

# Guidance for maintained schools and academies in England on provision for transgender pupils

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**This briefing applies to maintained schools, academy trusts and academies in England only. It provides legal information but does not constitute or include legal advice. Schools should seek their own legal advice where appropriate. References to ‘schools’ includes trusts, academies and free schools unless otherwise stated, but does not include independent schools.<sup>1</sup> The focus is on schools’ duties towards pupils, rather than to staff.**

This briefing is provided to aid members pending the anticipated publication of guidance by the Department for Education (DfE). It should not itself be accorded the status of official guidance.

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<sup>1</sup> Independent schools are directed to *What the Independent School Standards say about provision by English schools for transgender pupils*, June 2022 published by the Boarding Schools’ Association and the Independent Schools’ Bursars Association to their members

## Introduction

The rights and protection of transgender people are currently contested and rapidly developing areas of law. The analysis this briefing contains is set in the context of recent developments and the wider law, but it does not attempt a full discussion of the law of transgender rights; any such attempt would at present become rapidly out of date as new case law emerges.

Set against this backdrop, decisions about how to support transgender pupils can be complex and sensitive, requiring context and child-specific judgments to be made by schools in dialogue with pupils, parents<sup>2</sup>, and professional advisors<sup>3</sup>.

### Trans identities

It is common today to refer to a spectrum of trans identities.<sup>4</sup> 'Trans' and 'transgender' are used in this briefing as umbrella terms for all pupils experiencing gender-related distress or otherwise questioning their gender, whether or not they clearly have the legally defined protected characteristic of 'gender reassignment', which will be explained below.

### The duties of schools

The starting position in relation to schools' legal duties towards transgender pupils is, as always, that schools must have systems in place with a view to ensuring that all pupils' educational needs and other legal rights are met at all times. These obligations apply to pupils who are questioning their gender identity, are gender non-conforming, and/or who are experiencing gender-related distress. In areas in which the law is not prescriptive, frontline professionals may use their discretion in responding to the needs of their pupils. There is often more than one approach which is reasonable and legally compliant.

Schools are likely to have a 'safe harbour' to the extent that they act in line with any relevant guidance about the law which is produced or endorsed by the primary regulators: the DfE, as regulator of schools, and the Equality and Human Rights Commission (EHRC), as the national body charged with protecting and promoting equality and human rights. This briefing, therefore, draws heavily on existing guidance from the DfE and EHRC where it is relevant to transgender pupils, pending publication of more targeted guidance. It is important to note that passing an inspection will not necessarily protect schools from complaints or actions for discrimination by parents/carers ('parents' is used as an umbrella term throughout for carers and legal guardians) or pupils who might challenge the position of the regulators and question whether it reflects an up-to-date understanding of the law.

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<sup>2</sup> To include those with parental responsibility (in the case of looked-after children).

<sup>3</sup> To include legal advisors where necessary.

<sup>4</sup> See the glossary for more.

In practice, the best advice is often for schools to work closely with all pupils affected by policies and decisions relating to sex and gender<sup>5</sup>, and with their parents (subject to what appears below), to find sensitive pragmatic solutions which ensure that every pupil is kept safe, the privacy and dignity of every pupil is respected, and that all are enabled to access education and participate fully in the life of the school. Avoiding discrimination and advancing equality in this context requires balancing the rights of pupils with different protected characteristics. Schools should be mindful that, in attempting to keep one group of pupils safe, and to respect their privacy and dignity, they need to avoid compromising the safety, privacy and dignity of other pupils.

A reading list including key legislation, a selection of relevant case law and other governmental briefings and guidance is provided in Appendix One.

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## Medical Perspectives

### The Cass Review of NHS gender identity services for children and young people: Key points for schools

The Cass Review is an independent review of GIDs (the NHS's gender identity services for children and young people).<sup>6</sup> Some of the emerging thinking in the [Cass Review Interim Report](#) (February 2022) may be of interest to others to inform the development of their own approach. These are some points we consider most useful to support schools in their approach.

- 1. Gender-related distress:** When considering transgender children and young people schools may find it helpful to consider using the language of the Cass Review which refers to children or young people 'experiencing gender-related distress', 'gender-questioning' or 'needing support around their gender'.
- 2. Transgender children are not a homogenous group:** The Interim Report explains that children and young people seeking to access gender identity services 'are not a homogenous group'
  - 2.12. They can vary in their age at presentation, their cultural background, whether they identify as binary, non-binary, or gender fluid, whether they are neurodiverse and in a host of other ways.
  - 2.13. Some children and young people may thrive during a period of gender-questioning whilst for others it can be accompanied with a level of distress that can have a significant impact on their functioning and development.

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<sup>5</sup> The meanings of 'sex' and 'gender' are discussed below

<sup>6</sup> GIDS is currently the single national specialist service based at the Tavistock and Portman NHS Trust. On 28 July 2022 it was announced that GIDS will close in spring 2023 and be replaced by regional centres which will ensure the holistic needs of patients are met.

2.14. Alongside these very varied presentations, it is highly unlikely that a single cause for gender incongruence will be found. Many authors view gender expression as a result of a complex interaction between biological, cultural, social and psychological factors.

The subgroups mentioned in the Interim Report are not exhaustive but include:

- Birth-registered females: birth-registered females presenting with onset of reported gender incongruence in early teen years who are now the predominant group seeking NHS help
- Children and young people with ASD and neurodiversity: children and young people who have autism or other types of neurodiversity and who currently comprise approximately one third of children and young people referred to GIDS
- Children and young people with mental health issues: children and young people with complex mental health issues who account for the majority of children and young people presenting to GIDS
- Children and young people with psychosocial needs: young people who often present to GIDS with a wide range of psychosocial needs
- Looked-after children: this group is over-represented as a percentage of children and young people presenting to GIDS (compared to the national percentage) of looked-after children.<sup>7</sup>

In addition, the Interim Report also notes ‘the complex interaction between sexuality and gender identity, and societal responses to both...’<sup>8</sup>

- 3. There is no ‘one-size fits all’ approach to meeting the needs of children and young people experiencing gender-related distress:** These ‘different subgroups may have quite different needs and outcomes ...’. There is a variety of possible pathways requiring careful assessment by clinicians in terms of which would best address the needs of the particular young person.<sup>9</sup>

The implication we draw for schools is that in the educational context, as in the medical context, some flexibility of approach is likely to be required in supporting and including pupils experiencing gender-related distress. Schools should work with pupils, their parents where possible and with professional advisors to understand which approach is right for them at school.<sup>10</sup>

- 4. Other needs should not be overlooked:** The Review has found that many of the children and young people presenting to GIDs have complex needs but, once they are identified as experiencing gender-related distress, other important healthcare and other issues that would normally be managed by local health services have sometimes been overlooked. Funnelling this cohort exclusively towards GIDS, which is currently the single service available nationally,

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<sup>7</sup> Paras 1.10, 3.11 and 5.9, *Cass Review Interim Report*.

<sup>8</sup> Para 4.14, *Cass Review Interim Report*.

<sup>9</sup> Para 5.10 and diagram on p 57, *Cass Review Interim Report*.

<sup>10</sup> See further the discussion under ‘Confidentiality’ below about how to proceed when pupils are resistant to parental involvement.

has led to 'long challenging waits' and can compromise children's and young people's access to support for other clinical presentations they may have.<sup>11</sup>

The Interim Report stated that: 'It is essential that [these children and young people] can access the same level of psychological and social support as any other child or young person in distress, from their first encounter with the NHS and at every level within the service.'<sup>12</sup>

- 5. Neither 'doing nothing' nor social transition are neutral acts:** Social transition and counselling are areas in which schools sometimes become involved. The Interim Report is clear that both social transition and counselling should be viewed as active interventions. Social transition is 'not a neutral act' as it 'may have significant effects on the child or young person in terms of their psychological functioning.' The Interim Report adds that 'It should also be recognised that "doing nothing" cannot be considered a neutral act.'<sup>13</sup>
- 6. Polarised disagreements between adults are not in the best interests of children:** Considerably more research and data-gathering are needed to inform the future. In the meantime, it is necessary to develop professional consensus about how best to proceed. The uncertainty about how to support children and young people experiencing gender-related distress is 'exacerbated when there is no space to have open, non-judgemental discussions about ... differing perspectives.'<sup>14</sup> The review process advocated by Cass therefore aims to encourage such discussions in a safe and respectful manner so that progress can be made towards finding solutions. This is equally important in the educational context.

The Interim Report recognises: '[t]he important role of schools and the challenges they face in responding appropriately to gender-questioning children and young people'.<sup>15</sup> It commits to considering these further during the lifetime of the Review but offers no observations, yet which are specific to schools. It is against this backdrop of emerging understanding that this briefing note considers the obligations on schools.

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## Legal Definitions and Perspectives

The Equality Act 2010 (EqA) protects people against unlawful discrimination because of 'protected characteristics.' There are nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The EqA 2010 sets out the law in respect of what amounts to unlawful discrimination and what protection is available to people with these characteristics.

This section explains the protections offered by the EqA 2010 to people with the protected characteristic of gender reassignment and the limitations of such protections and considers when other protected characteristics (namely disability and belief) may overlap with gender reassignment.

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<sup>11</sup> Para 1.35, *Cass Review Interim Report*.

<sup>12</sup> Para 1.34, *Cass Review Interim Report*

<sup>13</sup> Paras 5.19 and 5.20, *Cass Review Interim Report*.

<sup>14</sup> Para 2.19, *Cass Review Interim Report*.

<sup>15</sup> Para 4.14, *Cass Review Interim Report*.



## The protected characteristic of Gender Reassignment

### Sex/gender

Confusingly, the EqA 2010 and Gender Recognition Act 2004 use ‘sex’ and ‘gender’ interchangeably. In current parlance, these are distinct concepts. As explained by Baker J in *R (Elan-Cane) v Secretary of State for the Home Department* (2018):<sup>16</sup>

‘...sex is now more properly understood to refer to an individual’s physical characteristics, including chromosomal, gonadal and genital features, whereas gender is used to refer to the individual’s self-perception.’

This is how the terms are used in these briefing notes.

The position of the EHRC, as stated in March 2022 is that:

‘Under the Equality Act 2010, ‘sex’ is understood to be binary, being a man or a woman. For the purposes of the Act a person’s legal sex is their biological sex as recorded on their birth certificate. A trans person can change their legal sex by obtaining a Gender Recognition Certificate. A trans person who does not have a Gender Recognition Certificate retains the sex recorded on their birth certificate for the purposes of the Act.’<sup>17</sup>

### Gender reassignment

The protected characteristic of ‘gender reassignment’ is defined as follows by the EqA 2010:

#### 7. Gender reassignment

- (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.
- (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
- (3) In relation to the protected characteristic of gender reassignment –
  - (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person

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<sup>16</sup> *R (Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin), [2018] 1 WLR 5119, para 96.

<sup>17</sup> See EHRC, *Separate and single-sex service providers: a guide to the Equality Act sex and gender reassignment provisions* (March 2022). This reiterates a passage from the EHRC, *Our statement on sex and gender reassignment: legal protections and language* (30 July 2018). It is supported by dicta from Lord Reed in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 All ER 1, para 3: ‘The term “gender” is used in this context to describe an individual’s feelings or choice of sexual identity, in distinction to the concept of “sex”, associated with the idea of biological differences which are generally binary and immutable. See also *Forstater v CGD Europe* [2021] UKEAT 0105\_20\_1006 at paras 114–115 and *R (Elan Cane)* (2021), paras 52 and 53. See also *Mackereth v Department for Work and Pensions & Anor* [2022] EAT 99, [2022] IRLR 721.

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.<sup>18</sup>

## Scope of gender reassignment protected characteristic: section 7, Equality Act 2010

1. **‘Proposing to undergo’**: A person may have the protected characteristic of gender reassignment on the basis that they are ‘proposing to undergo’ a process, or part of a process, of reassignment. This is particularly important in the case of pupils who are unlikely to be able to progress an intention to transition before they reach legal adulthood but could nonetheless have the protected characteristic because of their intention.
2. **‘A process or part of a process’**: A person may have the protected characteristic of gender reassignment on the basis of their intention to undergo ‘a process or part of a process’ of reassignment. There need be no settled intention to complete all possible aspects of reassignment.
3. **‘Physiological or other attributes of sex’**: The steps proposed may be quite limited as they may include changing ‘physiological or other attributes of sex’. ‘Other’ could include non-physiological attributes of sex such as hair or clothing (as in the case of social transition).
4. **‘Process’**: Unlike previous legislation, there is no requirement for a person to be under medical supervision to have the protected characteristic of gender reassignment.

Of note, the characteristic protected by the EqA 2010 is ‘gender reassignment’ and not ‘gender identity’.

### Possible limitations on protection

The protected characteristic is ‘gender reassignment’. This does not appear to include people with broader trans identities who may not be seeking or have sought reassignment (that is, from one (binary) sex to another, see below). The House of Commons Women and Equality Select Committee recommended in 2016 that ‘the protected characteristic should be amended to that of “gender identity”’ but there has been no legislative change to that effect and such change does not appear to be imminent.<sup>19</sup>

### Non-binary, gender fluid and cross-dressing people

Pupils who identify as non-binary (that is, whose gender identity does not fit traditional/conventional concepts of male or female) or gender fluid (that is, who do not identify as having a fixed gender identity, and whose gender identity may vary from day to day), may not identify with either sex. Such pupils may, therefore, not intend to undergo a process of reassigning their sex. The EqA 2010 defines the protected characteristic of ‘gender reassignment’ as involving ‘reassigning [a] person’s sex’. It then defines ‘sex’ (also a protected characteristic) by reference to

<sup>18</sup> EqA 2010, s7.

<sup>19</sup> See House of Commons, Women and Equalities Committee, *Transgender Equality* (First Report of Session 2015–16), para 91 *et seq.*

‘men’ and ‘women’ which it defines by reference to ‘male’ and ‘female’. ‘Gender reassignment’ being defined by reference to a transition between sexes (that is, from ‘male’ to ‘female’ or vice versa), the EqA does not appear to prohibit discrimination against someone because they are non-binary or otherwise gender non-conforming.

An employment tribunal decided in 2020, in *Taylor v Jaguar Landrover Ltd*, that a non-binary or gender fluid employee was protected by the EqA 2010 protected characteristic of ‘gender reassignment’.<sup>20</sup> However, employment tribunal decisions have no precedent value and are therefore not binding on other courts or tribunals. The advice we have received is that the Taylor decision does not appear to be consistent with the EqA for reasons explained above. More recently, in 2021, the Employment Appeal Tribunal (EAT) indicated in *Forstater v CGD Europe* that the question of whether people with broader trans identities fall within the protected characteristic of ‘gender reassignment’ is still open:

... the protected characteristic of gender reassignment under s.7, EqA would be likely to apply only to a proportion of trans persons ...<sup>21</sup>

An EAT decision has binding force on employment tribunals and on the EAT itself. Cross-dressing with no intention to transition (for example, for performance purposes) does not fall within the EqA 2010 definition, though the EqA 2010 prohibits discrimination against someone who is perceived to have the protected characteristic of gender reassignment, which might apply to someone who cross dresses.

The nature of the protection for pupils with the protected characteristic, such as what it means in relation to affirmation and access to single-sex spaces, is discussed below and in the topic-specific information in the section: ‘Legal requirements for schools.’

## Overlap with other protected characteristics

Transgender pupils may or may not have the protected characteristic of gender reassignment. In particular, pupils who identify as non-binary or gender fluid might consider themselves to be transgender but are unlikely to have the legally protected characteristic of ‘gender reassignment’. They will, of course, be protected from discrimination as a result of any other protected characteristic, such as sex, sexual orientation, or disability. They will also be protected from discrimination on the basis of a perceived protected characteristic, whether that be gender reassignment or (for example) sexual orientation.

## Disability and gender dysphoria

Some transgender people may experience gender dysphoria, which the NHS defines as a sense of unease that a person may have because of a mismatch between their biological sex and their gender identity.

The NHS states that gender dysphoria is not a mental illness, but that some people may develop mental health problems because of gender dysphoria.

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<sup>20</sup> Birmingham ET 1304471/2018.

<sup>21</sup> [2021] UKEAT/0105/20/JOJ, [2022] ICR 1, para 118(c). This was not the point which was before that tribunal for decision.

Under the provisions of the EqA, a person is considered to have a disability if they have a physical or mental condition which has a substantial and long-term (i.e., lasting or likely to last at least 12 months) effect on their ability to carry out normal day-to-day activities.

**Not all transgender or gender diverse people experience gender dysphoria; nor will gender dysphoria always amount to a disability.**

A person experiencing gender dysphoria may meet the definition of disability set out in the EqA depending on how long they have experienced it, and its effect on their ability to carry out normal day-to-day activities. A diagnosis by itself will not confirm either way if a person is disabled for the purpose of the EqA; what is important is whether or not the person's experience of the condition or any associated impairment (for example long-term depression resulting from anxiety about their situation or how they have been treated) meets the test set out in the EqA (see above).

In *Forstater v CGD Europe* [2021] Choudhury J stated that gender dysphoria could potentially be a disability.

Hughes J in *Taylor v Jaguar Landrover* [2020] suggested that it was 'potentially offensive' to a transitioning person to suggest 'that their protected characteristic equates to a disability'; schools ought to avoid making assumptions that gender questioning pupils are disabled, and to be mindful of the risk of offence which may be caused by any perceived treatment of gender dysphoria as disability.

Where a pupil is disabled, their school will be under a duty to make reasonable adjustments to avoid putting them at a substantial disadvantage on account of their disability. The school will also be prohibited from treating them unfavourably because of anything arising in connection with their disability unless the treatment is proportionate and can be justified.

The nature of the protection, such as what this means in relation to 'affirmation' and access to single-sex spaces, is discussed below and in the topic-specific information under 'Legal requirements for schools.'

## Other

Choudhury J suggested in *Forstater* that a trans person might also be able to rely, in a suitable case, on the protected characteristics of sex 'or even a philosophical belief that gender identity is paramount and that a trans woman is woman'.<sup>22</sup> This means that a trans person (or a person who is not trans) is entitled not to be discriminated against because of that belief. It will not necessarily mean that the belief itself must be accommodated or shared (again see further 'Legal requirements for schools' below).

## When does the pupil become protected?

The EHRC's Technical Guidance for schools provides criteria in paragraph 5.114:

'A person will be protected because of gender reassignment once:

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<sup>22</sup> See footnote 1 in *Forstater*, fn 30 above. See also the employment tribunal decision in *Bailey v Stonewall Equality Ltd, Garden Court Chambers Ltd & Ors*, 27 July 2022, (ET: 2202172/2020), para 53.

- he or she makes his or her intention known to someone, regardless of who this is (whether it is someone at school or at home, or someone such as a doctor)
- he or she has proposed to undergo gender reassignment, even if he or she takes no further steps or decides to stop later on
- there is manifestation of an intention to undergo gender reassignment, even if he or she has not reached an irrevocable decision
- he or she starts or continues to dress, behave or live (full-time or part-time) according to the gender with which he or she identifies as a person
- he or she undergoes treatment related to gender reassignment, such as surgery or hormone therapy, or
- he or she has received gender recognition under the Gender Recognition Act 2004.<sup>23</sup>

It does not matter which of these applies to a person for him or her to be protected because of the characteristic of gender reassignment.'

## Nature of protection

Part 6 of the EqA prohibits direct and indirect discrimination because of any protected characteristic, whether it is sex, gender reassignment, disability, belief, or another, as follows:

### 'Section 85 Pupils: admission and treatment etc

- (1) The responsible body of a school to which this section applies 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.<sup>24</sup>
- (2) The responsible body of such 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...'

Section 85(6) EqA also provides that 'A duty to make reasonable adjustments applies to the responsible body of such a school'.

Direct discrimination means treating a pupil less favourably than others because of a protected characteristic. Direct discrimination is always unlawful, unless it falls within one of the specified

<sup>23</sup> Note that a person cannot apply for a Gender Recognition Certificate until they reach 18 and it takes a period of some months before any certificate can be issued so it is unlikely that many school age pupils will have Gender Recognition Certificates.

<sup>24</sup> Part 1, Schedule 11, EqA 2010 makes an exception to allow single-sex schools to discriminate in their admissions on the basis of sex.

exemptions set out in the EqA. For example, faith schools may lawfully discriminate on the basis of religion and single-sex schools may lawfully discriminate on the basis of sex. Unless a specific exception applies, direct discrimination cannot be justified.<sup>25</sup> There are also exceptions which permit schools to discriminate directly because of sex and because of gender reassignment, as discussed further below.

Indirect discrimination occurs when a school applies a provision, criterion, or practice ('PCP') which puts pupils with a particular protected characteristic at a disadvantage compared to others. This will be lawful if the school can show that the PCP was justified, that is, it was 'a proportionate means of achieving a legitimate aim'. Examples of legitimate aims in the context of school education include: '... the fair exercise of powers; ensuring the health and safety of pupils and staff, provided that risks are clearly specified; maintaining ...behaviour standards; and ensuring the well-being and dignity of pupils.'<sup>26</sup>

Direct and indirect discrimination include discrimination based on a (mistaken) perception about a pupil's gender reassignment or other protected characteristic and because of the pupil's association with others who have a protected characteristic.

The duty to make reasonable adjustments applies only to pupils with disabilities. What is 'reasonable' is a context-specific and a child-specific judgement. Criteria which might be taken into account in deciding what adjustments might be reasonable include factors such as practicability, the effect of the disability on the individual, health and safety requirements, and the interests of other pupils and prospective pupils.<sup>27</sup>

Harassment is defined by the EqA as unwanted behaviour or conduct related to a protected characteristic which has the purpose or effect of violating a pupil's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the pupil.<sup>28</sup> In the context of the relationship between schools and their pupils, harassment only applies to the protected characteristics of disability, race and sex and does not apply to the protected characteristic of gender reassignment.<sup>29</sup> In practice, however, harassment of a pupil with the protected characteristic of gender reassignment may well be considered direct or indirect discrimination because of gender reassignment and would be at odds with other duties on schools which will be explained below.

The DfE's guidance: *The Equality Act 2010 and schools* (May 2014) advises that: 'Schools need to make sure that all gender variant pupils, or the children of transgender parents, are not singled out for different and less favourable treatment from that given to other pupils. They should check that there are no practices which could result in unfair, less favourable treatment of such pupils. For example, it would be unlawful discrimination for a teacher to single out a pupil undergoing gender reassignment and embarrass him in front of the class because of this characteristic.'

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<sup>25</sup> See the exception for single-sex schools, above, and discussed later. See Part 2, Schedule 11, EqA for exceptions relating to schools registered with a religious character or ethos.

<sup>26</sup> See EHRC, *Technical Guidance for Schools*. Examples are taken from para 5.34. EqA provisions relating to victimisation (treating pupils detrimentally for asserting their rights under the EqA) apply but are outside the scope of this briefing.

<sup>27</sup> See EHRC, *Technical Guidance for Schools*.

<sup>28</sup> See EqA s26 for the full details.

<sup>29</sup> EqA s85(10).

## Human Rights Act 1998

The HRA gives effect in domestic law to provisions of the European Convention on Human Rights ('ECHR'). These rights include Article 8 (which protects the right to private life), Article 9 (right to religion and belief), Article 10 (right to freedom of expression), Article 14 (freedom from discrimination) and Article 1 of Protocol 2 ECHR (A1P2), (which protects the rights of parents to ensure that their children's education is in conformity with their religious and philosophical convictions). The right to private life includes a right to develop one's own personal identity as one matures towards adulthood, to determine one's sexual orientation and lifestyle, and to control who sees one's body.<sup>30</sup> These rights are generally qualified and have to be balanced with the rights of others. They are discussed further below.

### Conclusion

**Both the HRA and the EqA requirements set out above are principle-based. They balance competing rights, employing concepts of reasonableness and proportionality. Even though direct discrimination because of sex and gender reassignment is not subject to any general defence of justification, there are partial exceptions applicable in education which depend on considerations of reasonableness and proportionality. Further, as we shall see below, a pupil's right not to be subject to discrimination because of gender reassignment does not necessarily amount to a right to be treated as being of the sex other than the pupil's birth sex.**

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## Legal Requirements for Schools

### Introduction

Requirements on schools in relation to pupils who are questioning their gender or experiencing gender-related distress flow from principles of inclusion, safety, and respect, as do those in relation to other pupils. These are inter-related threads which encompass duties to provide an environment where every pupil is included in the life of the school, and all children are safe to learn, all pupils are respected and are taught to be respectful of others and tolerant of difference. KCSIE 2022 explains that schools should ensure that 'all systems, processes and policies should operate with the best interests of the child at their heart'. Where the best course of action is unclear, the Cass Review encourages 'open, non-judgemental discussions about ... differing perspectives.'

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<sup>30</sup> EHRC, *Article 8 – Respect for your private and family life*.

## Inclusion

All children have a right to education.<sup>31</sup> Schools must not discriminate unlawfully against pupils because of protected characteristics such as gender reassignment, disability, sexual orientation, or sex.<sup>32</sup>

In addition, schools are required to have due regard to the need to eliminate unlawful discrimination, to advance equality of opportunity for pupils with protected characteristics and to foster good relations between people with a protected characteristic and those who do not share it.<sup>33</sup> This typically entails monitoring how policies are affecting different groups with protected characteristics in order to track issues of inclusion as part of a cycle of reflection, development, and improvement.

The HRA also requires schools, as public authorities, to respect rights to private life and non-discrimination.<sup>34</sup>

## A respectful environment

The Headteachers' Standards require heads to 'promote positive and respectful relationships across the school community and a safe, orderly and inclusive environment'. Under the Teachers' Standards all teachers are expected to 'build relationships rooted in mutual respect', to 'establish a safe and stimulating environment for pupils, rooted in mutual respect' and to treat pupils with dignity. Both heads and teachers are required to show 'tolerance of and respect for the rights of others.' This includes upholding fundamental British values which include 'individual liberty and mutual respect, and tolerance of those with different faiths and beliefs.'

Schools also have a duty to 'actively promote' the fundamental British values through the curriculum. This is deemed to be part of the duty to promote the spiritual, moral, cultural, mental, and physical development of pupils and of society, and prepare pupils for later life.<sup>35</sup> In addition, academy trusts are required to actively promote principles which enable pupils to develop their self-knowledge, self-esteem, and self-confidence.<sup>36</sup> This includes pupils who are questioning their identity and/or experiencing gender-related distress.

As outlined in the DfE guidance for teaching about respectful relationships, the value of tolerance encompasses the notion that 'mutual respect does not mean having to agree with someone'.<sup>37</sup>

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<sup>31</sup> Paras 83-85 [KCSIE 2022](#) explain relevant parts of the HRA.

<sup>32</sup> See legal definitions above, EqA Part 6 and [KCSIE 2022](#), paras 86-90. Not all discrimination is unlawful. In particular, indirect discrimination (disparately impacting PCPs) is lawful when it is a proportionate means of achieving a legitimate aim. Single sex schools may discriminate in their admissions on the grounds of sex; see EqA Schedule 11 and discussion below.

<sup>33</sup> For the public sector equality duty see EqA s149 and [KCSIE 2022](#), paras 91-93.

<sup>34</sup> These are 'qualified' rights, meaning that they are not absolute but can be restricted in order to protect the wider public interest.

<sup>35</sup> Education Act 2002 ss 78 & 79: see [Promoting fundamental British values as part of SMSC in schools](#) (2014). For academy trusts see ISS paras 5(a) and 2(1)(b)(ii).

<sup>36</sup> ISS para 5(b)(i).

<sup>37</sup> DfE, [Teacher training: respectful relationships - Practical training materials for primary and secondary schools to use to train staff to teach about respectful relationships](#).



## Bullying

Schools have a ‘responsibility to provide a safe environment in which children can learn’.<sup>38</sup> KCSIE 2022 sets a clear expectation that schools should create ‘a culture of zero tolerance’ for prejudice-based bullying and harassment and links to the requirement for a behaviour policy ‘which includes measures to prevent bullying’.<sup>39</sup> Clearly no pupil should live with intimidation, ridicule or ostracization for any reason, including on account of their gender identity. The value and dignity of every child should be affirmed.

The headteacher of a maintained school is required to: ‘...determine measures to be taken with a view to encouraging good behaviour and respect for others on the part of pupils and, in particular, preventing all forms of bullying among pupils.’<sup>40</sup>

The equivalent legal requirement for academy trusts is found in the Independent School Standards (ISS). The standards require each trust to ‘... promote good behaviour amongst pupils ...’ and ensure that bullying ‘is prevented in so far as reasonably possible by the drawing up and implementation of an effective anti-bullying strategy’.<sup>41</sup>

These requirements benefit all pupils. In this context, the legal question marks over whether the protected characteristic of ‘gender reassignment’ covers all types of trans identities fall away because the duties to provide an inclusive, safe, respectful environment apply to all pupils and without hierarchy between those with different protected characteristics.<sup>42</sup> Just as schools should not tolerate bullying of gender non-conforming pupils, so they should not tolerate intimidation of pupils with other protected characteristics such as sex, or holding ‘gender critical’ beliefs.<sup>43</sup> In Bailey v Stonewall Equality Ltd, Garden Court Chambers Ltd & Ors (2022), an employment tribunal followed the Forstater judgment, confirming that:

‘Both the belief that women are defined by sex, and the belief that gender is a matter of self-identity, are protected as beliefs. Toleration of difference is an essential characteristic of an open, pluralist society.’<sup>44</sup>

The Bailey judgment does not create precedent as it is a decision of an employment tribunal only but it is consistent with EAT’s Forstater judgment which does create precedent, and with other precedents including the decision of the House of Lords in R (Williamson) v Secretary of State for Education and Employment.<sup>45</sup>

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<sup>38</sup> KCSIE 2022, paras 2 and 7.

<sup>39</sup> KCSIE 2022, paras 98 and 130.

<sup>40</sup> Education and Inspections Act 2006, s89(1)(b).

<sup>41</sup> ISS paras 9 and 10.

<sup>42</sup> See above.

<sup>43</sup> ‘Gender critical beliefs’ (which include the belief that someone’s sex, whether they are male or female, is biological and immutable) are capable of being a protected belief. See Forstater v CGD Europe [2021] UKEAT/0105/20/JOJ, [2022] ICR 1, and below.

<sup>44</sup> Bailey v Stonewall Equality Ltd, Garden Court Chambers Ltd & Ors, 27 July 2022, (ET: 2202172/2020), para 53.

<sup>45</sup> [2005] UKHL 15, [2005] 2 AC 246.

## Political balance in school

The law requires that, where political issues are brought to the attention of pupils at school, they are offered a balanced (that is, fair and dispassionate)<sup>46</sup> presentation of opposing views.<sup>47</sup> At the time of writing, gender identity and sex-based rights have become a matter of highly polarised, politicised debate.

In *R (L) v Hampshire CC* (2022) the claimant challenged the lawfulness of local authority advice to schools about how to support trans-identifying pupils. Bourne J confirmed that the explanatory materials were lawful: 'There is no "indoctrination" involved in explaining the meaning of "intersex/transgender/ agender, etc" or in teaching that respect is owed to all individuals regardless of gender issues.'<sup>48</sup>

Further '... the contents of the Guidance have nothing to do with any active political debate e.g., about possible changes in the law. Instead, it contains practical advice about how to make children safe in schools. The fact that there are pressure groups who lobby for legal change, e.g., on the question of whether sex should be regarded as mutable or immutable, is not sufficient to turn a social or educational question into a political one.'

Schools will need to be alive to the difference between imparting factual/legal information and discussing contentious political issues. The latter should be covered with appropriate balance.<sup>49</sup>

## Relationships and sex education (RSE)

### Guidance

Teaching about self-respect, respect for others and about protected characteristics are seen as an important part of the statutory RSE curriculum. See:

- DfE, [Relationships education, relationships and sex education \(RSE\) and health education - statutory guidance for governing bodies, proprietors, headteachers, principals, senior leadership teams, teachers](#) (statutory guidance)
- DfE, [Teacher training: respectful relationships - Practical training materials for primary and secondary schools to use to train staff to teach about respectful relationships](#)
- DfE, [Plan your relationships, sex and health curriculum](#) – Non-statutory advice from the DfE to help school leaders plan, develop and implement the new statutory curriculum.

Ofsted has stated that: 'No matter what type of school they attend, it is important that all children gain an understanding of the world they are growing up in, and learn how to live alongside, and show respect for, a diverse range of people. When we inspect schools, we assess how well they equip children to do this.'<sup>50</sup> In an Ofsted-related case, a First-tier tribunal held that omitting to

<sup>46</sup> See *Dimmock v Secretary of State for Education and Skills* [2007] EWHC 2288 (Admin); *The Independent School Standards: Guidance for independent schools* (April 2019), paras 3.25-6.

<sup>47</sup> Education Act 1996 ss406 and 407, and, for academy trusts, ISS para 5(d).

<sup>48</sup> *R (L) v Hampshire CC* [2022] EWHC 49 (Admin), [2022] ELR 314, para 26.

<sup>49</sup> See DfE non-statutory guidance: *Political impartiality in schools* and *What you need to know about political impartiality in schools* (both February 2022).

<sup>50</sup> *Inspecting teaching of the protected characteristics in schools*, 27 September 2021.

acknowledge the fact, or enable pupils to acquire any awareness, that some people are different because of sexual orientation or gender reassignment 'prevents [a] school from encouraging respect for people who have such characteristics' or preparing pupils for life.<sup>51</sup>

Concerning lesbian, gay, bisexual and transgender (LGBT) pupils, the RSE Statutory Guidance provides that:

'36. In teaching Relationships Education and RSE, schools should ensure that the needs of all pupils are appropriately met, and that all pupils understand the importance of equality and respect. Schools must ensure that they comply with the relevant provisions of the Equality Act 2010, (please see 'The Equality Act 2010 and schools: Departmental advice'), under which sexual orientation and gender reassignment are amongst the protected characteristics.

37. Schools should ensure that all of their teaching is sensitive and age-appropriate in approach and content. At the point at which schools consider it appropriate to teach their pupils about LGBT, they should ensure that this content is fully integrated into their programmes of study for this area of the curriculum rather than delivered as a standalone unit or lesson. Schools are free to determine how they do this, and we expect all pupils to have been taught LGBT content at a timely point as part of this area of the curriculum.'<sup>52</sup>

## **RSE – 'Facts and law'**

When teaching about LGBT issues it is important to ensure that 'inclusive language is used, considering how individual pupils may relate to particular topics.'<sup>53</sup>

Primary schools are enabled and encouraged to include LGBT content in relationships education if they consider it age-appropriate to do so.<sup>54</sup> The statutory guidance on relationships education for primary age pupils explains:<sup>55</sup>

'Teaching about families requires sensitive and well-judged teaching based on knowledge of pupils and their circumstances. Families of many forms provide a nurturing environment for children. (Families can include for example, single parent families, LGBT parents, families headed by grandparents, adoptive parents, foster parents/carers amongst other structures.) Care needs to be taken to ensure that there is no stigmatisation of children based on their home circumstances and needs, to reflect sensitively that some children may have a different structure of support around them; e.g. looked after children or young carers.'

In the context of secondary education, the RSE Statutory Guidance says:

'75. Pupils should be taught the facts and the law about sex, sexuality, sexual health and gender identity in an age-appropriate and inclusive way. All pupils should feel that the content

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<sup>51</sup> See *Beis Aharon Trust v SSE* [2016] UKFTT 270 (HESC) at p 22. For the requirement to prepare pupils for life see Education Act 2002 ss 78 and 79.

<sup>52</sup> DfE, *Relationships education, relationships and sex education (RSE) and health education - statutory guidance for governing bodies, proprietors, headteachers, principals, senior leadership teams, teachers*, paras 36 and 37. This is cross-referenced in *KCSIE 2022*, para 204, indicating that countering homophobic, biphobic and transphobic abuse, like any form of bullying, could be seen as a safeguarding issue in appropriate cases.

<sup>53</sup> See the training module on families <https://www.gov.uk/government/publications/teacher-training-families>.

<sup>54</sup> *Ibid.*

<sup>55</sup> DfE, *Relationships education, relationships and sex education (RSE) and health education - statutory guidance for governing bodies, proprietors, headteachers, principals, senior leadership teams, teachers*, para 59.

is relevant to them and their developing sexuality. Sexual orientation and gender identity should be explored at a timely point and in a clear, sensitive and respectful manner. When teaching about these topics, it must be recognised that young people may be discovering or understanding their sexual orientation or gender identity. There should be an equal opportunity to explore the features of stable and healthy same-sex relationships. This should be integrated appropriately into the RSE programme, rather than addressed separately or in only one lesson.

76. It is recognised that there will be a range of opinions regarding RSE. The starting principle when teaching each of these must be that the applicable law should be taught in a factual way so that pupils are clear on their rights and responsibilities as citizens.

77. Schools may choose to explore faith, or other perspectives, on some of these issues in other subjects such as Religious Education.

78. Pupils should be well informed about the full range of perspectives and, within the law, should be well equipped to make decisions for themselves about how to live their own lives, whilst respecting the right of others to make their own decisions and hold their own beliefs.’

‘Gender identity’ is listed in paragraph 82 of the statutory guidance as one of the matters about which secondary pupils should be taught ‘the relevant legal provisions.’

While there is no governmental advice yet on what those provisions might be, minimum ground to cover (in relation to legal provisions) could include:

- the fact that the Equality Act 2010 provides the legal framework for protecting and balancing the rights of various groups;
- the existence of legally protected characteristics and what they all are;<sup>56</sup>
- that ‘gender reassignment’ is included among the protected characteristics;
- the definition of the characteristic (see details above);
- the nature of the protections, such as the prohibition on direct discrimination and harassment, and on indirect discrimination unless it is proportionate and for a lawful purpose;
- the fact that the Equality Act 2010 protects single-sex spaces, services and sports and does not necessarily entitle transgender people to access single-sex spaces/ services consistent with their expressed gender,<sup>57</sup> or to participate in single-sex competitive sports of that gender;<sup>58</sup>
- that both ‘gender critical’ beliefs and the belief that gender is a matter of self-identity are protected beliefs,<sup>59</sup> and
- that this is a rapidly developing and hotly contested area of law

<sup>56</sup> See the EHRC website for more information about the [protected characteristics](#).

<sup>57</sup> The Gender Recognition Act also uses ‘acquired gender’. For more information see EHRC, [Separate and single-sex service providers: a guide to the Equality Act sex and gender reassignment provisions](#) (2022).

<sup>58</sup> See Sport England, [Guidance on transgender inclusion in domestic sport](#) (September 2021)

<sup>59</sup> ‘Gender critical beliefs’: the view that someone’s sex, whether they are male or female, is biological and immutable. [Forstater v CGD Europe](#) [2021] UKEAT/0105/20/JOJ, [2022] ICR 1. Paras 41–53 of [Bailey v Stonewall Equality Ltd, Garden Court Chambers Ltd & Ors](#), 27 July 2022, (ET: 2202172/2020) summarise the conflicting beliefs around sex and gender which are at the heart of the debate, and the law. See also DfE, [Teacher training: respectful relationships - Practical training materials for primary and secondary schools to use to train staff to teach about respectful relationships](#), which advises that pupils should be taught ‘that **mutual respect does not mean having to agree with someone and that their own needs are just as important**’ and discuss why cancel culture is damaging (original emphasis).

## Gender stereotypes

The DfE's RSE Statutory Guidance is very clear that schools should be alive to issues such as everyday sexism, misogyny, homophobia and gender stereotypes and take action to build a culture in school where these are not tolerated and are tackled.<sup>60</sup> The DfE's non-statutory advice, Plan your RSE curriculum, encourages both primary and secondary schools to address how gender stereotypes can be unfair, negative and damaging.<sup>61</sup>

Plan your RSE curriculum, adds: 'We are aware that topics involving gender and biological sex can be complex and sensitive matters to navigate. You should not reinforce harmful stereotypes, for instance by suggesting that children might be a different gender based on their personality and interests or the clothes they prefer to wear. Resources used in teaching about this topic must always be age-appropriate and evidence based. Materials which suggest that non-conformity to gender stereotypes should be seen as synonymous with having a different gender identity should not be used and you should not work with external agencies or organisations that produce such material. While teachers should not suggest to a child that their non-compliance with gender stereotypes means that either their personality or their body is wrong and in need of changing, teachers should always seek to treat individual students with sympathy and support.'

Likewise, careers guidance must not be based around gender stereotypes:<sup>62</sup> 'Schools and colleges should challenge the stereotypes and inequalities that exist across different courses and jobs to ensure that students from all backgrounds, gender and diversity groups, including those with SEND, consider the widest possible range of careers.'<sup>63</sup>

## Sport

PE is a compulsory subject under the National Curriculum at all key stages.<sup>64</sup> Every pupil is entitled to physical education at least alongside pupils of their birth sex but not necessarily alongside pupils of their expressed gender.

The EqA 2010 allows schools to separate pupils by sex (i.e. birth sex) for sports, games or other activities which are:

- of a competitive nature and
- 'gender-affected activities'. These are defined by reference to the relative strength, stamina and physique of average men and average women, where these would put participants of one sex at a disadvantage compared to the other. Where children are involved, the age and stage of development of likely participants can also be taken into account.

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<sup>60</sup> DfE, RSE Statutory Guidance, para 31.

<sup>61</sup> DfE, Plan your relationships, sex and health curriculum – Non-statutory advice from the DfE to help school leaders plan, develop and implement the new statutory curriculum, pp 22 and 28.

<sup>62</sup> The Independent School Standards: Guidance for independent schools (April 2019), para 2.17.

<sup>63</sup> Careers guidance and access for education and training providers Statutory guidance for schools and guidance for further education colleges and sixth form colleges, July 2021, pp 20 and 27.

<sup>64</sup> Statutory guidance, National curriculum in England: physical education programmes of study (2013); House of Commons Library, Physical education, physical activity and sport in schools (March 2022).

Pupils with the protected characteristic of gender reassignment can be excluded from sports restricted to pupils of the other birth sex where the restriction is necessary in the interests of fairness or safety.<sup>65</sup>

The definition of 'gender-affected' activities means that it is lawful for a policy of separating pupils by sex for particular sports to be determined at a strategic level by reference to average men, women and children or young people. The exception is available not only for formal competitive events but for activities 'of a competitive nature', which is likely to include at least some lessons, although there is no case law on the point.

### Guidance from Sport England, 2021

In September 2021, the UK's Sports Councils' Equality Group (SCEG) issued guidance to sports bodies, and a suite of other information, about the inclusion of transgender people in sport. The guidance is stated to be based on the latest scientific findings and extensive consultation and provides 'Ten Guiding Principles'. While schools were not the intended audience, the principles may assist schools to frame their thinking. The headlines are outlined in Appendix Three of this briefing note.<sup>66</sup>

The SCEG guidance also provides outline analyses of when activities should be considered 'gender-affected', with examples which recognise a continuum and layers of complexity. It points out that the lawful considerations of fairness and safety can be relevant to interaction not only with opposing teams but also within a team or club (for which we read 'school') insofar as they may impact on selection decisions and opportunities to compete at a high level, for example.<sup>67</sup>

In short, sports bodies are being encouraged to think in innovative and creative ways to ensure that nobody is left out of sport. While a school's first port of call when considering fairness and safety should be any advice from the relevant sports body, it appears that not all the sports bodies have yet been able to review their guidance in the light of the above principles.

### Risk assessment in sport

The EqA 2010 exceptions for sport are permissive not compulsory; that is, they allow schools to discriminate in certain circumstances but do not compel them to do so. While this leaves schools with an element of professional discretion, failure to use the applicable exceptions (for example, by including male-bodied pupils in gender-affected sports with female-bodied pupils) could in some

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<sup>65</sup> EqA 2010, s195 provides that:

- (1) A person does not contravene this Act, so far as relating to **sex**, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.
- (2) A person does not contravene section 29, 33, 34 or 35, so far as relating to **gender reassignment**, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity—
  - (a) fair competition, or
  - (b) the safety of competitors.
- (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.
- (4) In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors. [emphasis added]

<sup>66</sup> It is recommended that schools read the report in full: Sport England, [Guidance on transgender inclusion in domestic sport](#) (September 2021).

<sup>67</sup> [Guidance on transgender inclusion in domestic sport](#), p 11.

instances risk the safety of some pupils. The health and safety duty on the school will be particularly onerous in respect of safety hazards which might be argued to be reasonably foreseeable or to have been created by the school's own decisions. Classic defences to sports injury claims, such as that an injured person understood the risks and voluntarily chose to participate, are unlikely to be available because the participants are children, and the curriculum is both compulsory and an entitlement.

Risk assessment and management is an integral part of health and safety responsibilities.<sup>68</sup> Risk assessment will be vital when a school is making decisions both at a strategic level and individual level (if the school chooses not to use the fairness or safety exceptions when they are available) in order to ensure that effective action is taken to reduce risk.

Schools should also be alert to the risk that failure to use an available exception may reduce opportunities for female pupils to participate and excel in sport. This may well constitute unlawful indirect discrimination against female pupils, though this has yet to be considered by the courts. Schools will be well advised to think through and document their approach to participation by transgender pupils in sport for the purpose of evidencing how they are meeting requirements under health and safety and equality legislation, and the quality of leadership and management in the school.

Apart from the implications for inspection and the possibility of regulatory action by the DfE or the Health and Safety Executive (HSE), failure to keep pupils safe could lead to legal claims of negligence and/or discrimination by parents, pupils, or adult former pupils.<sup>69</sup>

## Toilets and changing rooms

### The requirements

This section will first explain the legal requirements before considering how they apply to provision for transgender pupils.

### Suitability

Schools are required to provide 'suitable toilet and washing facilities' which, except where provided for disabled pupils, must be 'for the sole use of pupils.'<sup>70</sup>

The requirement of 'suitability' applies in addition to the other specific requirements imposed. It is assessed by reference to:

'... the pupils in respect of whom it is provided, having regard to their ages, numbers and sex and any special requirements they may have.'

A pupil will be regarded as having 'special requirements' if they have:

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<sup>68</sup> See *Health and safety: responsibilities and duties for schools* (2022) for more. In addition to health and safety legislation, academy trusts are subject to a separate risk assessment standard: ISS 16.

<sup>69</sup> See, for example, *MM V Newlands School* [2002] EWCA Civ 21 where a pupil was injured by another pupil during a rugby match. The pupil who caused the injury was a year older but had stepped down a school year. The school did not avoid liability, although the situation was permissible within the rules of the game, because risks had not been assessed and mitigated.

<sup>70</sup> For maintained schools, reg 4(1), School Premises (England) Regulations 2012. For academy trusts, ISS para 23(1)(a). Schools which provide separate facilities for disabled students may permit them to be used by 'other pupils, teachers and others employed at the school, and visitors, whether or not they are disabled' (reg 4(1), ISS para 23(2).

'... any needs arising from physical, medical, sensory, learning, emotional or behavioural difficulties which require provision which is additional to or different from that generally required by children of the same age in schools other than special schools.'<sup>71</sup>

'Suitable' changing rooms and showers must also be provided for pupils aged 11 or over<sup>72</sup> having regard to the 'sex and any special requirements' of pupils.<sup>73</sup>

The suitability requirement implicitly involves, for example, the provision of toilet paper, the means to dry hands after washing and, for female pupils, means to access and dispose of sanitary products discreetly.

Privacy is not expressly mentioned in the standards but must be encompassed in the requirement for facilities to be 'suitable... having regard to sex'.<sup>74</sup> 'Suitability' will include considerations of 'decency' and 'propriety'<sup>75</sup> and must clearly be interpreted in line with the requirement that arrangements are made to safeguard and promote the welfare of pupils and the HRA right to privacy mentioned above.<sup>76</sup>

## Separation of sexes

The toilet facilities for boys and girls aged 8 years or over must be separate except where the toilet facility is in a lockable room for use by one pupil at a time.<sup>77</sup> This applies also to toilet facilities in boarding accommodation.<sup>78</sup>

'Room' is not legally defined, but dictionary definitions tend to refer to 'walls, ceilings, floors, and doors'.<sup>79</sup> In normal speech a 'room' will have floor to ceiling walls, at least unless otherwise specified. Further, in a context in which lockable 'rooms' are being distinguished from toilet facilities which would otherwise consist of cubicles/ partitions (whose walls will generally not be floor to ceiling and may not be robust, but which will generally be lockable), the only reasonable interpretation to be given to 'room' is one whose walls are robust and floor to ceiling, without gaps. Schools will want to be mindful of instances in which pupils have used mobile phones to video their peers when toilet facilities did not provide adequate levels of privacy.

Although separation of sexes is not specified in the context of changing rooms and showers, it is implicit in the suitability requirement and safeguarding standard.

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<sup>71</sup> Reg 2, School Premises (England) Regulations 2012 and ISS para 31 (c).

<sup>72</sup> Reg 4(4) School Premises (England) Regulations 2012 and ISS para 23(1)(c).

<sup>73</sup> Reg 2(2) and (3), School Premises (England) Regulations 2012 and ISS para 31(b). The notion of 'special requirements' is yet to be explored in guidance or case law in this context.

<sup>74</sup> This because otherwise schools would breach pupils' rights under the HRA and the EqA not to be subject to sex discrimination.

<sup>75</sup> 'Propriety' is a requirement of H&S Regulations. See also *R (Authentic Equity Alliance) v EHRC* [2021] EWHC 1623 (Admin), 6 May 2021 at para 21, Henshaw J: '*exclusion is permissible if it would be a proportionate way of achieving a legitimate aim: for instance, in the example given [in the EHRC Code for service providers], the preservation of all users' privacy and decency*'.

<sup>76</sup> See: Legal definitions and background in part 2.

<sup>77</sup> Reg 4(2) School Premises (England) Regulations 2012 and ISS para 23 (1)(b) '*separate toilet facilities for boys and girls aged 8 years or over [must be] provided except where the toilet facility is provided in a room that can be secured from the inside and that is intended for use by one pupil at a time*'.

<sup>78</sup> This has been clarified in the NMS 2022. NMS 4.3 and fn 10 to the NMS.

<sup>79</sup> Eg Collins Dictionary, Cambridge English Dictionary, Britannica Dictionary.



## Issues and possible solutions

Pupils who experience gender-related distress, like others, need to be able to access suitable toilet facilities while at school. There are various issues, however, which have not yet been considered by the courts such as whether such pupils may be permitted to use the toilet facilities provided for pupils of the other sex and whether a school could be compelled to allow this.

Pending further guidance specific to schools from the DfE and EHRC as regulators, we have received clear independent legal advice that the EqA 2010 does not override the requirements of the premises regulations, above.<sup>80</sup> This means that a school would be in breach of the premises regulations if it were to permit pupils of one sex to use the toilet facilities provided for pupils of the other sex unless those facilities were each in a single lockable room intended for use by one person. In principle, it could be lawful for single-sex facilities to be shared on the basis that pupils of different birth sexes are not present at the same time, but in practice this is likely to be impractical to manage.

The legal advice we have received indicates that the premises requirements are clear and unambiguous and should be adhered to as written. We recognise that views may differ at present about interpretation of the legal requirements. Schools which wish to take a more flexible approach should take their own legal advice from lawyers familiar with school regulations and their enforcement.

### Unisex/gender neutral toilet facilities

For some, unisex/gender neutral facilities are seen as an obvious solution to meet the needs of pupils experiencing gender distress. In practice, providing unisex/gender neutral facilities can sometimes be as simple as changing a label on a door of an existing facility which is already in a lockable room for use by one person. In other premises, new provision can present greater challenges and involve expense because each toilet facility must be in a lockable room.

Although they are permissible (where they consist of individual, lockable rooms), in practice unisex/gender neutral facilities are not always a panacea for addressing legal issues in this context. It will be important for schools to ensure that while solving one problem they do not create another. Lockable rooms, for example, can give rise to safeguarding risks, particularly when in a cul-de-sac corridor. They can present opportunities for sexual abuse, bullying and self-harm and create supervision challenges. Unisex/gender neutral facilities may also be rejected by pupils (possibly female pupils in particular) for reasons such as safety, cleanliness, religion, privacy (including in relation to access to and disposal of sanitary products), and embarrassment. Where toilets are rejected by pupils, for whatever reason, it will be important to consider whether the over-arching 'suitability' aspect of the premises regulations is being met for all pupils.

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<sup>80</sup> See EqA Schedule 22.

To meet the regulatory requirements for all pupils, depending on the needs of the pupil cohort, schools may need to provide both unisex/gender neutral and single-sex facilities. All facilities must be suitable and conveniently located for those for whom they are provided. We recognise that this is not always straightforward logistically but, pending advice from the DfE or EHRC, this appears the clearest course in terms of both safeguarding requirements and managing the risk of legal challenge.

Pending guidance from the DfE and EHRC, if a school is considering moving (fully or partially) to unisex/gender neutral toilets, it would be wise to consult with the school community. Any such consultation should be undertaken with a view to ensuring that the needs of all pupils would continue to be met.<sup>81</sup> Undertaking a consultation should allow consideration of any safeguarding implications and the ability to gather 'pupil (and parental) voice' (including any concerns). Careful thought should be given, and action taken to ensure that any privacy and safety issues are resolved, including in communal areas. Consultation and risk assessment might also provide evidence of thoughtful, inclusive consideration of the needs of all pupils in case of legal challenge. To be clear, however, there is no specific case law, legislation, or guidance on this point in this context.

### **Potential other solutions: use of disabled or staff facilities**

As mentioned above, the premises regulations specifically allow for disabled toilets in schools to be shared by disabled pupils with others (including non-pupils).<sup>82</sup> Further, as regards changing facilities, the EHRC's [Technical guidance for schools in England](#) suggests that, rather than insisting on a trans girl using the boys' changing room 'even though she is now living as a girl', it might be appropriate to allow her 'to use private changing facilities such as the staff changing room or another suitable space'.<sup>83</sup> In considering these options, schools will need to be mindful of the needs of disabled pupils and of staff, and to ensure that these needs will continue to be met in light of any new arrangements designed to meet the needs of trans pupils.

### **Conclusion**

In practice, risk-assessed decisions which ensure the privacy, decency and safety of all pupils appear to be permissible for inspection purposes, pending further advice from the regulators. In view of the controversy around these issues, however, and the possibility of challenge from a range of directions, it would be advisable to ensure that:

- the regulations are adhered to
- alternative compliant facilities are offered to ensure that every pupil has access to suitable sanitary facilities, and
- decisions are evidence-based, risk-assessed and recorded.

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<sup>81</sup> This is particularly important in view of the Ofsted review of sexual abuse in schools and colleges 2021 which stresses the scale of sexual harassment in schools and that schools should assume it is happening in their setting even when there are no specific reports. Recognition of the importance of listening to the voice of the child can be traced to the UN Convention on the Rights of the Child, Article 12 and is reflected in *Working Together* which expects schools to have a 'culture of listening to children and taking account of their wishes and feelings, both in individual decisions and the development of services', p 59.

<sup>82</sup> Reg 4(3), School Premises (England) Regulations 2012 and ISS para 23(2).

<sup>83</sup> EHRC, *Technical Guidance for Schools in England*, para 3.20. The use of an adult changing room would need to be risk assessed and appropriately managed to ensure safeguarding issues do not arise between adults and children.

Schools should take into account safeguarding issues (including in particular emanating from the use of cameras on mobile phones and online bullying and relating to child-on-child abuse),<sup>84</sup> and the need for supervision of pupils and the promotion of pupil well-being.<sup>85</sup>

## Residential school trips

When it comes to pupil accommodation on school trips, several legal principles operate simultaneously in the same space, such as: the best interests of each pupil, privacy, equality, Gillick-competence, health, safety and safeguarding, pupil voice. Reaching decisions about the appropriate accommodation of trans pupils on residential trips will require schools to consider the privacy interests of all pupils involved, to conduct appropriate risk assessments and to consider proportionality and consent, taking into account the needs of all pupils affected.

The National Minimum Standards for boarding schools (NMS), though they have no direct application to day schools, provide a helpful example of how the DfE has balanced these principles in another residential setting for children, namely boarding schools.

NMS 4.1 requires ‘good quality sleeping accommodation’<sup>86</sup> to be provided for boarders and that such accommodation must be:

‘...well organised and managed with ongoing assessments of risk (which should be documented) and findings acted upon to reduce risk for all boarders. Accommodation [must] give[] boarders appropriate privacy, taking into account sex, age and any special requirements. Where children share a bedroom, they [must be] able to express a preference about whom they share with.’ This replaced a previous requirement that: ‘Where boarders are aged 8 years or over, sleeping accommodation for boys [was to be] separate from sleeping accommodation for girls’.<sup>87</sup>

NMS 4.1 cannot be considered in isolation (even when it is directly applicable i.e. in boarding schools). There is a strong argument that it would be contrary to Article 8 ECHR, read with Article 14 (and therefore contrary to the HRA), to put a pupil in a position of having to undress or, possibly, sleep (a time of vulnerability) in the presence of members of the other sex. This would be particularly the case where it is without that pupil’s knowledge and consent, even where there has been a risk assessment.<sup>88</sup> But even if a pupil has expressed consent to this situation, questions may arise as to whether the pupil was competent to give such consent and whether apparent consent was genuine or the product of social pressure. The latter would be a particular problem where a school placed strong emphasis on the affirmation of trans pupils.

Questions will also arise under Article 9 and 14 ECHR where objection is or would be voiced by pupils or their parents based on religious and/or cultural norms concerning contact between the sexes. Requiring female pupils to share residential facilities with male-bodied pupils may also

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<sup>84</sup> Education Act 2002 s175; [KCSIE 2022](#), Education and Inspections Act 2006, ss88 and 89; ISS 7 and ISS para 10.

<sup>85</sup> Education Act 2002, s175; Children Act 2004, s10; ISS 34(1)(c).

<sup>86</sup> [NMS 2022](#) come into effect on 5 September 2022. The NMS are incorporated into the standards by ISS paras 8 and 30. ‘Good’ means that ‘the quality of provision should be such that a reasonable person would consider it to be good in relation to the specific needs of the boarders residing at the school, having regard to their ages, numbers, sex and any special requirements they may have’; see [NMS 2022](#), p 6.

<sup>87</sup> NMS 5.1 of the [NMS 2015](#) was in force until the close of 4 September 2022.

<sup>88</sup> This will not apply to very young children but the variability of the onset of puberty and of religious and cultural norms around sex segregation mean that it is not easy to suggest a threshold age.

amount to or result in indirect discrimination because of sex and or religion or belief contrary to the EqA.

Schools should also consider whether, for reasons of safety, privacy or support, any information (personal data) relating to trans pupils needs to be shared with others, such as an external partner managing or hosting the trip, or pupils participating on the trip. The school's assessment of the need to share information may vary depending on the nature of the trip, the available accommodation and the needs of pupils involved. As a general principle, information may be shared with the consent of the person to whom it relates (the data subject). A child may not be capable of giving valid consent, however, and data protection legislation provides other legal foundations for the sharing of personal information including the protection of the rights and vital interests of others. 'Who needs to know what' will be a matter of judgement and for agreement with trans pupils and/or their parents.<sup>89</sup> Schools ought to make it clear that consent about information sharing (or its absence) may affect how (if at all) a trans pupil may be included in a residential trip.

### **Affirmation, names and pronouns**

In accordance with principles in the HRA, schools should normally work, with the agreement of parents, towards respecting the wishes of pupils to be the people they wish to be. This might include being known by a name other than that originally assigned to them, and it may include being addressed by pronouns other than those usually used for their birth sex. Where parents are not involved (see further below), consideration will have to be given to whether a pupil is Gillick competent to make a particular decision, a determination which is likely to vary depending on the significance of the decision in question.

It is often suggested that if a school would allow non-trans pupils to change the names by which they are known, it would be discriminatory not to apply the same approach to trans pupils. Schools should, however, be mindful of the finding of the Cass Review Interim Report that affirmation and social transition are not neutral acts but can have a significant impact on the pupil's psychological functioning. This casts doubt on any assumption that changing the name by which a transgender pupil is known is necessarily equivalent to changing the name by which another pupil is referred to. It should also be borne in mind that the Cass review reports that 'doing nothing' for a child or young person who is experiencing distress is, equally, not a neutral act.<sup>90</sup>

**This briefing paper recommends that social transition should not be undertaken lightly; the Cass Review findings should be discussed with the parents and pupil where possible and should be taken into account when assessing the competence of the young person. Some schools will wish to take a more cautious approach to social transition than previously in light of the Cass Review Interim Report findings and to look at other options for supporting pupils, pending further advice from the Cass Review, the DfE and/or EHRC.**

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<sup>89</sup> See discussion of confidentiality and *Gillick* competence in the 'Confidentiality' section.

<sup>90</sup> Various guidance documents about possible other or additional actions for schools are flagged in the section on 'Health and well-being'.

In many instances staff and pupils, whatever their personal feelings, will wish to respect a pupil's preferences about pronouns and form of address a matter of courtesy, particularly where the pupil's parents are aware. However, some may object to being placed under pressure to refer to biologically male pupils as female, or vice versa, viewing this as 'forced speech'. Such 'forced speech' may be inconsistent with rights under Article 10 ECHR to freedom of expression and under Article 9 ECHR to freedom of belief.<sup>91</sup> Whether this is the case in any particular situation, however, will depend on all the circumstances.

At one extreme, for example, requiring pupils to use male pronouns about a pupil known to their peers and teachers to be female, who wishes to be treated as male (or vice versa), may involve the effective prohibition of the expression of particular views by pupils (Article 10). It could also amount to or involve indoctrination, which may breach Article 9 and A1P2.<sup>92</sup> At another extreme, however, where a pupil's birth sex is known only to a limited group of staff, requiring those staff to refer to the pupil as they are generally known is unlikely to be viewed by a court as unlawful. This is because the Article 10 rights of staff would be modified by their obligations of confidentiality and care towards the pupil, and their duties of co-operation as employees. It is unlikely that compliance with these obligations would be regarded by any court as amounting to a manifestation of belief that the pupil is of the sex (or even the 'gender identity') in which the pupil is presenting.<sup>93</sup>

Deliberate repeated 'misgendering' of pupils by staff may amount to indirect discrimination because of gender reassignment, though this would only apply to pupils who had the protected characteristic of 'gender reassignment' (see above).

**The case law in this area is still developing. In the meantime, schools can be clear in the Codes of Conduct for both staff and pupils and with all members of the community that all speech must be courteous and respectful at all times, and that members of the school community must show 'mutual respect and tolerance for those with different faiths and beliefs', including beliefs about gender identity.<sup>94</sup>**

## Confidentiality

### Confidentiality and parents

Confidentiality can be a contested issue in the context of transgender pupils. Schools are required by the HRA to recognise pupils' developing rights to self-determination. But pupils, as children, have a right to protection. Safeguarding legislation<sup>95</sup> requires schools to have regard to KCSIE and Working Together which contain guidance about working co-operatively with parents and carers,

<sup>91</sup> See *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2020] AC 413 in which the Supreme Court ruled that bakers were not obliged to provide a cake iced with a message with which they profoundly disagreed.

<sup>92</sup> A1P2 protect parents' rights to have their children educated in conformity with their religious and philosophical convictions. It is a qualified right which would not entitle parents to have their children educated as Nazis, for example, but which would entitle objection to be raised to political indoctrination.

<sup>93</sup> A detailed analysis of employment rights is outside the scope of this briefing which is focused on provision for pupils.

<sup>94</sup> In *Bailey v Stonewall Equality Ltd, Garden Court Chambers Ltd & Ors*, 27 July 2022, (ET: 2202172/2020) an employment tribunal found that a barrister had been discriminated against and victimised by her chambers for expressing gender critical views. The case demonstrates the importance of ensuring balance between the rights of groups defined by reference to different protected characteristics.

<sup>95</sup> Education Act 2002 s175, and ISS para 7.

as pupils' primary carers, and taking into account children's wishes and feelings in accordance with principles in the Children Acts 1989 and 2004.<sup>96</sup> This has been restated in recent non-statutory advice from the DfE:

'You should work together with parents on any decisions regarding your school's treatment of their child, in line with the school's safeguarding policy and the statutory guidance on Working together to safeguard children.<sup>97</sup>

When there is potential for conflict between the wishes of children and their parents, such as when a pupil wishes to transition socially at school without the knowledge of their parents, the case of Gillick v West Norfolk and Wisbech Area Health Authority remains the authority.<sup>98</sup> The legal authorities concerning Gillick competence were reviewed in 2021 by the Court of Appeal in Bell v Tavistock<sup>99</sup> which strongly affirmed Gillick, quoting with approval the statement of Lord Scarman in that case that 'a minor's capacity to make his or her own decision depends upon the minor having sufficient understanding and intelligence to make the decision ...'<sup>100</sup>

**The law is clear that the views of a young person who is in conflict with their parents should prevail where the young person is Gillick-competent in relation to the decision in question.<sup>101</sup>**

Assessing Gillick competence in this area, however, is far from straightforward. It is likely to require nuanced legal advice beyond the scope of this briefing note. Consideration will have to be given to whether a particular pupil will be able to understand the implications of certain decisions at a time when, as the Cass Review observes in the medical context, there is a 'lack of consensus' among professionals and 'there has not been routine and consistent data collection, which means it is not possible to accurately track... outcomes.'

**Even if a pupil is *Gillick* competent to make decisions in this area it does not prevent schools from working with them in an appropriate and sensitive way to help them understand the implications of their decisions about when to include their parents in this important part of their lives.**

For example, a planned disclosure which the pupil prepares for and chooses the timing of may be preferable to accidental disclosure, which may otherwise be inevitable. In some cases, it may be appropriate for trusted staff to support a pupil to open the conversation with their parents/carers. Further, as mentioned above, where a pupil seeks to transition socially at school without their

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<sup>96</sup> See Working Together, Introduction para 11 and Chapter 1 para 74; Children Act 1989, ss.1-3. The right of the child to have their wishes and feelings taken into account does not equate to a right to self-determination.

<sup>97</sup> See the non-statutory departmental advice, Plan your RSE curriculum.

<sup>98</sup> Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.

<sup>99</sup> Bell v Tavistock [2021] EWCA Civ 1363, [2022] 1 All ER 416.

<sup>100</sup> NMS 7.7 provides that '*Boarders' confidentiality, rights, privacy and dignity as patients is fundamental and is appropriately protected. This includes the right of a boarder deemed to be "Gillick Competent" to give or withhold consent for their own treatment.*'

<sup>101</sup> The NSPCC website advises that '*The same child may be considered Gillick-competent to make one decision but not competent to make a different decision*'.

parents' knowledge, schools should consider involving their designated safeguarding lead to consider what steps are necessary to safeguard and promote the pupil's welfare.

## Confidentiality and others

Whether information about pupils can be disclosed to other pupils and/or the parents of other pupils falls to be considered primarily under data protection legislation. Pupils and parents are not entitled to be provided with personal information (data) about other pupils except with valid consent or where the interests in disclosure outweigh those in non-disclosure. Where the balance lies may be difficult to determine.

Schools must ensure that respecting information rights of one group does not lead to rights of other pupils being compromised or undermine the ability of third-party organisations such as residential centres, organisers of sporting or outward-bound facilities, or employers providing work experience placements to discharge their responsibilities. By way of example, the EHRC advises that people have a 'right to control who sees and touches [their] body'.<sup>102</sup> Except perhaps in the case of very young children, pupils should therefore not be put in a position where they are unknowingly undressing in school in the presence of members of the other sex. KCSIE 2022 explains that under the HRA 'it is unlawful for schools and colleges to act in a way that is incompatible with the [ECHR]'. Article 8 ECHR 'includes a duty [on schools] to protect individuals' physical and psychological integrity'.<sup>103</sup>

Ensuring that these rights are respected might require measures such as: working sensitively with transgender pupils and their parents to obtain consent to proportionate disclosure of information to other pupils; risk assessment; supervision; consultation; pastoral care plans; finding new ways of working; drawing up new policies; and seeking advice from other agencies or independent legal advice. In some cases, it may be possible to preserve confidentiality only by limiting some forms of participation by a trans pupil whose birth sex is not generally known.

## Single-sex schools

**In short, single-sex schools are lawful and they may discriminate in their admissions on the ground of sex.<sup>104</sup> The single-sex status of a school is not compromised by allowing a pupil who transitions to remain in the school because they remain legally of the sex for which the school is registered.<sup>105</sup>**

Whether it is lawful for single-sex schools not to consider applications from trans pupils of the other (legal) sex is more contentious. The legal advice we have received is that this would be lawful in view of the single-sex exemption in the EqA. This is in line with general statements from official sources such as the EHRC ('a person's legal sex is their biological sex as recorded on their birth certificate') and the House of Commons Library briefing ('At present, there is no process in any

<sup>102</sup> EHRC, *Respect for your private and family life*.

<sup>103</sup> KCSIE 2022, para 84.

<sup>104</sup> Schedule 11 Part 1 EqA 2010 disapplies s85(1) EqA 2010 so far as it relates to sex discrimination in the context of admissions to single-sex schools.

<sup>105</sup> See *The Equality Act 2010 and schools* at para 2.2.

part of the UK by which transgender people may achieve legal recognition of their acquired gender based on self-declaration only').<sup>106</sup>

A refusal to consider such applications may involve indirect discrimination because of gender reassignment, since pupils with this characteristic may be more likely to be affected by the maintenance of the single-sex rule. Such a challenge could only be mounted by or on behalf of a prospective pupil who had the protected characteristic of gender reassignment (as distinct from being 'trans' in the broader sense). If a court accepted that the exclusionary policy disparately impacted on gender reassigning pupils, and on the individual claimant, the question would be whether the policy was justified as a proportionate means of achieving a legitimate aim. It is likely that any indirect discrimination is likely to be justified in circumstances in which (1) single-sex schools in England are explicitly permitted by law, (2) trans pupils will retain their legal sex at birth (because they will not have become eligible for Gender Recognition Certificates<sup>107</sup>), and (3) the admission of a trans pupil is likely to give rise to difficulties as regards toilet and changing facilities, sports and residential trips.<sup>108</sup>

## School uniform

The DfE's non-statutory publication: School uniforms (2021) advises that:

'When making decisions about their uniform policy, a school must have regard to its obligations under the Human Rights Act 1998 and the Equality Act 2010. A school will need to consider the impact of their policy on pupils who share a protected characteristic.'

**Governing bodies should seek to make their uniform policy as inclusive as possible in order to accommodate cultural and religious needs of pupils and to avoid gender stereotyping. Consideration might be given to having a single list of uniform items which has regard to the needs of pupils with different protected characteristics and permitting pupils to wear any item on the list, though this should not involve the creation of a 'gender neutral' uniform which requires girls to wear trousers.<sup>109</sup> Leaders can contact their professional associations for suggestions if necessary.<sup>110</sup>**

<sup>106</sup> EHRC, *Separate and single-sex service providers: a guide to the Equality Act sex and gender reassignment provisions* (March 2022) and Balogun, Fairbairn and Paper, *Gender recognition reform: consultation and outcome* (House of Commons Library, February 2022).

<sup>107</sup> The Gender Recognition Act permits applications for Gender Recognition Certificates only from people aged at least 18 who have lived in the acquired gender for at least two years. Certificates may be issued within 24 weeks of application but the age limit, two year requirement and requirement for medical evidence means that few if any trans pupils will have Gender Recognition Certificates.

<sup>108</sup> Former Attorney General (now Home Secretary) Suella Braverman announced in August 2022 that it is 'lawful for a single sex school to refuse to admit a child of the opposite biological sex who identifies as transgender. This can be a blanket policy to maintain the school as single sex. This does not constitute unlawful direct discrimination on grounds of sex under schedule 11 nor does it constitute unlawful indirect discrimination on grounds of gender reassignment. This is clearly a proportionate means of achieving a legitimate aim'. The former Attorney General's statement does not have the force of law but this aspect of it is consistent with the legal advice we have received.

<sup>109</sup> Any such uniform is likely to discriminate because of sex and/or religion by denying female pupils the ability to wear clothes which are appropriate to their body types, comfortable and (where relevant) culturally acceptable.

<sup>110</sup> Former Attorney General Suella Braverman announced in August 2022 that 'it can be lawful for a school to refuse to allow a biologically male child, who identifies as a trans girl, to wear a girls' uniform. This will be a significant part of social transition and the inherent risks of that could present an ample legitimate aim. Therefore, this does not necessarily constitute unlawful direct sex discrimination nor is it likely to constitute unlawful indirect discrimination on grounds of gender reassignment. Court of Appeal authority permits different dress codes for male and female employees and no rational distinction can be made for school uniforms'. As pointed out in fn 128 above, the former Attorney General's statement does not have the force of law but this aspect of it is also consistent with the legal advice we have received.



## Health and well-being in school

Pupils who experience gender-related distress sometimes commence some form of medication while they are still of school age. Some such pupils may also wish to make use of products such as 'binders'<sup>111</sup>. Management of health needs will be under the control of pupils and/or their parents, together with their medical advisors but it may be necessary for schools to consider the adoption of policies dealing with the use of binders in PE lessons in particular.

Schools are not health providers but they have duties of care towards their pupils and are under a statutory duty to make arrangements, where necessary, to support pupils at school with medical conditions and to have regard to the statutory guidance: [Supporting pupils at school with medical conditions](#). The guidance advises that:

'The aim is to ensure that all children with medical conditions, in terms of both physical and mental health, are properly supported in school so that they can play a full and active role in school life, remain healthy and achieve their academic potential.'

One of the key points named in the guidance is that:

'Governing bodies should ensure that school leaders consult health and social care professionals, pupils and parents to ensure that the needs of children with medical conditions are properly understood and effectively supported.'

For more advice, schools should refer to: [Supporting pupils at school with medical conditions 2015](#). Taking a holistic view of the needs of pupils experiencing gender-related distress in light of the emerging findings of the Cass Review, schools may wish to draw on other guidance such as:

- DfE and DHSS, [SEND code of practice: 0 to 25 years](#) (2015) (statutory guidance);
- DfE, [KCSIE 2022](#) (statutory guidance);
- DfE, [Designated teacher for looked-after and previously looked-after children](#) (2018) (statutory guidance);
- DfE, [Promoting and supporting mental health and wellbeing in schools and colleges](#) (July 2022) (non-statutory guidance);
- DfE, [National Minimum Standards for Boarding Schools](#).

## Pupil registration

Monitoring attendance at school lays the foundation for ensuring children receive the education to which they are entitled, and that action can be taken to safeguard their welfare if attendance is irregular, or they go missing. Registration should therefore be seen as playing a part in safeguarding arrangements.<sup>112</sup> Failure to comply with registration regulations is a criminal offence under s434(6) of the Education Act 1996.

The school admission register, sometimes known as the 'the school roll', must be kept in accordance with regulation 5 of the Education (Pupil Registration) (England) Regulations 2006, as

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<sup>111</sup> A chest binder is an undergarment that helps flatten the chest.

<sup>112</sup> See DfE, [Working together to improve school attendance](#), September 2022.

amended. Schools must record certain personal details of every pupil at the school in the admission register, including full name and sex. As this is a regulatory requirement, references to 'name' and 'sex' are to legal name and sex.<sup>113</sup> The admissions register is not a public document and registration in one sex does not prevent a school from addressing or treating a pupil as being of the other sex for other purposes (though see section on affirmation above).

## Risk assessment and safeguarding

Schools are legally required to make arrangements to safeguard and promote the welfare of pupils.<sup>114</sup> This applies to all pupils.

KCSIE 2022 explains that

'203. The fact that a child or a young person may be LGBT is not in itself an inherent risk factor for harm. However, children who are LGBT can be targeted by other children. In some cases, a child who is perceived by other children to be LGBT (whether they are or not) can be just as vulnerable as children who identify as LGBT.

204. Risks can be compounded where children who are LGBT lack a trusted adult with whom they can be open. It is therefore vital that staff endeavour to reduce the additional barriers faced, and provide a safe space for them to speak out or share their concerns with members of staff.'

Risk assessment is key to ensuring the safety of all pupils, including from potential risks from themselves and from each other.<sup>115</sup> It is particularly important in relation to the judgements discussed in this briefing which will so often turn on a full assessment and proper understanding of the complex matrix of needs, facts and rights which make up a particular context. The aim of a risk assessment is to support evidence-based decision-making which is in the best interests of all pupils and proportionate in the context of particular situations. This entails also identifying and implementing ways to mitigate any risks noted with a view to ensuring the safety, well-being and privacy of all pupils.

While there is no DfE guidance for schools on the content of a good risk assessment policy or how to approach individual risk assessments, the case of *R (FDJ) v Secretary of State for Justice and Sodexo (2021)* provides food for thought. It concerned the national prison policy in relation to transgender prisoners.<sup>116</sup> While, of course, issues for adult prisoners and children in schools are entirely different, the case provides a practical example of a risk-assessed approach to ensuring safety and well-being. Although the parallels are limited and the applicable law differs slightly,<sup>117</sup> both schools and prisons are closed communities where it is possible to take an individualised approach.

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<sup>113</sup> Note that it is easy to change a legal name by deed poll.

<sup>114</sup> Education Act 2002 s175, and for academy trusts, ISS para 7.

<sup>115</sup> For academy trusts, ISS para 16 explicitly requires schools to ensure 'the welfare of pupils is safeguarded and promoted by the drawing up and effective implementation of a written risk assessment policy and appropriate action is taken to reduce risks that are identified'. For maintained schools, risk assessment is a function of the H&S and safeguarding duties.

<sup>116</sup> [2021] EWHC 1746, [2021] 1 WLR 5265.

<sup>117</sup> Prison policy relates to adults while school policy is about children. The EqA 2010 provisions relating to prisons are in Part 3 (services) while those about schools are in Part 6 (education).

In brief, headline requirements of the Prison Care and Management Policy included:<sup>118</sup>

‘All individuals in our care must be supported to express the gender with which they identify.’<sup>119</sup>  
‘Their preference does not oblige us to allocate them to a men's or women's prison or approved premises accordingly; it is one of many factors that may influence such decisions. ... .. A balanced approach must be adopted when making allocation, care and management decisions relating to transgender individuals, balancing the risks and well-being of the individual with the risks and impact on well-being that the person may present to others, particularly in ... residential settings.’

The policy, as reported in the FDJ case, then set out the criteria which would be used to ensure that case by case assessments of risk in that setting were based on all available relevant information. These included factors such as: mental health, risk of self-harm, vulnerability, medication, history of being bullied or bullying, age, health, SEND, past behaviour, allegations if any, relationships, anatomy and strength, strength of confirmation of presented gender, vulnerabilities and needs of others. To these we would suggest adding factors relating to the school and its environment, such as facilities, the layout of premises, budget and culture, and factors relating to legal rights such as competence, privacy, beliefs, and data sharing. The rights of parents and staff are also sometimes part of the equation.

## School governance

How trusts and schools are governed is a matter for each trust board or governing body, having regard to relevant legislation. This briefing recommends that those responsible for governance consider assessing the risks across their school estate covering issues such as:

- how leaders create a respectful environment
- how gender-non-conforming and gender-questioning pupils, and pupils experiencing gender-related distress are/would be supported in school
- how school policies and practices impact these pupils (such as uniform<sup>120</sup> and residential trips)
- how the school ensures that the rights and needs of all pupils are balanced and respected
- the adequacy of school premises to meet the needs of all pupils
- whether, in light of the above, there are any school ‘policies, criteria or practices’ which may have a disproportionate adverse effect on transgender pupils and, if so, whether they are justifiable as a proportionate means of achieving a legitimate aim
- how staff engage with parents and external agencies about these issues
- the training and ongoing support that staff receive about these issues
- the staff code of conduct
- how staff keep abreast of policy developments
- the effectiveness of RSHE provision including how materials are chosen and quality-assured, and
- how bullying is monitored and addressed.

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<sup>118</sup> *R (FDJ) v Secretary of State for Justice and Sodexo* [2021] EWHC 1746, [2021] 1 WLR 5265, para 22.

<sup>119</sup> This is provided as an example of a policy only. It should not be assumed that this principle would be appropriate for children and young people, and indeed the Cass Review would suggest that it is not. Those arguments are outside the remit of this paper.

<sup>120</sup> See section 11 above and the DfE's non-statutory advice about inclusive school uniforms: *School uniforms* (2021).

Further, we suggest that trust boards should be clear in their schemes of delegation where decisions about these matters lie.

## Glossary

- **Agender person**: a person who does not identify with either gender may consider themselves 'agender'.
- **'Acquired gender'**: a term used by the Gender Recognition Act to refer to the gender in which a person who has made an application for a Gender Recognition Certificate is living or has been recognised by the law of the country in which they have been living. It is also used to refer to the gender recognised in the Gender Recognition Certificate.
- **'Cis' or 'cis-gender'**: refers to a person whose gender conforms to their sex at birth. Some people with gender critical views find the terms objectionable because they presume that gender is inherent rather than societal.
- **'Expressed gender'**: the gender a person projects.
- **'Gender-fluid'**: refers to a person who does not identify as having a fixed gender identity.
- **'Gender identity'**: a term used to describe an individual's internal sense of being male, female or other. The term is contested by those who view gender as a societal construct and who do not regard themselves as having a 'gender identity'.
- **'Non-binary'**: refers to a person whose gender identity does not fit with the male/female binary.
- **'Trans boy', 'trans man'**: a biological female who identifies as a boy or man.
- **'Trans girl', 'trans woman'**: a biological male who identifies as a girl or woman.

## APPENDIX ONE – Additional reading

### Key legislation:

- The Education Act 2002, s175<sup>121</sup>
- The Education Act 2002, ss 78 and 79<sup>122</sup>
- The Education Act 2002, ss80-80B<sup>123</sup>
- The Education and Inspections Act 2006, ss88 and 89<sup>124</sup>
- The School Premises (England) Regulations 2012<sup>125</sup>
- The Education (Pupil Registration) (England) Regulations 2006 (as amended)<sup>126</sup>
- The Education (Independent School Standards) Regulations 2014 (as amended) ('the standards')<sup>127</sup>
- The UN Convention on the Rights of the Child<sup>128</sup>
- The Human Rights Act 1998 ('HRA')
- The Children Acts 1989 and 2004
- The Equality Act 2010 ('the EqA'), Part 6 (education) and s149<sup>129</sup>
- The Gender Recognition Act 2004<sup>130</sup>
- The National Minimum Standards for Boarding Schools 2022 ('the NMS')

### Selection of relevant case law:

- *Bailey v Stonewall Equality Ltd, Garden Court Chambers Ltd & Ors*, 27 July 2022, (ET: 2202172/2020)
- *Bell v Tavistock* [2021] EWCA Civ 1363, [2022] 1 All ER 416
- *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467
- *Croft v Royal Mail* [2003] EWCA Civ 1045, [2003] ICR 1425
- *R (Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin), [2018] 1 WLR 5119 (High Court)
- *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 All ER 1 (Supreme Court)
- *R (FDJ) v Secretary of State for Justice and Sodexo* [2021] EWHC 1746, [2021] 1 WLR 5265
- *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ, [2022] ICR 1.
- *R (L) v Hampshire CC* [2022] EWHC 49 (Admin), [2022] ELR 314
- *Mackereth v Department for Work and Pensions & Anor* [2022] EAT 99, [2022] IRLR 721.
- *Taylor v Jaguar Land Rover Limited* (Birmingham ET 1304471/2018)

<sup>121</sup> This imposes a duty to make arrangements with a view to safeguarding and promoting the welfare of pupils and to have regard to guidance, *KCSIE* and *Working Together*. See also Children Act 2004, s11.

<sup>122</sup> This imposes requirement to follow a curriculum which promotes the spiritual, moral, cultural, mental and physical development of pupils and of society, and which prepares pupils for later life.

<sup>123</sup> This imposes requirements concerning the national curriculum and relationships, sex and health education, as inserted by ss34 & 45 of, Children and Social Work Act 2017.

<sup>124</sup> This imposes duties concerning the behaviour of pupils and bullying in schools.

<sup>125</sup> This imposes requirements concerning premises including toilets, washing, and changing facilities.

<sup>126</sup> This imposes registration requirements for schools.

<sup>127</sup> This imposes requirements on academy trusts equivalent to those above. The curriculum standard in the Independent School Standards (ISS) does not apply to trusts.

<sup>128</sup> An international human rights treaty which influences the laws of England but is not directly enforceable in English courts.

<sup>129</sup> This prohibits discrimination by schools against pupils and imposed the public sector equality duty.

<sup>130</sup> This provides a process for transgender adults to achieve legal recognition in their expressed gender and change the sex recorded on their birth certificate.

## Other reading:

- DfE, [Keeping Children Safe in Education](#) (2022): 'KCSIE 2022'
- DfE [Working Together to Safeguard Children](#): 'Working Together' (2022)
- DfE, [Relationships education, relationships and sex education \(RSE\) and health education - statutory guidance for governing bodies, proprietors, headteachers, principals, senior leadership teams, teachers](#) (September 2021)
- DfE, [Plan your relationships, sex and health curriculum](#) (February 2022)
- EHRC, [Separate and single-sex service providers: a guide to the Equality Act sex and gender reassignment provisions](#) (March 2022)<sup>131</sup>
- Dr Hilary Cass, [The Cass Review Interim Report](#) (February 2022)
- Sport England, [Guidance on transgender inclusion in domestic sport](#) (September 2021)
- Robert Long and Philip Loft, [Provisions to support transgender children in schools](#) (House of Commons Library, December 2020)
- Robert Long, [Relationships and sex education in schools \(England\)](#) (House of Commons Library, July 2021)
- Bukky Balogun, Catherine Fairbairn and Douglas Pyper, [Gender recognition reform: consultation and outcome](#) (House of Commons Library, February 2022)

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<sup>131</sup> This provides useful context and parallels but is not directly applicable to schools because the EqA 2010 deals with education separately from service provision and the EqA chapter on 'service providers' (Part 3) expressly excludes matters covered in the EqA chapter on schools (Part 6, chapter 1) - see s28(2) EqA.

## APPENDIX TWO – Gender Recognition Act 2004

The Gender Recognition Act is mentioned here for legal context only. School pupils in England are unlikely to have Gender Recognition Certificate (GRC) because a person cannot apply for a GRC until they are 18 years of age, and the process of registration takes some months.

Section 9 of the Gender Recognition Act provides:

- (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

'For all purposes' means 'for all legal purposes'.<sup>132</sup> A person may obtain a GRC without undergoing surgical transition. The protected characteristic of gender reassignment does not depend upon a person having a GRC but the case law indicates that the EqA's protection may operate differently depending on GRC status.<sup>133</sup>

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<sup>132</sup> See *House of Commons Library: Gender recognition reform: consultation and outcome by (December 2020)* and see *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ, [2022] ICR 1, para 97.

<sup>133</sup> This is inherent in the fact that a trans person retains their birth sex unless and until they have a Gender Recognition Certificate which changes their legal birth sex for most purposes. See *R (FDJ) v Secretary of State for Justice and Sodexo* [2021] EWHC 1746, [2021] 1 WLR 5265 in which the rights of prisoners in the female estate were analysed by reference to three categories: women, transwomen without a Gender Recognition Certificate, transwomen with a Gender Recognition Certificate.



## APPENDIX THREE – Guidance from Sport England, 2022

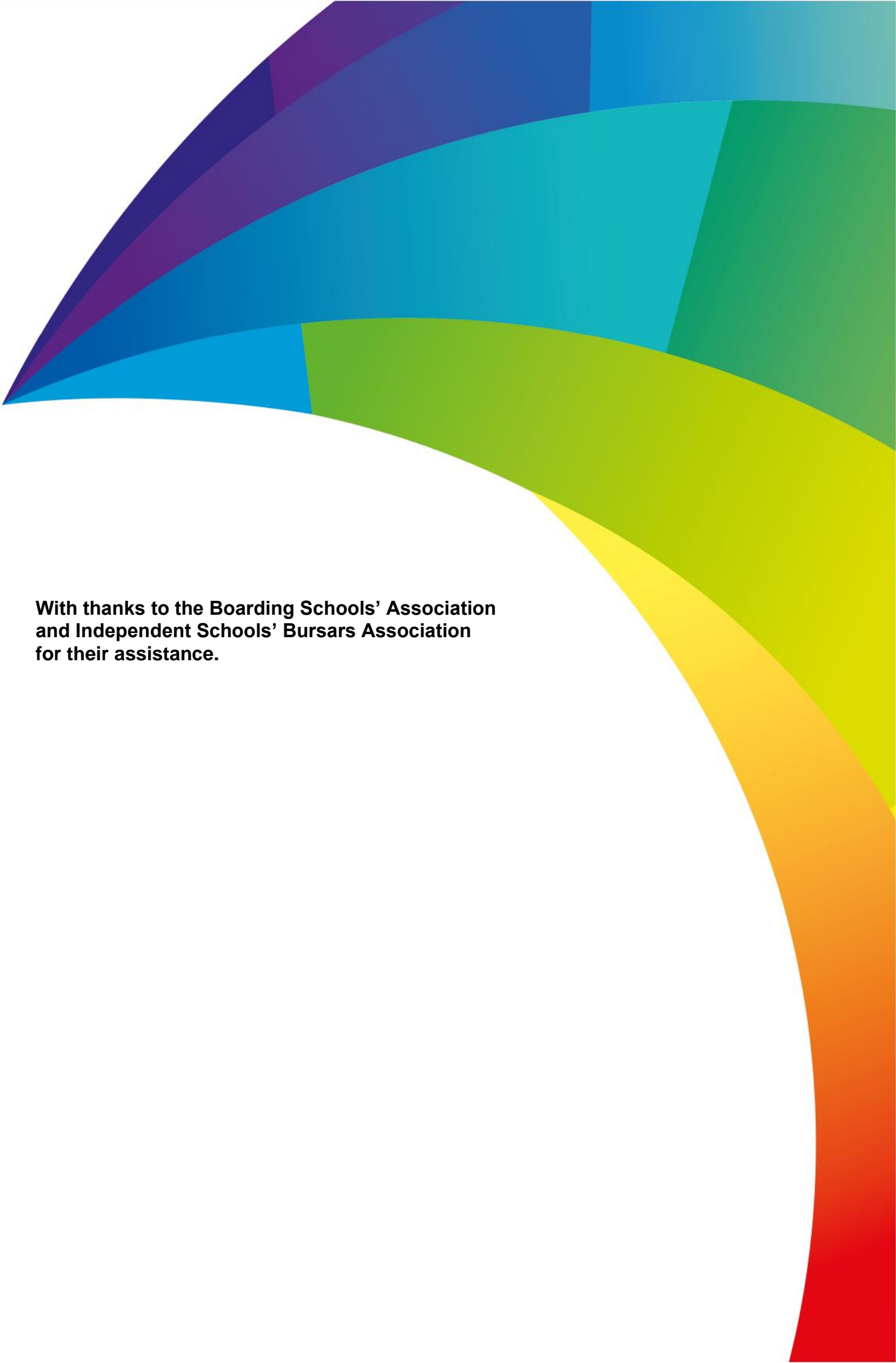
The UK's Sports Councils' Equality Group (SCEG) has issued guidance to sports bodies about inclusion of transgender persons in sport. The guidance is intended to assist sports governing bodies to develop appropriate regulations for their area of responsibility. It is stated to be based on the latest scientific findings and extensive consultation and provides 10 guiding principles. While schools were not the intended audience, the principles may assist schools to frame their thinking. The headlines are outlined here for ease of reference.<sup>134</sup>

- 1) All of the Sports Councils are committed to the inclusion of transgender people in sport and physical activity.
- 2) Categorisation within the sex binary is and remains the most useful and functional division relative to sporting performance.
- 3) Evidence indicates it is fair and safe for transgender people to be included within the male category in most sports.
- 4) Competitive fairness cannot be reconciled with self-identification into the female category in gender affected sport.
- 5) Based upon current evidence, testosterone suppression is unlikely to guarantee fairness between transgender women and natal females in gender-affected sports.
- 6) 'Case-by-case' assessment is unlikely to be practical nor verifiable for entry into gender-affected sports.
- 7) There are likely to be times in which some transgender people cannot or choose not to be registered, either in the short or long term, within sex binary categories.
- 8) Categorisation by sex is lawful, and hence the requirement to request information relating to birth sex is appropriate.
- 9) The ability of NGBs and SGBs<sup>135</sup> to provide the best mix of sporting options for the broader community may be determined by whether a model is intended as physical activity and participation, or whether it represents 'meaningful competition'.
- 10) Achieving inclusion across all the strands of the Equality Act is complex and nuanced.

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<sup>134</sup> Schools are recommended to read the report in full: [SCEG Guidance for Transgender Inclusion in Domestic Sport 2021](#)

<sup>135</sup> National Governing Bodies and Scottish Governing Bodies.



**With thanks to the Boarding Schools' Association  
and Independent Schools' Bursars Association  
for their assistance.**