Kishwer Falkner, Chair, Equality and Human Rights Commission
Marcial Boo, CEO, Equality and Human Rights Commission

4th October 2023

Dear Kishwer and Marcial

Thank you for updating the Technical Guidance on the Equality Act for schools.

We think this update will help correct some particularly harmful misinformation about the Equality Act in relation to single-sex facilities. We have written about the update at https://sex-matters.org/posts/updates/what-is-new-in-the-ehrc-guidance and have produced a briefing for parents and headteachers, which we attach.

However, we think that the guidance is still inaccurate and problematic in relation to this example:

> "A school fails to provide appropriate changing facilities for a transsexual pupil and insists that the pupil uses the boys' changing room even though she is now living as a girl. This could be indirect gender reassignment discrimination unless it can be objectively justified. A suitable alternative might be to allow the pupil to use private changing facilities, such as the staff changing room or another suitable space."

This section appears to align with former paragraph 3.35, which has now been withdrawn, insofar as it imagines a child "living as the opposite sex" while at school and encourages schools to view such a child using the facilities for their own sex as inappropriate.

In the changing-room scenario, the guidance should explain the school's responsibility to ensure the child is able to access the school curriculum and activities, including those which may require changing, such as sport, drama, protect the child against bullying and ensure their privacy. Creating or knowingly allowing a situation where a pupil is made to feel unwelcome or unsafe in the facilities provided for their own sex would be direct discrimination.

The example states that it may be indirect gender-reassignment discrimination if the school does not find a "suitable alternative". It suggests that this alternative "could be a staff changing room or another suitable space".

While it is true that a pupil might bring a claim of indirect discrimination about a lack of unisex facilities, there has been no such case to date. Whether such a claim would be successful would be very much fact-dependent, in our view, and this should be reflected in the guidance in more constructive terms. In this scenario, the guidance could explain that even if a detriment were proven, the issue of proportionality would remain to be considered. Bearing in mind the very different premises and circumstances of pupils, schools and their staff, the school's position might be justifiable, for example on grounds that it provides safe and lawful changing facilities which are designated and risk-assessed as suitable for a child of that age and sex; it has taken steps to address issues of bullying, if any; it has also taken into account the lawful privacy rights and needs

of other pupils and staff; and, given pressure on space and budgets, it cannot safely promise to offer ad-hoc spaces outside of this.

We are particularly concerned that the ad-hoc alternatives suggested in the guidance present safeguarding risks. They might be away from the group and hard to supervise; they could risk mixing with adults (contrary to the relevant premises regulations, and undermining the staff code of conduct); or they might encourage schools to consider demeaning spaces which could be physically unsafe, such as a broom cupboard (putting schools in breach of health and safety requirements). During a school career that spans several years, risk assessment of alternative ad-hoc facilities would need to apply to multiple different situations, both within the school and off-site, for instance sporting activities and school trips. It seems highly unlikely that any school would always be able to promise and provide pupils with ad-hoc alternatives to the ordinary, safe and risk-assessed facilities provided for their own sex. To do so would be speculative and create an uncontrolled risk to that child, the staff and the school.

Furthermore, segregating the child from their peers encourages the idea that discrimination on the basis of the protected characteristic of gender reassignment is acceptable and should continue.

If a child has a mental-health condition that results in so much anxiety when using same-sex facilities that they are not able to access key aspects of education despite the school's best efforts to include them in mainstream provision, then a request for alternative facilities could be considered under the framework of special educational needs, with a time-limited plan that is kept under review. As the case of *R (AI) -v- London Borough of Wandsworth and Secretary of State for Education [2023] EWHC 2088 (Admin)* makes clear, such provision is based on the best interests of the child and is not changed by the protected characteristic of gender reassignment.

We are troubled by this statement in the guidance (paragraph 3.31; 3.32 in Scotland):

> "Even if a school thinks that it is acting in the best interests of a pupil, its actions may still amount to a detriment."

The illustration which immediately follows is an instance of direct discrimination on grounds of religion. Direct discrimination once established under the Equality Act cannot be justified, so this treatment will be unlawful even if the school decided on it wrongly believing it to be in the child's best interests. It is in no child's best interests to suffer direct discrimination on grounds of a protected characteristic, except where expressly sanctioned by the Equality Act.

Read carefully enough and with a background of a sufficient understanding of the difference between direct and indirect discrimination, the statement at ¶3.31 is accurate. But we are concerned that it is capable of being understood as meaning that a school's duty to act in the best interests of children in its care may sometimes have to give way to a duty of non-discrimination under the Equality Act. That understanding would be both wrong and dangerous.

Schools are required (as set out in *Keeping Children Safe in Education*) at all times to safeguard and promote the welfare of the children in their care. That means that where a provision, criterion or practice (PCP) is capable of being said to put children with a particular protected characteristic at a particular disadvantage compared to children who do not have that protected characteristic, if the PCP is necessary or proportionate to ensure safeguarding, it will always be justified.

It would of course also be direct discrimination if schools were to *disapply* the "best interests"

principle and associated practices in relation to pupils with the protected characteristic of gender reassignment, or any other protected characteristic. We would be grateful if you could clarify this, perhaps by replacing the statement at 3.31 with something like:

> "Direct discrimination is always unlawful except where permitted by a specific statutory exception or obligation. A mistaken belief that it is justified to treat a particular pupil differently because of a protected characteristic in his or her best interests will not provide a defence.
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> "It is important to note that this does not mean that assessments of the best interests of the child, such as in relation to safeguarding or special educational needs, can ever be trumped by the duty not to discriminate: for the purposes of indirect discrimination, a rule or policy that treats all children the same will always be justified if it is necessary or proportionate in the interests of the welfare of children."

Yours sincerely

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