

IN THE HIGH COURT OF JUSTICE Claim No. AC-2026-LON-001527
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

THE KING on the application of

- 1) [REDACTED]
[REDACTED]
[REDACTED]

Claimants

-and-

- 1) [REDACTED]
2) BRIGHTON AND HOVE CITY COUNCIL

Defendants

SUMMARY GROUNDS OF DEFENCE OF THE FIRST
DEFENDANT

INTRODUCTION

Overview

1. The First Claimant is referred to throughout as Sophie. The Second Claimant is referred to throughout as James. James seeks to act as a litigation friend for Sophie and has submitted a certificate of suitability. The First Defendant is referred to throughout as the School. Sophie is currently [REDACTED].

2. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] (Ibid.).

3. The Claimants do not challenge a specific decision made by the School, by reference to a particular case. They challenge the School's provision of toilet and changing room facilities; and the School's longstanding case-by-case approach to decision-making on the welfare requirements of trans children (see Claim Form

§3.1 for the targets of the judicial review). The School's approach has been in operation for [REDACTED] and involves:

- 3.1. Case by case decision making as to the facilities that a trans child is permitted to access, taking into account all relevant considerations and welfare needs.
 - 3.2. Case by case decisions on the scope of consultation that should occur with peers and/or parents, in respect of that decision on a trans child's access. The School will frequently but not always consult.
4. Inherent in the School's approach is consideration of the needs of all affected children; of whether any indirect discrimination, or interference with a qualified human right, is a proportionate means of achieving a legitimate aim; and of whether any unwanted conduct could reasonably produce the 'proscribed effect'.
 5. The heart of the Claimants' case is that the School's approach is incapable of operating lawfully because the only possible lawful approach pursuant to equality, human rights and child welfare obligations is a bright line rule, by which trans children must only access facilities of their biological sex (or gender-neutral third spaces) regardless of the circumstances. The Claimants, in effect, argue that even in the most extreme hypothetical circumstance - involving significant countervailing welfare considerations for a trans child i.e., self-harm at not being allowed to share overnight accommodation with a trusted friend, and no adverse effect on other pupils - a deviation from the bright line rule is never justified. That is not even a position that would inhere in statutory guidance mandating sex-separation; since as a matter of law, inherent in statutory guidance – even for duties phrased as mandatory - is the ability to deviate if exceptional circumstances justify it (the duty in s.175(4) Education Act 2002 is to "*have regard*" to guidance).
 6. The Claimants also contend that in all cases, a decision on whether a trans child can access facilities of their lived gender will always require the School to automatically consult all children and parents. The Claimants describe anything short of this as operating in "*stealth*".
 7. It is unarguable that the School's case-by-case approach is incapable of operating lawfully, as the Claimants must show. The Claimants' case is an extreme one, which

seeks to remove all educational safeguarding judgments from schools and teachers, without exception. It is in tension with the safeguarding duty in s.175(2) Education Act 2002, which is interwoven with the School’s general management powers (see *R (CHF & Anr) v Headteacher and Governors of Newick CE Primary School & Anr* [2021] EWHC 2513 (Admin) §31, per Fordham J).

8. The School is cognisant of the draft Keeping Children Safe in Education (KCSIE) guidance published in February 2025. This most relevantly states, “*Reflecting the underpinning statutory duties, our proposal makes clear that schools must not permit: children over the age of 8 to access toilets designated for the opposite biological sex; children over the age of 11 to access changing rooms designated for the opposite biological sex; allow children to share boarding or overnight accommodation with those of the opposite sex.*” As to this:

8.1. The School is required to have regard to finalised statutory guidance (s.175(4) Education Act 2002). It will apply the finalised guidance: **WS H** §45. If the draft guidance is finalised in current form and applied by the School from September, then the Claimants’ claim would be largely rendered academic. That is not least because the Governing Body has resolved that the School will comply with the guidance if it is in its final form: **WS H** §45.

8.2. The Secretary of State for Education is currently consulting on this guidance. The School continues to await finalised KCSIE guidance and EHRC guidance. There has therefore, currently, been no change to the use of a case-by-case approach.

8.3. [REDACTED]

9. In summary the Claimants should be refused permission on the following basis:

9.1. **Limitation:** the Claimants’ claim is brought years out of time.

9.2. **Academic and/or premature:** it is highly likely that the ‘outcome’ for the Claimants would not have been substantially different if the conduct

complained of had not occurred (i.e., if instead of a case-by-case approach, the School adopted the approach the Claimants seek): s.32(1A) Senior Courts Act 1981, CPR 54.8(4)(a)(ii). Further, to the extent Sophie and James are concerned about Sophie being affected in future by a case-by-case decision, that concern is premature; and, in any case, most likely groundless because future case-by-case decisions affecting Sophie will take into account her strong aversion to sharing facilities with a trans girl. Finally, assuming permission was granted, by the time this case is heard, the position at the School may have changed, subject to the form of the finalised KSCIE statutory guidance.

- 9.3. **Standing:** James is not an appropriate litigation friend for Sophie (see §11 below). James lacks standing, particularly in respect of Grounds 3 to 5.
- 9.4. **Alternative available remedy:** there is an alternative remedy available in respect of Grounds 3-5 via a claim in the County Court, which is the more appropriate forum.
- 9.5. **Each of the grounds is in any event unarguable:**
- 9.5.1. **Grounds 1-2:** The Claimants' arguments on breach of statutory duty in respect of toilet provision is based upon legal and/or factual errors regarding the School's provision. Further, the Claimants' arguments that the School is in breach of safeguarding duties under statute and regulations on provision of facilities are largely parasitic upon the Claimants' erroneous contention that a case-by-case approach is incapable of operating lawfully. These grounds are equally unmeritorious.
- 9.5.2. **Grounds 3-5:** Each of these grounds is unarguable for further reasons specific to each ground, which are set out below.
- 9.5.3. **Ground 6:** The Claimants' claim for breach of the public sector equality duty is unarguable. The School extensively investigates equalities impacts, particularly at the time of each case-by-case decision, i.e., the main analytically relevant point. Indeed, the School has spent significant time and sums on investigating equalities impacts, including by legal advice.
- 9.6. **The position on the Applications:** In summary (i) Professor Phoenix should not be given permission or her report relied upon because she lacks relevant expertise (on child safeguarding in schools) and independence (ii) this is not

11.3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

FACTUAL BACKGROUND

The School

12. The School’s ethos is set out in **WS H §2**. The School is *“well versed with dealing with difficult welfare judgments which require the consideration of safeguarding risks to students”* (**WS H §14**). These include on *“the particular safeguarding risks to adolescent girls, including (but not limited to) in the context of violence, sexual violence, harassment, puberty, and exclusion from sport”* (**WS H §15**). The School openly acknowledges *“the complex issues involved in safeguarding the welfare of trans pupils”* and that *“in some circumstances, the rights of individuals and groups may be in tension”* (**WS H §16**). Its approach is guided by its safeguarding responsibilities, relevant legislation, and statutory guidance (**WS H §17**).

The School’s estate and provision

13. The School’s toilet provision is set out at **WS H §§4-8**.

13.1. [REDACTED]
(**WS H §5**).

13.2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

13.3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

[REDACTED]

14. [REDACTED]

14.1. [REDACTED]

14.2. [REDACTED]

14.3. [REDACTED]

14.4. [REDACTED]

The case-by-case approach in use

15. The School's case-by-case approach, as first explained at §§3-4 above, is explained in detail in **WS H §§21-27**. Its application to the issue of toilet access (**WS H §§28-30**), changing room access (**WS H §§31-32**), and the sharing of overnight residential accommodation is then explained (**WS H §§33-34**).

16. As regards the approach in principle:

16.1. The School's approach is longstanding. [REDACTED] (WS H §§21).

16.2. It is considered fair and lawful because, amongst other reasons, it assesses each case individually, ensuring decisions are tailored to the student's individual context and are respectful; considers the rights and needs of all students; and requires justification of any decision that disproportionately disadvantages a group. It balances inclusion with legal and ethical responsibilities, making it both reasonable and principled (WS H §§21).

16.3. The School's approach does not involve automatic or unrestricted entitlement based on self-identification. *"It recognises that requests for a departure from usual arrangements such as sex-based provision must be considered carefully and lawfully. Its approach therefore involves assessing the welfare of the child alongside the rights, safety, and dignity of others. Any decision to depart from standard arrangements is made only where it is considered justified, proportionate, and in the best interests of the child, taking into account all relevant circumstances"* (WS H §§23). Case by case decisions are made on the scope of consultation (WS H §§24).

16.4. Legal advice is usually obtained in relation to individual cases (WS H §§26).

17. In respect of toilets:

17.1. Regulation 4(2) of the School Premises (England) Regulations 2012 and its requirements amount to relevant law that will be complied with when deciding the correct case-by-case decision on toilet access (WS H §§28).

17.2. A trans student will discuss with the pastoral team and safeguarding leads which provision to use within the school, and an assessment takes place that takes account of all relevant factors. [REDACTED]

[REDACTED] (WS H §§29).

17.3. [REDACTED]

18. In respect of changing rooms:

18.1. As with toilet use, there will be a discussion with the trans student and parents regarding use of changing rooms. An assessment takes place that takes account of all relevant factors, and considers the appropriate scope of wider consultation (WS H §31). An example assessment, [REDACTED]

[REDACTED], is set out at (WS H §32).

18.2.

[REDACTED] (WS H §31).

18.3.

[REDACTED]
[REDACTED] (WS H §31).

18.4.

[REDACTED]
[REDACTED] (WS H §31).

19. In respect of overnight stays in residential accommodation:

19.1. Discussions will take place with a trans pupil and their parents prior to residential trips about preferences as regards accommodation. The School will then consider whether, and if so how, any request can be implemented and carry out a risk assessment of the proposal as appropriate, considering the dynamics with other students. The School will always take into account both the importance of ensuring the participation of trans students in trips, as well as the rights of other students (including girls and those with a religion or belief) (WS H §33).

19.2. Practical solutions taken into consideration include the trans student sharing a bedroom with trusted friends, with appropriate and previously agreed arrangements put into place, including the agreement of all parents (WS H §34).

Procedural chronology to date

20.

[REDACTED]
[REDACTED]
[REDACTED]:

20.1.

[REDACTED]
[REDACTED]

[Redacted text block]

20.2. [Redacted text block]

20.3. [Redacted text block]

20.4. [Redacted text block]

20.5. [Redacted text block]

Sophie's situation

21. [Redacted text block]

22. [REDACTED]

23. [REDACTED]

24. [REDACTED]

LEGAL FRAMEWORK

25. The Defendants take no issue with the Claimants’ statement of legal framework at SFG §§33-38 on provision of facilities, nor on §§39-42 regarding safeguarding duties save that:

25.1. For convenience, Regulation 4 of the School Premises (England) regulations 2012 (“**2012 Regulations**”) is set out in full:

(1) Subject to paragraph (3), suitable toilet and washing facilities must be provided for the sole use of pupils.

(2) 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.

(3) Where separate facilities are provided under paragraph (1) for pupils who are disabled, they may also be used by other pupils, teachers and others employed at the school, and visitors, whether or not they are disabled.

(4) *Suitable changing accommodation and showers must be provided for pupils aged 11 years or over at the start of the school year who receive physical education.*

25.2. There are further important parts of the current KCSIE (September 2025) that the Claimants omit to mention in their SFG. In particular KCSIE (2025) §91, which states as follows in course of discussing the PSED:

...Some pupils or students may be more at risk of harm from specific issues such as sexual violence, homophobic, biphobic or transphobic bullying or racial discrimination. Such concerns will differ between education settings, but it is important schools and colleges are conscious of disproportionate vulnerabilities and integrate this into their safeguarding policies and procedures...

26. The relevant legal framework in respect of Equality Act and Human Rights Act issues is more conveniently addressed under the School's response to the Claimants' Grounds, to the extent it is necessary to do so.
27. The Claimants' claim does not challenge a specific decision made by the School, by reference to a particular case. Nor does it challenge a policy, since the School's approach is not a policy in public law terms (as was explained in the PAP Response). A policy challenge is subject to a high threshold: *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931, which added clarity to the principle from *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("*Gillick*"). The bar to the Claimants' challenge is higher still, given that it seeks to impugn a case-by-case approach to decision-making in circumstances in which there is no requirement to have a policy. In effect, an *ab ante* challenge to case-by-case decision making of this kind requires the Claimants to show that the School's approach is incapable of operating lawfully (see by analogy the approach to an *ab ante* challenge to a legislative provision's human rights compliance per *Re Abortion Services (Northern Ireland)* [2022] UKSC 32 §14; see also *A v Secretary of State for the Home Department* §77 by reference to *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, *MM (Lebanon) v Secretary of State for the Home Department* [2017] 1 WLR 771 §§55, 58). Put another way, the School's approach needs to make non-compliance in individual cases practically inevitable: *R (Britcits) v Secretary of State for the Home Department* [2017] EWCA Civ 368 §72). That

is an extremely high threshold. In effect, it requires there to be no scope to produce lawful outcomes pursuant to case-by-case decision making.

28. An important part of the legal framework that the Claimants overlook is the law addressing competence in the case of children: *Gillick*; see further *R (Bell and another) v Tavistock and Portman NHS Foundation Trust* [2022] PTSR 544. The parental right to control a minor child deriving from parental duty is a “*dwindling right*” which exists only in so far as it is required for the child's benefit and protection. The extent and duration of that right is not ascertained by reference to a fixed age but, instead, depends on the degree of intelligence and understanding of that particular child and a judgment of what was best for the welfare of the child. Where a child has “*achieved sufficient intelligence and understanding*” (*Gillick* pg.187D) to make the decision, it may be made without parental consent.

GROUND FOR RESISTING PERMISSION

DELAY

29. Time runs for the purposes of CPR 54.5(1) from when a person is affected by the application of the challenged measure: see, e.g., *R (Badmus) v Secretary of State for the Home Department* [2020] EWCA Civ 657; [2020] 1 WLR 4609 §§77-78.

30. The Claimants’ challenge has been brought several years out of time. The School’s approach has been in use since [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

31. The Claimants do not offer any attempt in the SFG to overcome their flagrant delay, and the years’ old expiry of limitation. For this reason alone, the entire challenge is unarguable and permission should be refused.

ACADEMIC AND/OR PREMATURE

32. First, it is highly likely that the outcome for Sophie would not have been substantially different if the conduct complained of had not occurred (i.e., if

instead of a case-by-case approach the School adopted the approach the Claimants seek): per s.32(1A) Senior Courts Act 1981, see also CPR 54.8(4)(a)(ia); see further *R (Bradbury) v Brecon Beacons National Park Authority* [2025] 4 WLR 58 §70.

33. [REDACTED]. Even if the conduct complained of had not occurred, in that there was an absolute rule in favour of sex-separation at the School, the ‘outcome’ for Sophie would be the same: in both scenarios, she is not required to, [REDACTED]. The relevant ‘outcome’ for James in the context of his pleaded claim, [REDACTED] is in respect of what happens to Sophie. Neither have suffered material prejudice.
34. **Second**, to the extent that Sophie and James are concerned about Sophie being affected in the future by a case-by-case decision, that concern is groundless because the case-by-case decision will take into account Sophie’s preferences and welfare: see *WS H* §§56-64. It is also, obviously, premature, since the appropriate time to bring such a claim based upon such a concern would be at the time it occurs: *National Bank of Anguilla v Chief Minister of Anguilla* [2025] UKPC 14 §86.
35. **Third**, the position at the School may have changed by the end of the school year, subject to the form of the finalised KSCIE statutory guidance. Should the finalised KCSIE statutory guidance remain in the same form as the current draft guidance, the Claimants will have largely achieved their proposed outcome. At the same time, if a judicial review hearing occurs prior to July 2026, the position the Court considers will be one that may imminently (in weeks) expire, including before judgment (subject to the form of the finalised statutory guidance). A determination on the current case-by-case approach therefore offers little utility.
36. The better course would be for permission to be refused now as premature, and for a challenge to be brought if necessary once the form of the finalised statutory guidance (and EHRC guidance), and the School’s response, are known. Alternatively, the case should be stayed until that has occurred. Such an approach will facilitate good administration at the School, which is a relevant discretionary

factor as to whether to grant a remedy and, if so, what: *R (HPSPC Ltd) v Secretary of State for Education* [2022] EWHC 3159 (Admin) §191.

LACK OF STANDING

37. Sophie's standing *per se* is not impugned (beyond the points made above and below). However, her standing to bring the current claim is challenged given James is not a suitable litigation friend for her, for the reasons discussed at §§10-11 above.

38. James lacks standing, particularly in respect of Grounds 3 to 5.

39. Grounds 3 and 4 are attempted discrimination challenges. In *R (Good Law Project Limited and another) v The Prime Minister and another* [2022] EWHC 298 (Admin) §§31-34, the Court found the Claimants did not have standing to pursue claims of indirect discrimination because (underlining added):

39.1. There were individuals, directly and personally affected by the decisions under challenge, who would be capable of bringing proceedings alleging unlawful discrimination: those who were considered (or perhaps feel that they should have been considered) for appointment to one of the posts in question but were not appointed (§31).

39.2. The question of standing is closely related to the statutory definition of indirect discrimination, which is defined in terms of the application by person "A" of a PCP on a person B in relation to B's protected characteristic, which puts B at a particular disadvantage. The obvious person to bring proceedings is person B (§32).

39.3. There was no practical consideration pointing in favour of a conclusion that Good Law Project or Runnymede Trust should be recognised to have standing to bring the claim. Practical considerations pointed in the other direction as the Employment Tribunal was better suited to adjudicate disputes of fact material to the outcome of a discrimination claim (§34).

39.4. Those points apply *a fortiori* to this case, [REDACTED] does in fact attempt to bring discrimination claims purporting she herself was affected. (It is a different point that those claims are unarguable).

40. Ground 5 is a human rights challenge. The Claimants' SFG §§112-118 does not properly allege that James' Article 8 ECHR (Article 8) rights are affected. Nor would James offer a conceptual anchor for an Article 14 ECHR (Article 14) read with Article 8 claim. In any event, in the circumstances he lacks victim status pursuant to Article 34 ECHR and ss.7(1) and (7) Human Rights Act 1998.
41. The Claimants' Grounds 1 and 2 are substantially contingent upon Grounds 3 to 5 (cf. SFG §76, 85). Further, in respect of Grounds 1, 2, and 6, there remains an individual, Sophie, who is said to be affected, [REDACTED] and a claimant in the claim (subject to the issue of the litigation friend).

ALTERNATIVE AVAILABLE REMEDY

42. Proceedings brought by Sophie in the County Court are plainly an alternative remedy available in respect of the intensely fact-sensitive matters in Grounds 3-5, which form the heart of the Claimants' claim.
43. The County Court has primary jurisdiction on the Equality Act claims in issue (s.114(1)(c) Equality Act 2010). Even if that does not prevent a claim for judicial review (s.113(3)(a) EqA) in respect of those claims, this remains subject to the anterior question of whether there is an adequate alternate remedy and of whether the Claimants have standing: *R (Good Law Project) §30*. It is only in a most exceptional case that an application for judicial review will be entertained when other means of redress are conveniently and effectively available: *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] 1 WLR 2625 §19.
44. Redress before the County Court is convenient and effectively available, and offers the more appropriate forum:
- 44.1. There are significant disputes of fact at hand, including on facilities at the School, and the extent of Sophie's interaction with trans students: **WS H** §§56-65. The discrimination claims in Grounds 3 and 4 are inevitably based upon fact-sensitive disputes, including: analysis of the nature and extent of alleged individual and group disadvantage (Ground 3), whether members of the pool for comparison are in materially similar circumstances (Ground 3),

the proportionality assessment (Ground 3), and fact-sensitive assessment of whether any unwanted conduct reasonably had the proscribed effect so as to amount to harassment (Ground 4). There will also be fact-sensitive disputes under Articles 8 and Article 14 (Ground 5), on the limb of the Article 14 test considering ‘analogous situation’ and on proportionality under both Articles.

44.2. The County Court is better placed to resolve disputes of fact. It regularly hears oral evidence and has the benefit of cross-examination. It also offers the benefit of a statutory assessor: s.114(7) Equality Act 2010 and s.63(1) County Court Act 1984.

44.3. If the Claimants wish to rely on expert evidence, any (genuine) expert should be subject to cross-examination on issues as contentious as those engaged here. Such cross-examination did occur in the *Bethany Hutchison & Others v County Durham and Darlington NHS* [2025/2026] (“**Darlington Nurses**”) case (in any event, a first instance decision of an Employment Tribunal) that the Claimants rely so heavily upon.

45. Claims for breach of the Human Rights Act 1998 are routinely brought in the County Court alongside claims for breach of the Equality Act 2010. In the current context, findings on breach of e.g., Articles 8 and Article 14 would be better made in the County Court following testing of evidence.

46. As explained above, Grounds 1 and 2 are parasitic upon Grounds 3-5, even if breaches of those grounds are not matters to be resolved by the County Court. In such circumstances, and given the obvious benefit of a County Court process to resolve Grounds 3-5 (and 3-4 in particular), Grounds 1 and 2 could either proceed in parallel or be stayed. Staying is likely the better option, given the reasons at §§35-35 above. A similar point applies to Ground 6. In any case, Grounds 1, 2 and 6 are unarguable independently of the position for Grounds 3-5.

NO ARGUABLE GROUNDS

Overarching position

47. The only relevant decision is the one adopted some time before [REDACTED] to use a case-by-case approach: §§3-7 are repeated. It is unarguable the School’s approach is incapable of operating lawfully. By contrast, the Claimants’ approach

offers no scope for deviation even in a genuinely exceptional circumstance (a rigidity that does not even inhere in statutory guidance). Their position is extreme.

48. There is nothing arising from the Supreme Court’s judgment in *For Women Scotland v The Scottish Ministers* [2026] AC 315 that alters this. The Supreme Court judgment decided a narrow point: whether trans women with gender recognition certificates fell within the definition of ‘women’ for the purposes of the Equality Act 2010. That has no application here (children are ineligible for gender recognition certificates). The Supreme Court expressly recognised in the first paragraph of its judgment that the trans community is both historically and currently a vulnerable one, which Parliament has sought to protect: §1. Further, its conclusion did not remove or diminish the important protections available to trans persons under the Equality Act: §§248-264.

Ground 1: toilet and changing room provision

49. The School complies with Regulation 4(2) in respect of toilet provision and the Claimants’ suggestion otherwise is unarguable.

49.1. **First,** [REDACTED]

[REDACTED]

By this alone, the School’s obligations under Regulation 4(2) to provide sex-separated toilets are discharged, even if other toilets in the School are mixed-sex. If *all or any* mixed-sex toilet provision was prohibited under Regulation 4(2), then the text could have been expected to say that (i.e., it would say ‘all’ toilet facilities must be sex-separated). This reading of Regulation 4(2) is in keeping with its purpose, of ensuring that sex-separated provisions are made. So long as such provisions are made, the regulatory mandate is achieved. The regulatory mandate operates as “*a floor*” but not “*a ceiling*” (see by analogy *R (Good Law Project) v EHRC* [2026] EWHC 279 (Admin) §§26-7). So long as the ‘floor’ (of sex-separated provisions are made), the School is not precluded from making additional provisions. It is “*fanciful to believe*” that a regulatory floor “*seek[s] to regulate every possibility that can arise*” (*Ibid.*).

49.2. **Second,** further and in any event, [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED].
49.3. **Third**, further and in any event, [REDACTED]
[REDACTED]

[REDACTED] The existence of gender-neutral provision will often be a powerful factor in assessing the correct case-by-case decision, particularly given many trans children prefer using such facilities. But this does not mean the School should abandon legitimate discretion, necessary to ensure it can reach correct (i.e., lawful) outcomes in exceptional cases.

50. The obligation in respect of changing rooms is to provide “suitable” changing facilities. The term ‘suitable’ is not defined in the regulation. Nevertheless, ‘suitability’ is inextricably linked to what is suitable to comply with the School’s overarching child welfare and legal obligations. These include the safeguarding and promotion of child welfare obligations in s.175(2) Education Act 2002, for which the Governing Body must make arrangements. The Governing Body’s and headteacher’s ‘general management powers’ are “interwoven” into section 175 duties (see *R (CHF & Anr) v Headteacher and Governors of Newick CE Primary School & Anr* [2021] EWHC 2513 (Admin) §31). This affirms the discretion that exists for a school to exercise its own expert judgment, within the contours of the s.175(2) duty and the s.175(4) duty to have regard to statutory guidance. In the absence of any definition of ‘suitable’ within the Regulations, a similar approach should be taken to construing that term. In other words, the meaning of ‘suitable’ is a matter for a school’s expert judgment.

51. The School does provide ‘suitable’ washing and changing facilities.

51.1. **First**, there is no requirement that such facilities are always and totally sex-separated. Indeed, there is no mention *at all* of sex-separation in Regulation 4(3) – contrary to Regulation 4(2). The exclusion of that term in Regulation 4(3), despite its inclusion in Regulation 4(2), indicates a conscious choice by the draftsman not to regulate the provision of changing facilities by reference to sex-separation.

51.2. **Second**, the School’s provisions include [REDACTED] as set out at §18 above, [REDACTED]

[REDACTED]

51.3. **Third**, it is wrong to suggest that case-by-case use of the girls' changing facilities by a trans pupil where it is deemed appropriate and justified would make the available changing facilities "unsuitable". By definition, where permission is granted, there is a justification that warrants the use of the girls' changing room – and keeps the use of the girls' changing rooms within bounds of 'suitable' use. That is particularly true when permission may be conditional on further adjustments, such as that the transgender student change in the shower cubicles, or that changing occur at staggered times.

51.4. **Fourth**, all students, including Sophie, always have the option of using an individual lockable space to get changed.

52. The School's provision and practice is in keeping with the statutory scheme. Indeed, the School's approach has not merely discharged its regulatory mandate but used that mandate as a 'floor' rather than a 'ceiling' (cf. *R (Good Law Project) v EHRC* §§26-7). It has, time and again, made substantial additional provision, to help maximise pupil inclusion. The suggestion it is acting *ultra vires* or contrary to the *Padfield* principle is unarguable.

Ground 2: s.175(2) Education Act 2002 safeguarding duty

Ground 2(b)

53. Ground 2(b) alleges that the School has failed to make arrangements that safeguard and promote the welfare of girls, who are required to share private facilities with boys. The Claimants make this point by reference to the report of Professor Jo Phoenix, who has no expertise in respect of child safeguarding in the context of a school; and whose independence is otherwise doubtful (cf. SFG §§83-4): see §§73-73.4 below.

54. The Claimants’ position is extreme. It is unarguable for the same reason that their case, more generally, is unarguable. In the context of s.175(2) their position obviates any role for the expert judgment of teachers in a school, pursuant to their general management powers as identified by Fordham J in *R (CHF & Anr)*; despite the current silence of the KCSIE Statutory Guidance 2025 on this matter. By contrast, the School’s position is measured and reasonable. As explained above (see §§3, 4, 7, 47, 48), it offers scope to exercise judgment and reach the correct outcome in any given case; and in a difficult landscape that may involve tension between competing rights. The School’s position is certainly one capable of operating lawfully and, so, meeting the s.175(2) requirement.

55. In addition, it is wrong that the School’s case-by-case approach operates without any proper risk assessment, oversight, or record keeping.

55.1. *“The School runs robust safeguarding software where all incidents are recorded and followed up, and employs a safeguarding officer to oversee this.”* **WS H** §15.

55.2. The School carries out risk assessments when making specific decisions under its case-by-case approach: **WS H** §§29, 32, 33.

55.3. Legal advice is usually obtained in relation to individual cases: **WS H** §§20, 26. This legal advice from equalities specialists (on which privilege is not waived) forms an important part of the School’s prudent risk assessment, oversight and record keeping. It is a different point that this material is not disclosable.

Ground 2(a)

56. Ground 2a concerns a risk assessment by the School: see [577]. This document is alleged to be irrational. That is, of course, a very high bar, requiring the document to be so unreasonable that no reasonable school could have produced it. This is unarguable for the following reasons.

56.1. **First**, the risk assessment squarely engages with specific risks of ‘sexual violence and harassment’ from a trans child. It was reasonable for the School to consider sexual violence broadly. As part of this consideration, the School did risk assess dangers to the safety of girls, because that is one (and indeed the primary) contentious issue that arises regarding trans girls accessing girls’ changing rooms. Similarly, although the risk assessment does not deal

specifically with religion or belief, it does engage with alternative provision open to trans children and people with religious beliefs, including access to individual changing rooms. The School was entitled to its approach.

56.2. **Second**, the Claimants' view that the risk assessment comparatively overstates potential harm to a trans child as against potential harm to other pupils is simply their view. It is an attempt to draw the Court into a merits assessment, and away from the proper bounds of a rationality assessment. The risks identified in the risk assessment were, as the Claimants rightly point out, based on both likelihood and impact. The School is best placed, as part of its general management powers and expert judgment, to understand both.

56.3. **Third**, the School's judgment that breach of confidentiality (by which a trans student is 'outed') is to be rated as impact '3' (i.e., potentially causing – mental - injury leading to more than one week off school) is reasonably open to the School. It follows from the School's understanding of the impact of being 'outed' on a trans student's mental health; and reduced attendance at school as a result. The Claimants suggest that it is irrational to state that this is greater than 'exposure of genitals'; they do so by skewing analysis at SFG §82b, by referring to "*intentional*" exposure intended to cause alarm or distress. But that is now how the first hazard in the risk assessment is defined. It is defined more broadly, in a manner that includes unintentional exposure.

56.4. **Fourth**, similarly, providing the same impact rating for a trans child being 'outed' and a child suffering from 'sexual violence' (impact '3') equates to saying that for each these, the affected individual would have "*more than 7 days off school*". That is clear from the key in the risk assessment. This is a judgment open to a reasonable decision maker, given its experience of how different events can affect periods of time away from the school.

56.5. **Fifth**, the risk assessment thoroughly considers all the mitigations and contextual factors in place, which contribute to the likelihood of sexual violence being "*1*". These include the ability of students to immediately call for help, even if staff are stood outside. It is unarguable that no reasonable school could have reached this view.

Ground 3: indirect discrimination

57. **First**, the PCPs relied on are not made out. It is well established that it is for a claimant to identify the PCP that is said to give rise to the discriminatory disadvantage, and that those precise PCPs are the ones the Court must address: see by analogy *Hughes v Progressive Support Ltd* UKEAT/0195/20 §33 per Eady J. The School’s actual practice is as set out at §3 above. As can be seen:
- 57.1. The School does not authorise access to private facilities “based on self-declared ‘gender identity’” (cf. SFG §89(a)) but instead based on its assessment and judgment following a case-by-case decision that considers all relevant factors, including settled gender identity.
- 57.2. The School has no practice of authorising pupils to access facilities confidentially. Its practice is to take a case-by-case decision on the appropriate degree of consultation. It is a separate point that the School is not automatically required to consult all children and parents, in all circumstances.
58. **Second**, whether group disadvantage and particular disadvantage arise will depend on the factual context – i.e., on the facts in a particular case-by-case decision regarding access to changing rooms. For example: is permission granted to the trans student on conditions, such as requiring them to change in cubicles? Is there any provision to do with staggered access? There is a misconception in the Claimants’ attempts to determine this issue in abstract, and by reference to Professor Phoenix, who lacks expertise and independence (see §§73-73.4 below).
59. **Third**, Sophie speaks about discomfort in sharing private facilities with a trans girl, or the possibility she might end up doing so. [REDACTED]
[REDACTED]
[REDACTED] The School has also been clear she would be consulted in advance, given her views on the matter are known.
60. **Fourth**, the issue of justification is fact sensitive. In any given case, a case-by-case decision on justification is capable of being lawfully made. The Claimants’ contention otherwise is unarguable. Addressing each limb of the test:
- 60.1. The Claimants, rightly, note that the Defendants specify two legitimate aims in the PAPR (cf. SFG §97): “(a) the inclusion of trans children in a school environment (i.e. seeking to ensure the public safety, health and the rights and freedoms of trans children,

who already face higher than normal marginalisation)” and/or (b) *“avoiding unlawful indirect gender reassignment discrimination”* (PAPR §§11, 44). Their criticisms of these legitimate aims as ambiguous at SFG §98 lack conviction. Any word, phrase, or sentence can be deemed ambiguous if dissected in a vacuum. On a fair reading, it is clear what is meant by a ‘trans child’. In addition, the meaning of *“inclusion”* is clear (particularly when juxtaposed against ‘marginalisation’), as is the meaning of ‘safety, health, and rights and freedoms of trans children’. The Claimants offer no authority to suggest that these phrases are unacceptably ambiguous.

- 60.2. The case-by-case approach is rationally connected to the aims specified because it provides the School with scope to make decisions that protect the welfare of trans children, and avoid unlawful gender reassignment discrimination, as necessary. This is given that trans children face higher than normal marginalisation (including in social and educational settings and in respect of health and safety). The School has already explained this.
- 60.3. The Claimants’ case on less intrusive measures fails to engage with *why* the School has chosen to retain scope to make decisions on a case-by-case basis. This is an area involving child welfare in which hard cases, on extreme facts, can exist; such as the example at §5 above of a trans child who has lived in their acquired gender for a substantial period of time and has severe mental health requirements, such that they would suffer severe harm if denied access to facilities of their lived gender. Even if, for a hypothetical child, offering gender-neutral provision can be a no less intrusive means of achieving the same aim; there is no basis for saying that will necessarily be the case. (The School must necessarily deal in hypotheticals given its approach is being criticised and not its conclusion in any particular decision).
- 60.4. As regards the proportionality assessment, a case-by-case approach respects the potential conflict of rights (or conflict of aims/discriminatory effect) in issue. Neither right has precedence; they need to be balanced (e.g. *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410 at §45). Case-by-case decision making will always allow for a lawful choice to be reached, taking into account all relevant facts. Take a hypothetical residential trip, in which a trans child who has lived in an acquired gender identity for many years and her friend want to share overnight accommodation, with the consent of

all parents involved, and the trans child would suffer severe harm by being precluded from doing so. It is hard to see how the Claimants' approach would better protect a balance of rights than the School's case-by-case approach.

Ground 4: sex-related harassment

61. The unwanted conduct relied on is specified as "*authorising biological adolescent boys to access toilets, showers and changing rooms that are intended for use by female students*". This is not an accurate description, factually; particularly in respect of toilets (see §49).

62. In any event, it is unarguable that a case-by-case approach *per se* has the proscribed effect against Sophie (pursuant to s.26 Equality Act 2010).

62.1. **First**, a case-by-case approach would only warrant a trans child accessing private facilities of their acquired gender if the sufficiently serious facts of their case justified it. In those circumstances, the interest in meeting the dignity, health and privacy needs of that trans child would form a powerful part of the "*other circumstances of the case*". Further, the reasonable person – including the reasonable child – would have to take into account the School's need to promote the health and dignity of all individuals. In addition, it would also be a relevant part of the circumstances of the case that all girls, including Sophie, had access to sex-separated toilets in any event (as they have a specific right to). All the foregoing would tell against the unwanted conduct (of a case-by-case approach) having the proscribed effect.

62.2. **Second**, where the perception of a specific person, B (for the purposes of s.26(4)(a) Equality Act 2010) is sufficiently adversely affected by sharing with a trans peer, then this will ground a risk of sex-related harassment to them. However, that factor can be captured in a case-by-case decision. It does not mean a case-by-case approach itself amounts to unlawful harassment.

62.3. **Third**, there is a need for a detailed fact-finding exercise in order to determine whether or not the case-by-case approach has the proscribed effect for someone. This fact-finding exercise presupposes it is better for a decision-maker to investigate specific facts when making a specific decision, rather than to apply a bright line rule to all hypothetical scenarios.

62.4. **Fourth**, unlawful harassment can itself arise based on the protected characteristic of gender-reassignment. Contrary to the Claimants' case, the

scope for unlawful harassment, therefore, supports the use of a case-by-case approach to decision making; it does not undermine it.

63. [REDACTED] (cf. PAP §58). That is not a claim pursuable by judicial review and is anyway long out of time.

Ground 5: Article 8 and Article 14

64. Sophie lacks victim status by reference to s.7 Human Rights Act 1998. [REDACTED]
[REDACTED]
James plainly lacks victim status.

65. The Claimants’ contention at SFG §115 regarding breach of positive Article 8 obligations is unarguable. There is no obligation on the School to have a written policy or internal guidance document (for Article 8 ECHR purposes or otherwise: “no system of law could possibly achieve [freedom from doubt as to application and effect in particular cases], and the ECHR does not require it” see *A v Secretary of State for the Home Department* §51; see further *R (Northumbrian Water Ltd) v WSRA* [2024] 4 WLR 82, CA, §§ 58-67). The relevant law in this area (the Equality Act 2010, Human Rights Act 1998, the Education Act 2002, the 2012 Regulations, as well as statutory guidance) can be complex, as can decision making when rights compete. But that does not mean the law is inaccessible or unforeseeable.

66. The analysis above in respect of indirect discrimination is repeated here, in the context of justification and proportionality: see in particular §60.

67. Sophie’s Article 14 read with Article 8 challenge at SFG §119 is vague and cursory. In any event, the challenge is unarguable.

- 67.1. It fails at the ‘analogous situation’ stage (SFG §119(c)). The Claimants suggest adolescent girls are in an analogous situation to adolescent boys; whereas the core logic of their entire claim is otherwise that adolescent girls are in a disanalogous situation as compared to adolescent boys.

- 67.2. The justification argument is unarguable for analogous reasons to above: see in particular §60.

Ground 6

68. Grounds 6 concerns the PSED which is said to have been breached. The PSED is a duty that must be exercised in substance. It is not a box-ticking exercise. So long as there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision: see *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 §26. What the PSED requires is highly context specific: *R (TZA) v Secondary School* [2023] EWHC 1722 (Admin) §§37-38, by reference to *R (AD) v Hackney LBC* [2019] EWHC 943 (Admin) §83. Pursuant to this, the PSED is discharged by decision-makers at the School having sincere, substantive and rigorous due regard to equalities duties – to ensure proper appreciation and consideration of the impacts of any decision on equality objectives. What matters is that due regard is in fact paid to the PSED: *R (TZA) v Secondary School* §45.
69. In the current context, the use of a case-by-case approach is not the final step in decision-making; instead, the final and most significant step in decision-making is when a particular decision is made on specific facts. It is at that point that the equalities implications of specific decisions are best investigated and considered. As the Claimants themselves recognise (SFG §120), ‘generalities’ are not enough.
70. The School has given extensive consideration to equality issues. There is a draft EIA regarding the approach itself – addressed below. However, the School has discharged the PSED by a range of methods: by decision-makers having due regard to these issues in their own thinking; in internal meetings; in course of receiving, considering and deciding how to act upon privileged legal advice (on which privilege is not waived). They have done so at least at 2 distinct points: including through regular legal advice on the equalities implications of specific decisions. Although privilege is not waived, it is inconceivable that advice in specific cases would ignore indirect discrimination, sex-related harassment, and protected-belief discrimination (cf. SFG §122) as relevant.

71. It is, rightly, not contended by the Claimants that an EIA is necessary to satisfy the PSED. Instead, the Claimants contend the draft EIA, begun but not completed, is irrational. That requires the document to be so unreasonable that no reasonable school could have produced them. The contention is unarguable.

71.1. **First**, it must be seen in context, as a draft EIA on the case-by-case approach *per se*. It is reasonable to find that a case-by-case approach *per se* has an “*expected neutral impact with a potential negative impact*” on protected characteristics. That is a conclusion reasonably open to the School, in its experience. In effect, all that is being said is that when using a case-by-case approach, all groups’ rights are taken into account and given appropriate weight; and it is expected that the School will achieve the right outcome in any given case. The foregoing does suggest a neutral impact.

71.2. **Second**, the Claimants’ argument relies on misquoting the EIA’s finding as merely one of “*neutral impact*”. What the draft EIA says is more measured: “*expected neutral impact with a potential negative impact*” (underlining added).

71.3. **Third**, the EIA is said to be irrational because [REDACTED]: WS H §58.

72. The School also considered and took into consideration Brighton and Hove City Council’s equality impact assessment in respect of the updated version of the Trans Inclusion Toolkit, given that the toolkit is a document that the School has regard to. That was also reasonable and contributed to discharging its own PSED.

APPLICATIONS

Expert evidence

73. Professor Phoenix’s expert report should not be given permission or relied upon for the following four reasons.

73.1. **First**, as the Claimants rightly state, “...*expert evidence is unusual in judicial review...*” [32]. This is not a case that justifies it. It is not a merits review, unlike the Employment Tribunal decision in **Darlington Nurses**. Expert evidence may be ‘reasonably required’ (per CPR 35.1) to resolve a merits decision. However, in judicial review it is trite that (*R (Blue Marine Foundation) v Secretary of State for Environment, Food and Rural Affairs* [2025] EWHC 734 (Admin) [2025] ACD 62 §34, per Lang J):

“...the focus is on the material that was reasonably available to the decision-maker when the decision was made. It may be admissible to explain technical matters needed to enable the Court to understand the reasons relied on in making the decision in the context of an irrationality challenge; or where it is alleged that the challenged decision was reached by a process which involved a serious and incontrovertible technical error which is not obvious to a lay person but can be demonstrated by a person with the relevant technical expertise”

73.2. **Second**, Professor Phoenix lacks expertise on the central issue before the Court: safeguarding children in schools. She is a criminologist. The case in which she previously gave evidence before the Divisional Court - *R(FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin) - involved prisoners, an area in which she has expertise. Her lack of familiarity with basic learning in the context of child safeguarding at school is shown by her post on X on 13 February 2026, presumably while she was instructed by the Claimants and in the process of preparing her report (underlining added) (**Second WS ZJ** §8):

“RESEARCH QUESTION: are there any studies or robust evidence about sexual harassment in schools? I am looking for things like numbers of young girls experiencing sexual harassment at school – not school aged girls experiencing sexual violence. HELP”.

73.3. **Third**, Professor Phoenix lacks independence (**Second WS ZJ** §§10-19). She is an activist who seeks to further the gender-critical cause she is ideologically committed to. There is no cogent consideration whatsoever in her report of the welfare needs of trans children. It is clear she does not approach the issues at hand from an expert sociological perspective, on how to best balance the interests of various potentially vulnerable individuals (let alone children in schools, on which she lacks expertise anyway). Even whilst she has been instructed in the present case, Professor Phoenix has continued to espouse gender-critical views on social media in an aggressive way. In a post on X on 26 March 2026, she dismisses contrary views in the following terms:

What prompted this mini-rant? I am nearly 62 years old and I have been fighting for women-only space and provision since 198-fucking-4. I am soooo bored of hearing men bitch, moan and complain. Get over it and get over yourselves.

73.4. **Fourth**, the substance of her report offers little assistance to the Court. The report in essence says, firstly, that girls are more likely to be sexually harassed than boys – which the Court does not need an expert to tell it. Her report then goes on to give generalised evidence on safeguarding in schools (which is anyway outside her expertise), absent material consideration of the safeguarding requirements of trans children; the upshot of which is that schools can never exercise educational judgment or their s.175(2) general management powers. This is a particularly unattractive conclusion given her own lack of expertise on child safeguarding in schools.

Expedition

74. On the assumption that permission is granted on some or all of the claim, the School objects to expedition. The longstanding case-by-case approach has been in use since [REDACTED]. There is no basis for expedition now. That is *a fortiori* since the claim brought challenges a general approach, rather than any specific decision; and more broadly lacks utility for the reasons set out at §§35-35 above. Further, it is difficult to see why the claim should be expedited when fresh KCSIE guidance is shortly going to be adopted (potentially in September) and the School will need to review it.

Anonymity and reporting restrictions

75. The School agrees to anonymity and associated reporting restrictions in respect of the Claimants, the Claimants' family, and the School.

CONCLUSION

76. For the reasons above permission should be refused.

77. The School seeks its costs of defending the claim, including in preparing these Summary Grounds of Defence and accompanying evidence. The School's costs are set out in the enclosed Schedule.

HUGH SOUTHEY KC

ANIRUDH MATHUR

Matrix

27 April 2026