting other children to treat the child as if they were the opposite sex and refer to them by wrong-sex terms) is something that can be “reasonably required”.

While this has not been tested, our analysis suggests that consideration of other children’s human rights (and of the school’s ability to keep all children safe) means that such **social transition is not a form of healthcare provision that can reasonably be required to be delivered in a school setting.**

Under Section 33 (2) of the Children and Families Act:

“The local authority must secure that the plan provides for the child or young person to be educated in a [...] mainstream school [...], unless that is incompatible with –

- (a) the wishes of the child’s parent or the young person, or
- (b) **the provision of efficient education for others.**”¹³

¹² The Cass Review (2022). *Independent review of gender identity services for children and young people: Interim report.*

¹³ Children and Families Act 2014, part 3, section 33, point 2.

The local authority and the governing body, proprietor or principal of a school can rely on this exception if they can show that there are **no reasonable steps** that they or the local authority could take to prevent the incompatibility.

This analysis is not changed by recognising that the child has the protected characteristic of gender reassignment, or of disability.

A recent legal case considered a young person with the protected characteristic of gender reassignment in a college placement¹⁴. It found that the Children and Families Act imposed an absolute duty generated by the specific needs of the child or young person in question, and that this duty **did not vary as a result of any protected characteristic**. Therefore separate consideration of the young person's protected characteristics under the PSED was not required in relation to the implementation of the EHCP.

Impacts on other children with protected characteristics and on the school's statutory duties must be considered when committing to measures under an EHCP that involve or affect a child's peers.

Although there is no reason for a gender-questioning child to be excluded from school or treated differently, a child who refuses to comply with sex-based rules or who has been encouraged to become upset and is unable to cope emotionally at being referred to by their sex will be hard to integrate into mainstream education,

It is not reasonable or in the best interests of the child for the school to respond to a child who feels anxiety or distress at sex-based rules and language (which may be temporary) to encourage this to become a stable identity, as this pushes them towards opting out of aspects of mainstream education, or of mainstream education altogether.

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¹⁴ *IAI, R (on the application of) v London Borough of Wandsworth [2023] EWHC 2088 (Admin)*.