

Briefing: What head teachers need to know about the updated technical guidance on the Equality Act 2010 from the Equality and Human Rights Commission for schools in England

(See <https://www.equalityhumanrights.com/en/our-work/news/technical-guidance-schools-updated>.)

The EHRC's technical guidance was published in 2014 but has been found to be inaccurate in its presentation of what the Equality Act 2010 says in relation to pupils who identify as transgender. It has now been reviewed and updated.

Summary

The Equality Act requires that schools do not unlawfully discriminate based on sex (being male or female, a boy or a girl) or on the basis of "gender reassignment" (for a child: proposing to undergo transition).

Examples of unlawful direct gender-reassignment discrimination might include:

- excluding a pupil because they identify as transgender
- repeatedly insulting a child who identifies as transgender by saying he looks silly.

Schools in England are required to provide separate toilets for boys and girls over the age of eight (apart from where they are unisex, enclosed rooms), and separate changing-rooms for boys and girls over the age of 11. This relates to children's sex, which is not changed by having the protected characteristic of gender reassignment.

A school might face a legal challenge that its rules, where they differentiate between the sexes, result in indirect discrimination against pupils covered by the protected characteristic of gender reassignment. If a detriment is proven it would have to show that these rules are justified, for example by statutory requirements or safeguarding.

The EHRC is the national regulator on the Equality Act 2010 and its technical guidance provides "an authoritative, comprehensive and technical guide to the detail of the law". These are the key updates in the revised guidance.

Definition of the protected characteristic of sex (page 86)

"A person's sex refers to the fact that he or she is a male or female of any age.

"Sex' is understood as binary – being male or female – with a person's legal sex being determined by what is recorded on their birth certificate, based on biological sex."

The guidance makes clear that a person can only change their sex for (some) legal purposes through the procedures set out in the Gender Recognition Act 2004. This is something that can be done only by adults – that is, over the age of 18.

This aligns with the information collected by the Department for Education in the School Census. The DfE has recently updated its guidance to make clear that information on every pupil's sex **must** be accurately recorded.

Definition of the protected characteristic of gender reassignment (page 84)

"Gender reassignment means proposing to undergo, undergoing or having undergone a process to reassign a person's sex.

"To be protected from gender reassignment discrimination, a person does not need to have undergone any medical treatment or surgery to change from their birth sex to their preferred gender.

"A person can be at any stage in the transition process, from proposing to reassign sex, undergoing a process of reassignment, or having completed it. It does not matter whether or not a person has applied for or obtained a Gender Recognition Certificate, which is the legal document that enables trans people aged 18 and over to have their acquired gender recognised as their legal sex.

"A child can have the protected characteristic of gender reassignment."

The process of legally "reassigning sex" is defined by the Gender Recognition Act 2004. It involves making an application to the Gender Recognition Panel and making a statutory declaration that the person "intends to continue to live in the acquired gender until death".

This cannot be undertaken by anyone aged under 18.

However, as the guidance sets out, a child may be *proposing* to undergo that process in future and have taken steps towards it, such as seeking a medical assessment or changing their appearance, the way they describe themselves or the way they act. They would thus be covered by the protected characteristic of gender reassignment in relation to the Equality Act protections against discrimination in Section 85.

Single-sex facilities (page 57)

The guidance states:

“Sex segregation is permitted in certain situations, such as where it is necessary and appropriate to preserve privacy and decency. The law requires schools to provide single sex toilet facilities for children over eight and single sex changing facilities for children over 11. These may be either in sex-segregated communal facilities or in single-user lockable rooms.”

Previously, the requirements under schools premises regulations to provide facilities such as boys’ and girls’ changing-rooms, toilets and dormitories were described as “gender segregation”. However, the EHRC’s update makes clear that these requirements relate to pupils’ **sex**.

Avoiding unlawful discrimination based on sex or gender reassignment

The Equality Act requires that:

S85 (1) The responsible body of a school must not discriminate against a person

1. in the arrangements it makes for deciding who is offered admission as a pupil
2. as to the terms on which it offers to admit the person as a pupil
3. by not admitting the person as a pupil.

S85 (2) The responsible body of such a school must not discriminate against a pupil

1. in the way it provides education for the pupil
2. in the way it affords the pupil access to a benefit, facility or service
3. by not providing education for the pupil
4. by not affording the pupil access to a benefit, facility or service
5. by excluding the pupil from the school;
6. by subjecting the pupil to any other detriment.

These protections may apply to a child who self-identifies as transgender, who should not be treated differently or worse than a child who is not having gender issues. Page 53 of the guidance explains:

“It is not possible to justify direct discrimination, so it will always be unlawful, unless there are specific exceptions.

“In order for someone to show that he or she has been directly discriminated against, he or she must compare what has happened to him or her to the treatment that a person without his or her protected characteristic is receiving, or would receive.”

Thus a male child who identifies as transgender (who may say “I am a trans girl”) remains legally a boy, and is subject to the same rules and policies as other boys. The test for discrimination is based on comparison

with another boy who does not identify as transgender.

The guidance sets out examples of unlawful direct gender-reassignment discrimination:

- It is unlawful direct gender reassignment discrimination to exclude a pupil because they identify as transgender.
- A teacher repeatedly insulting a child who identifies as transgender by saying he looks silly could constitute direct discrimination on the grounds of gender reassignment.

By reminding schools of their statutory obligations to provide single-sex facilities, and clarifying that the legal meaning of sex is solely biological for under-18s, the EHRC makes it clear that boys’ changing-rooms and toilets are for boys (male), and girls’ changing-rooms and toilets are for girls (female).

Indirect discrimination

Indirect discrimination occurs when a school applies a provision, criterion or practice in the same way for all pupils or a particular pupil group (such as all girls or all boys) but this has the effect of putting pupils who share a protected characteristic at a particular disadvantage.

The guidance states that it *could* be indirect gender-reassignment discrimination if a school only provides separate-sex changing-rooms and insists that all children use the changing-room for their sex, rather than offering a private alternative for a child who identifies as transgender. It states that if the provision can be objectively justified then it would not be unlawful indirect discrimination (Page 41).

Sex Matters says: The application of this to real-world policies has not been tested in court, but schools should remember that they have a statutory requirement to provide suitable facilities and a duty of care towards *all* children.

By definition, separate-sex facilities **are suitable** for children of that sex (it would be direct gender-reassignment discrimination to exclude a child because they identify as transgender), and it would **not be appropriate** to allow a child to share facilities with the opposite sex. There may not be any safe, suitable alternative facilities.

All schools should review their policies and provisions in light of this guidance to make sure that suitable facilities for sanitation and changing are provided separately for girls and boys, and that **no pupil is allowed to use opposite-sex facilities**.