

# **GOOD LAW** Project

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Dear Department for Education,

Please find enclosed the response of Good Law Project to the draft 2026 statutory guidance on keeping children safe in education, in particular those sections which concern the rights of young trans people.

As an organisation working to defend the rights of trans people in the UK, we are very concerned that the guidance in its current state fails to adequately protect the rights of young trans people, and encourages action which is likely to constitute unlawful discrimination. This puts both schools and pupils at risk.

We identify and set out these failings in some detail, in the hope that the guidance can be amended to adequately address the rights of all. Although not intended to be comprehensive, we hope that it is sufficient to highlight various aspects of the guidance which urgently need to be addressed.

We remind the Department for Education that it is obliged, under the Public Sector Equality Duty, to have "due regard" to the need to eliminate discrimination against those with the protected characteristic of gender reassignment. We believe that the guidance, in its current form, risks the opposite outcome, in that it is likely to result in discrimination against pupils with this protected characteristic.

We hope that the Department for Education will amend its guidance, having given proper consideration to the likely harmful impact of its proposals on young trans people. We are happy to provide any further assistance to this end.

Yours faithfully,

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Trans Rights Lead  
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**Question 33: Does the updated section of the guidance on children who are questioning their gender provide clarity about the considerations schools and colleges will need to take into account?**

**Our response:**

No.

We consider that this section of the guidance is highly likely to encourage schools to unlawfully discriminate against children with the protected characteristic of gender reassignment, and potentially on the basis of other protected characteristics.

Protected Characteristic of Gender Reassignment

Under the Equality Act 2010, a pupil will have the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have 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.

The guidance rightly acknowledges that whether individual pupils have this protected characteristic will not always be easy for schools to determine, and that they should err on the side of caution in assuming that trans or gender questioning pupils have this protected characteristic to avoid acting discriminatorily.

The guidance notes that children who question their gender do not always go on to, or continue to, transition later in childhood or as adults. This is irrelevant for the purposes of gender reassignment discrimination. If a child is at any point proposing to undergo a process, or part of a process, for changing attributes of their sex, then at this stage they have the protected characteristic of gender reassignment, and are protected from discrimination on that basis. It is immaterial what choices they later decide to make. If a child who has undergone such a process, or part of a process, later detransitions, they will also have the protected characteristic of gender reassignment and will be protected on that basis. The guidance should explicitly reflect this – it will not be lawful to refuse to accommodate the needs of a child with the protected characteristic of gender reassignment solely because the school believes that they are unlikely to eventually transition. A proposal alone is sufficient.

Additionally, the guidance should explain that the Equality Act 2010 also prevents discrimination by perception. This means that regardless of whether a child actually has the protected characteristic of gender reassignment, it will be unlawful to discriminate against them because they are perceived to have that characteristic. This is highly likely to be the perception where schools are dealing with what they perceive as a request relating to social transition.

### The scope of “social transition”

The guidance does not define the term “social transition”, and as such the term may be interpreted by schools to cover a very broad range of behaviour and requests. The Cass Report states that whilst social transition is an individual process, it usually involves “social changes to live as a different gender such as altering hair or clothing, name change and/or use of different pronouns”. In the context of schools it is also likely to involve requests to be treated as the gender towards which the child is transitioning, for example, by allowing the child to use appropriate gendered facilities, or be described (or not described) as a girl/boy and be treated as such for relevant purposes.

Some of these changes are undertaken normally by children on a regular basis. It is entirely standard, and will usually be accommodated, when a child asks to be referred to by a nickname, or chooses to wear certain clothing already in line with the school’s uniform policy. Others might involve specific accommodation for the individual child which would not otherwise be routinely made for other pupils.

A wide definition of ‘social transition’, alongside the “very careful approach” encouraged in relation to it by the guidance, is very likely to encourage schools to directly discriminate against pupils with the protected characteristic of gender reassignment.

Under the Equality Act 2010, direct discrimination is where a person is treated less favourably “because of” a protected characteristic. The current framing of the guidance means that a request that would be easily accommodated for a pupil without the protected characteristic of gender reassignment may be approached in a far more restrictive way simply because it is considered to relate to the perceived “social transition” of a child with that protected characteristic. The child is therefore being treated differently when making the same request “because of” their protected characteristic. Unlike with indirect discrimination, this *cannot* be justified as a proportionate means of achieving a legitimate aim – it will simply be unlawful.

This may be illustrated by an example. A child with the given name Alexandra has the protected characteristic of gender reassignment. They decide to start wearing trousers to school instead of a skirt, and ask if they can be referred to at school by the name Alex rather than Alexandra. The school considers that this is a proposal to undergo social transition, deciding against the child's wishes to talk to the parents about the issue, and takes a cautious approach to determining whether the name Alex should be used. This process causes significant stress to the child.

Another child without the protected characteristic of gender reassignment, Alexander, decides to start wearing trousers to school instead of shorts, and asks if they can be referred to at school by the name Alex rather than Alexander. The school easily accommodates the request. The change in behaviour and the request made by the child in both cases are identical. But the current framing of the guidance may mean that schools treat the first child less favourably because of their protected characteristic of gender reassignment. This is likely to be unlawful direct discrimination.

The guidance should be more specific about what requests it envisions might be made of schools in relation to social transition. It should emphasise that where pupils make requests that are routinely accommodated in other circumstances, subjecting them to less favourable treatment because their request relates, or is perceived to relate, to their protected characteristic of gender reassignment will be unlawful direct discrimination.

### Approach to policies

The guidance correctly identifies that schools should consider adopting policies which maintain flexibility and avoid rigid rules based on gender stereotypes. However, it should go further. Rather, schools *must* adopt such policies to avoid indirect discrimination on the basis of gender reassignment (and likely, also, sex), unless policies to the contrary can be justified.

It is indirect discrimination to adopt a policy, criterion, or practice which puts people with a protected characteristic at a particular disadvantage compared to those without that characteristic – unless doing so can be justified as a proportionate means of achieving a legitimate aim. Schools will therefore need to justify any policy which puts pupils with the protected characteristic of gender reassignment at a particular disadvantage.

In considering the impact of policies, the guidance should also reflect the particular disadvantage likely to be experienced by those children who are living stealth. Whilst the current guidance notes that schools should be conscious of the vulnerabilities of such children, it fails to highlight that such children are likely to be disproportionately impacted by certain policy choices. For example, any policy which requires all pupils to be treated strictly according to 'biological sex' may be likely to out those living stealth, subjecting them to particular harm. It will be difficult to justify such policies as a proportionate means of achieving a legitimate aim in such circumstances, and may therefore amount to unlawful discrimination. The guidance should specifically identify this risk, and suggest ways of properly accommodating the needs of such pupils.

The guidance fails to properly emphasise that where schools adopt modern and inclusive policies, they will likely be able to avoid many potential individual requests related to social transition. Schools should consider how they can adopt policies which proactively consider the needs of all pupils, including those with the protected characteristic of gender reassignment. A gendered uniform policy, for example, which requires female pupils to wear skirts, is likely to place students with the protected characteristic of gender reassignment at a particular disadvantage. This may be indirectly discriminatory unless it could be justified as a proportionate means of achieving a legitimate aim.

Schools should therefore consider how they might adopt policies which allow flexibility for all pupils, regardless of whether they are trans, concerning their expression and presentation. This could include removing gendered distinctions where possible, and allowing all children to request that they be referred to in terms that they are comfortable with – regardless of their gender identity. Such approaches will in many cases help avoid individualised processes of 'social transition', and allow various children's needs to be accommodated – including those with the protected characteristic of gender reassignment – without having to present those needs as requiring particular choices or commitments in relation to gender identity. This allows for the flexibility and lack of pressure identified in the current draft as ideal. This approach to such policies should be emphasised in the draft guidance.

The guidance notes that any approach must also be conscious of the rights of pupils and staff in relation to their religion or belief. This is of course correct. However, the guidance should also note that it will often be justified to adopt policies which prioritise the best interests of children over the beliefs of staff.

The guidance also unhelpfully refers to access to spaces “designated for the opposite sex”. This framing is likely to lead to confusion, and inadvertently encourage schools to act unlawfully. We explain this issue in substantial detail in our answer to Question 34.

### Involving parents/carers

The current framing of the guidance on the involvement of parents/carers is seriously harmful, likely to undermine the best interests of children, and to encourage schools to act unlawfully.

A concerted change in emphasis is required. The guidance should ensure that schools centre the best interests of the child in making any decision, and, where relevant, the need for schools to avoid discrimination. The guidance should of course highlight that it will often be positive and desirable to ensure that parents/carers are engaged with any process, but it should not seek to predetermine a sensitive assessment of what is in the best interests of the child in the given circumstances. Engagement with parents should not be suggested to be a “priority” when the best interests of the child must always be paramount. Schools must start any assessment from the principle of determining what would be in the best interests of the child in any given situation, rather than beginning from a rebuttable presumption that this should mean informing parents/carers – as the guidance currently suggests.

Language such as the “vast majority of cases” and “rare circumstances” are likely to lead to a harmful and potentially unlawful approach on the part of schools. The outcome of sensitive decisions in this context should not be presumed either way. The instruction that “members of staff should not adopt any changes relating to social transition unless a decision has been made in consultation with parents or carers” is obviously wrong as a blanket statement and should be removed. This approach is likely to be contrary to the best interests of some children, and to be unlawfully discriminatory in some circumstances. There will necessarily be some circumstances where it will be in the best interests of a child for a school to accommodate particular requests, without making such a decision in consultation with their parents/carers. Schools should make such assessments on an individualised and sensitive basis. This must be properly reflected in the guidance.

As outlined above, such approaches may also amount to discrimination on the basis of the protected characteristic of gender reassignment. This will be particularly likely where

similar requests are accommodated for other children without the involvement of parents/carers.

### Social transition: different approaches to different needs

In considering the above, it may be helpful to break down the currently broad scope of the section on “social transition” as encompassing three different potential categories of need on the part of trans or gender questioning children. The guidance should outline the different approaches which should be taken to accommodate these different types of needs to avoid unlawful discrimination.

#### A) Needs which the school already accommodates for other pupils

These are needs, such as adopting a preferred nickname, which are already accommodated for pupils when unrelated to gender identity. In such circumstances, treating a child less favourably than other pupils making a similar request because it is perceived to relate to ‘social transition’ may amount to direct discrimination on the basis of gender reassignment. The guidance should make clear that schools should not adopt a different approach to requests it would otherwise accommodate merely because it is perceived to relate to gender.

#### B) Needs which can be addressed by broader policy changes, and which other pupils may benefit from

These are needs which can be addressed by adopting broad changes to policy, such as by removing gendered uniform distinctions, or by making gender neutral toilets and changing spaces available to all children who would prefer to use them (see the response to Question 34 for more detail on this). This provides the exact kind of flexibility favoured by the Cass Review, reduces pressure on individual children, and is likely to offer benefits to other pupils. A failure to adopt such flexible and inclusive policies may amount to indirect discrimination on the basis of gender reassignment.

#### C) Needs which require specific adjustments and active accommodation.

These are needs which require specific accommodation in relation to a child in order to be met. It is in these circumstances that an individualised, best interests approach to the needs of the specific child will be appropriate. If broad and flexible

policies are adopted as outlined in category B above, the need for such interventions should be significantly reduced. A failure to accommodate the needs of such children may amount to unlawful discrimination.

In any event, it is clear that schools will have to take a nuanced and context sensitive approach, considering both the surrounding circumstances and the specific needs of individual pupils. It is inappropriate for the guidance to introduce broad presumptions about what approach should be taken to individual pupils in various circumstances (for example, suggesting that full social transition should be agreed for primary school pupils "very rarely"). These comments should be removed from the guidance. Their current inclusion may lead schools to unlawfully default to a particular course of action without properly considering the best interests of the child, or properly considering whether any approach is discriminatory.

**Question 34: Do paragraphs 104-115 provide clarity for schools and colleges about their legal obligations relating to toilets, changing rooms, and boarding and residential accommodation?**

**Our response:**

No.

The guidance adopts unhelpful framing which is likely to misinform schools about their legal obligations, particularly insofar as it relates to the provision of single-sex facilities.

Contrary to how the guidance is framed, schools are under no obligation to provide any single-sex facilities whatsoever. It would be entirely lawful and legitimate for a school to provide toilet and changing facilities entirely in self-enclosed lockable rooms, designed for use by one pupil at a time. Indeed, where this is practicable, this may be the most sophisticated way of addressing the needs of all pupils. The guidance should make this clear.

Where not provided in this form, the relevant regulations require that schools provide separate toilet facilities for boys and girls. In a recent decision<sup>1</sup> concerning similarly phrased workplace regulations, the High Court emphasised that the provision of separate-sex toilet facilities was a floor, rather than a ceiling, and did not prohibit additional provision beyond that.

The guidance confusingly uses the phrase 'designated for the opposite sex' which may be likely to mislead schools as to the nature of the facilities they may lawfully provide. This may inadvertently encourage discrimination on the basis of gender reassignment. As noted by the High Court in the above case, it may be lawful (depending on the circumstances) to provide toilet facilities which are labelled for girls, and which those pupils presenting as girls are permitted to use, regardless of their 'biological sex'. Such facilities would have to be provided alongside single-sex facilities, which were separated based on 'biological sex'. Schools would also have to consider the risk of discrimination against other pupils, and ensure there were appropriate facilities for everyone to use. The guidance should be clear about this distinction, and that it may be lawful to provide facilities based on lived gender, and designated as such, without those facilities having to be entirely unisex.

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<sup>1</sup> *R (Good Law Project and others) v Equality and Human Rights Commission* [2026] EWHC 279 (Admin)

The guidance says that schools “should consider” providing alternative toilets and changing facilities for pupils who do not wish to use single-sex facilities in line with their sex recorded at birth. The guidance should be stronger on this, and emphasise that a failure to provide such alternative facilities is highly likely to amount to discrimination on the basis of gender reassignment. This was recently recognised by the High Court in the case referenced above, in the context of adults with that protected characteristic. The guidance should also reflect that providing, for example, individual changing facilities may be of benefit to numerous children who would prefer to dress in private, regardless of their gender identity. Adopting policies which increase the amount of private and gender neutral provision is likely to be of benefit to a large number of students.

The guidance currently identifies that where mixed-sex provision is made, schools should assess the safeguarding risks and plan accordingly. But this is true of all provision and not just that which is mixed-sex. Pupils of any sex may pose a potential risk to pupils of any other potential sex – risks are not limited solely to the interactions between male and female pupils. Nor will signage identifying facilities as single-sex necessarily exclude pupils of the opposite sex who pose such a safeguarding risk from accessing those facilities. The guidance should be clear that such risks must be assessed in relation to all facilities, not just those which are mixed-sex. It should also emphasise that provision in individual, lockable rooms may also decrease such potential risks more generally.

**Question 35: Do paragraphs 94-97 provide clarity for schools and colleges about the circumstances in which the school is justified in having a policy of single-sex sports?**

**Our response:**

No.

As currently framed, the draft guidance incorrectly and misleadingly explains the operation of the sports exception under the Equality Act 2010. The default position within the Act is that it will be unlawful to directly discriminate on the basis of sex. However, in the context of sport, schools may in some circumstances choose to rely on the relevant exception under the Act. This exception is found in section 195 of the Equality Act 2010.

The exception provides that it will not be unlawful discrimination to exclude people on the basis of sex if their exclusion is in relation to their participation as a competitor in a gender-affected activity. A sport will be a gender-affected activity 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. Therefore, where a school can show that a given sport is a gender affected activity, it may lawfully separate students on the basis of 'biological sex', without this amounting to direct sex discrimination.

However, the draft guidance fails in several respects.

Firstly, it fails to identify that in relation to children, determining whether an activity is gender-affected cannot be done simply by reference to adults. That is to say, by comparing the average adult woman against the average man. Instead, at section 195(4) the Act explicitly states that when considering whether a sport 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.

Schools may be acting unlawfully if they simply assume an activity is gender-affected without considering the difference in ability between average pupils of each sex at the relevant age and development level, rather than more generally. Schools should make decisions about whether sports are gender-affected on a sensitive basis, taking into account the specific nature of the activity and the age of the cohort of pupils. The guidance does not make this sufficiently clear.

Secondly, whether an activity is gender-affected may also vary within the scope of the curriculum itself, and in relation to a particular sport. Although a rugby match might be gender-affected, it is not necessarily clear that non-competitive catching drills or other similar training exercises would be. Schools may consider that, where appropriate, they could teach some aspects of sports on a mixed-sex basis, whilst treating other aspects as a gender-affected activity. This possibility should be reflected in the guidance.

Thirdly, the guidance fails to acknowledge that although it will not be unlawful sex discrimination for schools to exclude young trans people from gender-affected sports on the basis of their 'biological sex', it may nonetheless amount to indirect discrimination on the basis of the protected characteristic of gender reassignment. This is because a school offering sports on a sex-segregated basis will have a disproportionately negative impact on students with that protected characteristic. This will be especially true where such sports form a compulsory part of that child's education. In such circumstances, schools will have to show that their policy in relation to sports provision is a proportionate means of achieving a legitimate aim.

To avoid discriminating against trans pupils, the guidance should instruct schools to consider whether and in what circumstances it is actually necessary to separate sports according to 'biological sex'. Where the school determines that this is genuinely necessary for reasons of fairness or safety, it should consider what alternative provision can be made to adequately meet the needs of trans pupils. This could involve, for example, ensuring separate classes are available, which are offered on a mixed-sex basis. The guidance should make clear that schools will be required to justify any sports policy which disproportionately impacts pupils with the protected characteristic of gender reassignment, and in justifying any such policy, schools will need to show that they have sensitively tried to accommodate the needs of all pupils.

The guidance indicates that where there are no safety concerns, and a child makes a request relating to how they participate, schools and colleges should consider the request in light of the advice on social transition. This wrongly and harmfully conflates the obligation placed on schools to ensure that their policies do not unlawfully discriminate against pupils with the protected characteristic of gender reassignment with the question of whether such pupils should be enabled to socially transition. These are not the same thing.

For example, there may be circumstances where a child with the protected characteristic of gender reassignment experiences distress at being forced to participate in girls' sports. In such circumstances, a school adopting a policy which reduces such distress – for example, by offering mixed provision which the child is able to participate in instead – is not the same as a decision to enable social transition. Rather, it addresses a particular harm disproportionately experienced by pupils with the protected characteristic of gender reassignment, regardless of whether those pupils ultimately go on to transition.