

Response to
**Department for Education consultation
on draft guidance for schools on
gender-questioning children**

DRAFT

February 2024

Contents

Structure	3
Responding to requests and engaging parents	5
Registration of name and sex	7
Changing names	8
Pronouns	9
Single-sex spaces	10
Uniform	13
Sport	14
Single-sex schools	15
Public sector equality duty	16

Organisational response from Sex Matters: a human-rights organisation campaigning for clarity on sex in law and policy in the UK.

Our response is based on our analysis of relevant legislation¹ and engagement with parents, clinicians, teachers and school leaders, school governors, lawyers and officials.

Structure

11. Do you think the structure of the guidance is easy to follow?

No.

12. If you answered no, how could the structure of the guidance change to make it easier to follow?

The structure should start with the standard policies that apply to ALL CHILDREN before considering what schools should do to accommodate children who are experiencing gender-related distress.

There should be a section about “Adopting, communicating and enforcing clear fair policies” that comes before “responding to pupil requests and engaging with parents”.

This section should remind schools (and parents and pupils) that it is legally required and routinely necessary (and therefore legally justified) for a school to know, record and acknowledge a child’s sex throughout the school day, and throughout their school career, in its information systems, in relation to communicating and enforcing expectations and behavioural rules, and in relation to everyday language.

Any discussion of potential exceptions that go beyond the usual provisions that apply to boys or girls should come after, not before, this, and should be framed in terms of accommodations to ensure that a child who is experiencing difficulties is able to access education, not “social transition”.

This would make it clearer to schools, teachers, parents and activist organisations that a request for the school to call a girl a boy, or a boy a girl cannot be entertained. Otherwise the structure of the guidance suggests there is more room for negotiation than there really is.

The guidance should be clearer about what schools “must” do, “should” do and “are advised to” do. Sentences should be structured simply with active verbs that focus on what the school does.

¹ Sex Matters (2023). [Keeping children safe as girls and boys in education](#).

The Department for Education should also develop separate transitional support for schools that are currently operating in conflict with the guidance (for example if it has accepted a boy into school as if he was a girl or vice versa).

13. Does this guidance provide practical advice to support schools and colleges to meet their duties effectively?

Yes (but we also have comments).

14. If you answered no, how could we improve deliverability placed on schools and colleges whilst still providing for schools to meet their duties?

The DfE should publish a standard whole-school model policy based on this guidance to help schools to implement it.

The model policy should set out the standard policies that schools have in relation to recording and recognising every child's sex as part of information management, behaviour and safeguarding policies, and daily routines.

The model policy should be accompanied by an Equality Impact Assessment and be published together a legal explanation.

The work of developing clear, fair, legally compliant policies does not need to be done separately by every school. What schools need are policies that they can adopt confidently and communicate clearly to pupils and parents.

The policy does need to conceptualise "social transition" – or rather it should set out how the needs of pupils who are "gender questioning" or who have been diagnosed with gender dysphoria may be addressed, with the aim of ensuring that they are not treated less favourably than other pupils.

A simple set of policies that are in line with the guidance will remove risk from schools and reveal where activist groups are advising them to adopt different policies.

The DfE should make clear that if schools adopt its model policies and then face a legal challenge the DfE will come in as an interested party and defend the policy.

Responding to requests and engaging parents

15. Does this section provide enough detail to help schools and colleges support children?

No.

16. If you answered no, in which of the following areas do schools and colleges need further guidance to support a child? [tick all that apply]

How schools and colleges should involve parents in decisions

How schools and colleges should manage engagement with parents with different feelings or views to their child

When schools and colleges should seek specialist advice or support

How schools should put in place a “watchful waiting” period before acting on a child’s request

How schools and colleges can identify what issues may impact the wider school or college community

How schools and colleges should handle decisions that impact on the wider school and college community.

The law

Something else

The section expects schools to undertake decisions that are outside their competency and reasonable expectations. It is unworkable.

Schools should be directed that they do not need to make complex assessments of the individual situation of every child who wishes to be perceived and treated as being the opposite sex at school. They must simply say: “No, this is not possible at school.”

It is not fair or safe to pretend that a male pupil is a girl or a female pupil is a boy, or to place that child outside ordinary rules.

Schools are not clinics, and teachers are not clinicians. They cannot undertake watchful waiting – a concept taken from medicine, meaning closely watching a patient's condition but

not giving any treatment unless signs or symptoms appear or change – or involve other children in “providing treatment” for gender dysphoria.

The considerations that are suggested are unworkable. For example, the guidance states that when considering taking exceptional steps, the school should consider the age of the child and the impact on others. But it does not put this in the context that children are in school for several years. The request for “social transition” is a request for a change of status from this point forward. This is what the hoped-for “social transition” means to the child, and to the activist groups advising them.

What should be made clear is that “social transition” cannot be achieved at school: although a child may change their name or hairstyle, this does not mean they have undergone a change of status such that different rules and expectations will apply to them for the rest of their school career.

What a school may do is to consider making reasonable accommodations to enable a child to access education if they are having difficulties, such as measures that might mitigate a child’s anxiety, discomfort or oppositionality. For example, if a child is very distressed by using communal changing-rooms because of body dysmorphia, the school may be able to find a single-user unisex alternative. (However, it should only do this if the alternative is appropriate and safe.)

This kind of exception to normal rules and routines can be undertaken through a Special Educational Needs or health-care plan, which will be reassessed periodically. The goal of such accommodation is not to achieve “social transition” but to make sure the child is able to access education.

The legal justification for this approach (including why it is consistent with the Equality Act) should be explained for schools.

17. Think about the points outlined for schools and colleges to consider on pages 9–11 regarding making decisions about how to respond to requests for social transition. Are these points helpful?

No.

18. If you answered no, what considerations would be more helpful for schools and colleges to consider? For example, when assessing whether to support a child wishing to socially transition, do you think different weight should be given to the views of parents, the age of the child, the long- and short-term impacts on the child, the impact on other children, and any relevant clinical or medical advice?

The balancing considerations that the schools guidance sets out are complex and outside the competency of schools. They give too little weight to the need for whole-school rules in order for schools to meet their statutory responsibilities and to provide efficient education for others.

The guidance should make clear that a school cannot support a child wishing to socially transition. The school cannot treat a child as the opposite sex for reasons of safeguarding of all children. A boy will continue to be a boy and a girl will continue to be a girl.

The school has a duty to make sure that the child understands the school's behavioural expectations and that the child accesses education and is not bullied.

The framework of "social transition" should be removed from the guidance as it sets up expectations that schools cannot meet.

The guidance should be clearer that staff MUST NOT unilaterally adopt any changes that undermine a school's behaviour policies. This is in line with safeguarding, the DfE Teachers' standards, and guidance and statutory requirements for school behaviour policies.

Registration of name and sex

19. Does this section on page 12 provide enough detail for schools and colleges to ensure each child is recorded correctly and according to the Education Act 1996, Pupil Registration (England) Regulations 2006, GDPR and the Data Protection Act?

Yes (but we have comments).

20. If you answered no, what further information should be included to help schools and colleges?

This section should spell out clearly the implications of the requirement that a school **must know** a child's sex to protect them and others from harm.

The guidance states: "It is often necessary to know a child's sex in protecting them or others from harm. Schools should make sure that all relevant staff are aware of a gender questioning child's biological sex." This means that a boy cannot be referred to as a girl by the school and a boy cannot be referred to as a girl. This includes documents, data records, verbal instructions and the rules that apply to children.

It would be clearer to say: "It is necessary for the school to know a child's sex in order to protect them and others from harm and to communicate rules and expectations. Schools should make sure that all staff use clear sex-based language (boy/girl, male/female, he/she) when referring to pupils in the school."

Changing names

21. Does this section on page 12 provide enough detail for schools and colleges to respond to a child's requests to change their name?

Yes (but we have comments).

22. If you answered no, in which of the following areas do schools and colleges need further guidance to respond to a child's requests to change their name? [tick all that apply]

How schools and colleges should make a decision about a child's request to change their name

When schools and colleges might refuse a request in relation to a child changing their name

How schools and colleges should involve parents in a decision about a child's request to change their name

How schools and colleges should make relevant staff and other children aware of any agreed changes to name

What factors schools and colleges should take into account.

How schools and colleges should respond to other children and staff who do not wish to use a different name

The law

Something else

The school should make clear that a change of “known as” name is not a “social transition”. It does not change a child’s sex.

A model policy could state:

1. The school must be satisfied that, taking into account all the circumstances, the name change is in the best interests of the child. The school is under no legal obligation to make any informal name change and is fully entitled to refuse to do so. We will normally not consider an informal name change without the consent of a parent.
2. Teachers and other staff will refer to a child by their “known as” name only if it has been registered with the school. Teachers should not refer to pupils by nicknames outside this process.
3. A legal or informal name change from a conventionally male or female name to one associated with the opposite sex, or to an androgynous one, does not create any other change of status for the child, or for language used about them such as girl/boy or she/he.

Pronouns

23. Does this section on page 13 provide enough detail for schools and colleges to respond to a child’s requests to change their pronouns?

No.

24. If you answered no, in which of the following areas do schools and colleges need further guidance to respond to a child’s requests to change their pronouns?

[tick all that apply]

When schools and colleges should refuse a request in relation to a child changing their pronouns

What factors schools and colleges should take into account.

How schools and colleges should involve parents in a decision about a child’s request to change their pronouns

How schools and colleges should make relevant staff and other children aware of any agreed changes to pronouns

How schools and colleges should respond to other children and staff who do not wish to use different pronouns

The law

Something else

This section of the guidance is internally inconsistent, inconsistent with the rest of the guidance and unworkable.

For example, the guidance states that it is OFTEN NECESSARY to know a child's sex in protecting them or others from harm.

"She" in English is the pronoun used for a female person, and "he" is the pronoun used for a male person. If a school refers to a child by pronouns that do not match their sex, the school is communicating false and misleading information about that child.

School rules of behaviour (where this relates to sex) depend on all children and adults knowing which spaces can be used by each sex, and understanding that children do not shift between these categories.

The guidance states that other pupils and teachers should not be compelled to use preferred pronouns. But it also talks about others "having to use" preferred pronouns and not being sanctioned for "honest mistakes". Calling a girl "she" or a boy "he" is not a mistake.

The use of opposite-sex language for a child (calling a boy a "girl" or "she", or a girl a "boy" or "he") sets up expectations that others should perceive them and treat them as being the opposite sex (and that not to do so is "transphobia"). This is incompatible with the school's duty of care to that child and to other children.

The section on pronouns should be removed and replaced with a section on clear sex-based language. The guidance should recognise that schools should refer to all children by clear sex-based language so that no one becomes confused about the meaning of words and expectations of behaviour.

Single-sex spaces

25. Does this section on pages 14 and 15 provide enough detail for schools and colleges to respond when a child who is questioning their gender makes a request to use facilities (e.g. toilets, changing rooms, showers and boarding and residential accommodation) designated for the opposite sex?

Yes (but we have comments).

26. If you answered no, in which of the following areas do schools and colleges need further guidance? [tick all that apply]

How schools and colleges should make a decision about a child's request not to use facilities designated for their sex

When schools and colleges have to refuse a request in relation to a child using facilities designated for the opposite sex

How schools and colleges should involve parents in a decision about a child's request not to use facilities designated for their sex

What factors should be considered when deciding whether to offer alternative facilities

Toilets

Changing rooms

Boarding and residential accommodation

The law

Something else

While a school may be able to offer single-user facilities in some situations (depending on the school's built environment), it will be unable to promise that such facilities will always be available (for example on school trips, in future schooling and while doing work experience).

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.

The guidance currently says: “These alternative arrangements SHOULD NOT compromise the safety, comfort, privacy or dignity of the child, or of other pupils.” This should be changed to MUST NOT.

Schools are required to ensure that there are appropriate facilities for girls and boys. It would not be in any child’s best interests to allow them to use alternative facilities that compromise their safety, comfort, privacy or dignity.

27. Think about the circumstances provided in the guidance on pages 14 and 15, outlining the option for schools and colleges to find alternative facilities. Does the guidance provide enough support to help schools and colleges determine how to offer alternative facilities?

Yes (but we have comments).

If you answered no, what more information would you need?

Any provision of alternative facilities outside the norm to mitigate a child’s anxiety should be on a time-limited basis and reviewed as part of a SEND plan.

Schools should not give pupils the impression that they will never have to use ordinary sex-based facilities during their school career. In some situations such facilities will be the only safe and appropriate option.

28. Does this section provide enough detail for schools and colleges to support children who do not wish to use accommodation that is designated for their sex in relation to boarding and overnight accommodation?

Yes (but we have comments).

29. If you answered no, in which of the following areas do schools and colleges need further guidance? [tick all that apply]

How schools and colleges should make decisions about requests to access boarding and overnight accommodation designated for children of the opposite sex

When schools and colleges should refuse a child’s request to use different boarding and overnight accommodation while on a school or college trip

How schools and colleges should involve parents in a child's request to use different boarding and overnight accommodation while on a school or college trip

The law

Something else

The guidance currently says: "These alternative arrangements SHOULD NOT compromise the safety, comfort, privacy or dignity of the child, or of other pupils." This should be changed to MUST NOT.

Schools are required to ensure that there are appropriate facilities for girls and boys. It would not be in any child's best interests to allow them to use alternative facilities that compromise their safety, comfort, privacy or dignity.

Uniform

30. Does this section on page 16 provide enough detail for schools and colleges to respond to a gender-questioning child who makes a request in relation to uniform?

No.

31. If you answered no, in which of the following areas do schools and colleges need further guidance to respond to a gender-questioning child, who makes a request in relation to uniform? [tick all that apply]

How schools and colleges should make a decision about a gender questioning child who makes a request in relation to uniform

When schools and colleges might refuse a request in relation to a child wearing a different uniform

How schools and colleges should involve parents in a decision about a gender questioning child who requests an exception to uniform requirements.

How a school or college might accommodate a request within their uniform policy

How schools and colleges should make relevant staff and other children in the school or college aware of any changes agreed.

The law

[X] Something else

A school's uniform is part of its behaviour code. Uniforms are generally designed to promote the ethos of the school, remove distractions from learning, set an appropriate tone for education, create habits of good grooming, and provide a sense of belonging and identity.

Uniforms also have an informational and security aspect. Wearing a school uniform means a child can be easily recognised as going to a particular school. There can be other differentiations, such as different-coloured ties or lanyards for different year groups. These may correspond with varying rights to access different parts of the school, or to leave the school premises. When schools have a uniform that is differentiated by sex, this too has an informational element. In a school where the uniform includes a skirt or trousers for girls and trousers for boys, both children and staff will assume that any child wearing a skirt is a girl, and that the rules for girls about sports and spaces apply to that child.

To avoid confusion and unclear expectations, all children in a school should be held to the same standard of compliance with the appropriate school-uniform requirements for their sex. This is the case whether the school's uniform is significantly different for boys and girls, or is largely undifferentiated.

For staff supervising hundreds of children in circulation spaces and toilets, in a school where there is a sex-differentiated uniform, having some children wearing the opposite-sex uniform undermines the smooth running of the school and the communication and enforcement of rules and expectations that are designed to protect all pupils.

Sport**32. Does this section on page 17 provide enough information on what to do if a gender questioning child asks to participate in a certain sport or activity with the opposite sex?**

Yes (but we have comments).

33. If you answered no, in which of the following areas do schools and colleges need further guidance to support children taking part in PE or sport? [tick all that apply]

How schools and colleges should make a decision about whether a child can take part in a certain sport or activity

When schools and colleges should refuse a request in relation to a child taking part in a certain sport or activity

How schools and colleges should involve parents in a decision about a child's request to participate in a certain sport or activity

How schools and colleges should make relevant staff and children aware of any changes agreed

The law

Something else

This section could be clearer that where sports are divided by sex for fairness, safety or to encourage the participation of girls, no child's individual SEND or healthcare plan will include provisions that allow a child to be included in sport provided for the opposite sex.

The reason for this is that where sports are separated for fairness and safety, these categories should be maintained.

"For all sports where physical differences between the sexes threaten safety schools SHOULD adopt clear rules which mandate separate-sex participation. There can be no exception to this." This should therefore say MUST rather than SHOULD.

"Schools and colleges SHOULD AIM TO ensure all children participate in sport safely." This should say MUST AIM.

34. Think about the circumstances provided in the guidance on page 15, outlining the need for fairness and safety in PE or sport. Does the guidance provide enough support to help schools and colleges determine what is fair and safe?

Yes.

35. If you answered no, what further support should be included to help schools and colleges determine what is fair and safe in PE or sport?

-

Single-sex schools

36. Does the guidance on the application of the Equality Act to admissions to single sex schools on page 18 provide enough information to support single sex schools in making decisions about the admission of children who are questioning their gender?

Yes (but we have comments).

37. If you answered no, in which of the following areas do schools and colleges need further guidance to support effective decisions on the admission of children who are questioning their gender [tick all that apply]

The law

Something else

This section should reference the school admissions code for maintained schools.

In general (both for private and maintained schools) it should make clear that a single-sex school CANNOT admit a child of the opposite sex on the basis of pretending that they are the same sex as the other pupils. That is, a boy CANNOT be admitted to a girls school “as a girl”; similarly, a girl CANNOT be admitted to a boys school “as a boy”. To do so would be in breach of registration, safeguarding and data protection, and would breach the school’s duty of care to other pupils.

Public sector equality duty

40. Do you have any comments regarding the potential impact of the guidance on those who share a protected characteristic under the Equality Act 2010, whether negative or positive?

Providing a model policy would allow the DfE to publish a clear equality impact assessment (EIA) that schools can use.

The EIA document should make clear that policies that relate to sex are **categorical** in order to protect all children and provide clear expectations of behaviour.

For example, girls (and their parents) are entitled to expect that a school has female-only facilities for showering and changing. If the school has a policy of exceptionally considering that some boys might be allowed to use the girls' showers, then it needs to make clear to girls and their parents that the showers and changing rooms may be mixed-sex.

Some children may have the protected characteristic of "gender reassignment". This does not change their sex.

School policies that are designed to protect children are justified because they are a direct statutory requirement or are proportionate means to a legitimate aim, or both. Such policies include accurately recording a child's sex throughout their records and applying the same sex-based rules, duty of care and safeguarding to all pupils.

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).

Requiring children to refer to a boy as "she" or a girl as "he" is likely to constitute belief discrimination against 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 must 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.

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 (especially for girls, such as in sport). Any other approach holds out the hope that intransigence and prolonged negotiation (or ambiguity about rules) will lead to some children being treated as exceptions to sex-based rules.

41. Do you have any comments on the overall approach of the guidance?

Given that the guidance is likely to be challenged by both activist organisations telling schools to ignore it, and some children and their parents (and activist teachers and organisations) who seek exceptions, it should be made as clear as possible.

The guidance should be backed up by:

- legal analysis that highlights clearly which statutory requirements underpin the guidance and why it is consistent with the Equality Act
- a whole-school model policy that schools can adopt with confidence
- integration of key messages into the next revision of KCSIE (or a supplement)
- materials to support schools that need to make transitional arrangements to support children who have been led to believe that they can transition at school
- an easy reading or school-age-reading version of the model policy.

This is a draft of our response. Comments can be sent to info@sex-matters.org

This work is licensed under the Creative Commons Attribution 4.0 International License.

Sex Matters for Everyone Ltd, operating as Sex Matters, is a not-for-profit company registered by guarantee.

Company number: 12974690

Registered office: 63/66 Hatton Garden, Fifth Floor Suite 23, London, EC1N 8LE

Published 6th February 2024