

# Mermaids' Consultation

## Response:

# Draft Guidance for Schools and Colleges: Gender Questioning Children (2024)

### Context

This is Mermaids' organisational response to the Department for Education's [proposed guidance](#) on trans youth in schools and colleges, published in December 2023, for a consultation period ending March 12th 2024. We produced [this summary explainer](#) of the proposed guidance, and have supported a broader, cross-sector Supportive Schools Campaign opposing the guidance and [enabling others to respond](#).

We have used 'trans students' throughout to reference the group most likely to be impacted by this guidance, but recognise that there will be students making requests under this policy who will identify in different ways.

### Structure and overall guidance

**Question 11: Do you think the structure of the guidance is easy to follow?**

No.

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

The guidance's structure fails to comprehensively cover how to support trans young people, and it is an inaccessible document.

First, this guidance should be structured according to the needs of trans students who schools/colleges seek to support, including practical information on their legal and safeguarding duties to enable trans youth to learn in an inclusive environment. Instead, the guidance primarily outlines unevidenced, potentially unlawful, approaches to deny trans students' needs. The particular omission of the Equality Act 2010 protections for trans youth, and the related Public Sector Equality Duties of the provider, also render the guidance inaccurate and potentially unlawful.

Second, the lack of an Easy Read version of the guidance and consultation document runs counter to the Government's own advice on adhering to the Equality Act 2010 to enable certain disabled people to access the process. There is no youth-friendly version or explainer document, preventing substantive engagement by a core stakeholder group, namely students.

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

No.

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

The guidance is undeliverable, as it omits critical statutory requirements and best practice on supporting trans youth.

The guidance seeks to advise schools on their legal obligations, but by omitting core legal and statutory duties, the guidance itself may be unlawful, as well as encouraging decisions by schools which might be unlawful.

The Equality Act 2010 protects trans youth (regardless of age or possession of a Gender Recognition Certificate) from discrimination, and confers on schools a Public Sector Equality Duty to have 'due regard' to 'the need to eliminate discrimination' against trans students.

This is a critical factor for a school's decision-making. For example, a blanket policy to refuse social transition requests from primary students such as a name change, while at the same time allowing for cisgender students to use 'nicknames', could constitute discrimination. Blanket policies of exclusion, rather than case-by-case and justifiable/proportionate approaches, also contradict the Equality Act 2010.

The statutory Keeping Children Safe in Education (KCSIE) guidance states that being LGBTQ+ is not an inherent safeguarding concern, whereas this guidance posits that the 'impact on other pupils' of social transition should be a primary concern. Schools must meet their duties under KCSIE, including safeguarding and promoting the welfare of their pupils. This guidance, however, fails to include any information on how schools can fulfil their statutory duties to promote the welfare of trans pupils, who experience disproportionate levels of bullying and abuse.

The guidance fails to give accurate, actionable guidance on how schools assess harms when deciding to 'out' a student to their family. The presumption of disclosure of this information to parents is too broad and general, and it ignores important data protection and privacy rights of the trans student.

## Responding to requests and engaging parents

**Question 15: Does this section provide enough detail to help schools and colleges support children?**

No.

**Question 16: If you answered no, in which of the following areas do schools and colleges need further guidance to support a child?**

The guidance incorrectly recommends disclosure of a young person's requests to their parents in almost all circumstances. This blanket approach ignores important legal rights of the child, including on data protection and privacy. The Information Commissioner's Office (ICO) is clear that there is a default of privacy in relation to children's data, and that individual risk assessments must be performed before any such disclosure. Decisions must

be made case-by-case, informed by a young person's views, age, and safeguarding risks associated with disclosure. This is further supported in the KCSIE guidance, which is clear that breaching confidentiality without a safeguarding risk (and that being LGBTQ+ is not such a risk) is not appropriate as a generalised approach.

While we agree it is helpful to have supportive parents involved in a young trans person's journey, the balance of autonomy and choice should lean toward the young person. The UN Convention on the Rights of the Child establishes the right of children to have a say in decisions that affect them, and this is strengthened for those who are Gillick Competent and therefore able to make decisions without parental consent. Omitting these legal frameworks from the guidance further exposes schools to legal challenge.

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

No.

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

The primary consideration should be: 'what support does the young person need, and how can we enable this safely'.

The school must consider the needs and legal rights of trans students, including under the UNCRC which establishes the right of children to have a say in decisions that affect them. The views and wellbeing of the trans young person must be listed as consideration factors - especially when the young person is Gillick competent. Further, the presumption of disclosure to parents is too general, and ignores important data protection and privacy rights. The benefits of social transition are well-evidenced, whereas the 'watchful waiting' approach has been traditionally proposed by those seeking to deny trans youth's existence through endless delays. The Interim Cass Review is clear that "doing nothing" cannot be considered a neutral act". This stage should be removed.

The 'context of the request' section appears to ask teachers to diagnose the cause for a young person's gender diversity, based on erroneous, unevidenced factors such as social media, for which teachers are not equipped. Questions of context should instead consider what the trans young person's environment and needs are, to enable them to thrive as their authentic selves.

Factors on safeguarding and 'impact' fail to prioritise the trans students' best interests. KCSIE 2023, as well as guidance from leading children's charities like the NSPCC, Barnardos, and The Children's Society, all prioritise listening to and accepting pupils who come out as trans.

## Registration of name and sex

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

No.

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

Schools and colleges should record and use the additional information of someone's chosen name and their gender, as is common practice in most educational institutions regardless of gender identity (for example, nicknames used by cisgender students). The guidance also fails to recognise that a young person's legal name and/or gender may have been changed while in school or college (i.e. via Deed Poll or Gender Recognition Certificate in the older cohorts). It would be inaccurate to advise schools and colleges to refuse to update a student's information accordingly.

The guidance says the school must ensure 'that all relevant staff are aware of a gender questioning child's biological sex', but provides no useful advice on who these staff are, and how to approach this without breaching the child's privacy and data protection rights. Outing a trans young person to all staff could be incredibly harmful for that young person's continued engagement in education, and entirely unnecessary.

## Changing names

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

No.

**Question 22. If you answered no, in which of the following areas do schools and colleges need further guidance to a child's requests to change their name?**

Using a trans person's chosen name is a simple, powerful and often necessary factor to making school an inclusive, accessible space. This should not always require the consultation with a child's parents, and should be instead decided case-by-case. There is also potential for unlawful discrimination if trans students must go through a more burdensome process to change their known-as name than a cisgender person who uses a shorter nickname. Equally, even if all students must go through an unnecessarily multi-stage process for changing their name (as is proposed in this guidance), it will disproportionately negatively impact trans students who are protected under 'gender reassignment' in the Equality Act 2010 and thereby could constitute unlawful discrimination.

The guidance fails to give any practical advice to schools and colleges on young people who change their names legally through a Deed Poll, which is possible for under 16s with parental permission and for over 16s without parental permission. There should be practical guidance on how to ensure previous names are removed and replaced thoroughly and in line with privacy and data protection regulations.

## Pronouns

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

No.

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

The use of different pronouns can be an important step for some trans youth in feeling accepted, understood, and able to engage at school. The guidance states that pronoun change is to be "rare" and it enables staff/students to ignore these changes. Most egregiously, the guidance deems pronoun changes impossible for primary school children. Refusing to use new pronouns for a student could amount to unlawful discrimination if the trans student is treated less favourably because they are trans (e.g. consistently and intentionally being misgendered). Further, as identified by the Government's own lawyers, a blanket policy on primary students' inability to change their pronouns is likely to be unlawful discrimination. The guidance must therefore be amended to enable pronoun changes at all ages, and advise schools of the legal risks they face if they institute blanket policies to refuse pronoun changes.

The document should also include guidance on how to support an inclusive school environment free of transphobia and bullying, and to upskill staff and students to respect trans students' new names and pronouns. This would align with schools Public Sector Equality Duty to "foster good relations between persons who share a relevant protected characteristic and persons who do not share it." The EHRC's technical guidance for schools examples that repeated misgendering of a trans student could constitute direct discrimination, and schools should be advised on how to address deliberate misgendering and related discrimination.

## Single-sex spaces (toilets, changing rooms and showers and boarding and residential accommodation)

**Question 25: Does this section in pages 14 and a5 provide enough detail for schools and colleges to respond when a child who is questioning their gender makes a request to use facilities designated for the opposite sex?**

No.

**Q26: If you answered no, in which of the following areas do schools and colleges need further guidance?**

Trans students do not pose a safeguarding risk to cisgender students in toilets, showers and changing facilities that align with their gender. Rather, trans students are at a high risk of bullying and abuse if they are required to use the facilities of the opposite gender, and will

result in extreme distress by many trans youth. For example, trans youth face higher levels of urinary tract infections when they are unable to use a correctly-gendered toilet. The premise of this section of guidance (i.e. that trans pupils pose an inherent safety risk to other pupils) is harmful, unevidenced, and potentially unlawful.

The guidance omits the Equality Act 2010 protections for those with the protected characteristic of 'gender reassignment', which applies regardless of age or possession of a Gender Recognition Certificate. A government or school policy of a blanket ban (rather than a case-by-case and proportionate approach) is potentially unlawful. The guidance is inadequate in giving full advice to schools, and could therefore result in schools acting in contradiction to their duties under the Equality Act 2010. The options for an alternative arrangement require the pupil to experience 'distress', but there is no guidance on how schools should assess this, nor what alternative provisions schools can provide if they do not have single-stall options.

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

No. First, there is no clarity on how a school should decide that a student is in enough 'distress' to not be forced to use the facilities that don't align with their gender. We know almost all trans students would feel distress in this scenario, but that teachers are not trained/qualified to assess gender dysphoria-related distress. This will result in a postcode lottery of whether a trans student is lucky to have a supportive teacher or not, rather than based on their needs.

Second, there is no support provided for those schools or accommodation spaces which may not have separate, single-access facilities. The Education (Schools Premises) Regulations 1996 require them to accommodate 'special requests' related to toilet provision. If the school lacks a single-access space for toilets, changing rooms and residential accommodation, the guidance suggests the trans pupil must be forced to use the facilities that don't align with their gender. This could amount to discrimination, and is also impractical. For example, if a trans girl transitioned 5 years ago and has been comfortably using the girls' toilets, is she now expected to use the boy's toilet? Given the higher risk of violence faced by trans people, this scenario would run contrary to the safeguarding needs of the trans student.

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

No.

**Question 29: If you answered no, in which of the following areas do schools and colleges need further guidance?**

There is no clarity on how a school should decide that a student is in enough 'distress' to not be forced to stay in accommodation that doesn't align with their gender. We know almost all trans students would feel distress in this scenario, but that teachers are not trained/qualified to assess gender dysphoria-related distress. This will result in a postcode lottery of whether a trans student is lucky to have a supportive teacher or not, rather than based on their needs.

There is insufficient guidance on what schools should do in situations where a separate room (as an alternative) is not financially or logistically possible. Forcing a trans student to stay in accommodation of a different gender (e.g. a trans boy staying in a girls' dorm) is inappropriate, harmful for the trans student, and likely to result in trans youth being unable to access education or activities requiring overnight stay.

## Uniform

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

No.

**Question 31: If you answered no, in which of the following areas do schools and colleges need further guidance to respond to a gender-questioning child, who makes a request in relation to uniform?**

There needs to be accurate guidance to schools on the implications of the Equality Act 2010 and gender reassignment protections for trans youth. A sex-segregated uniform policy which includes a blanket refusal for trans pupils to wear the uniform of a gender different to their birth-assigned gender (e.g. a trans boy wearing the boy's uniform) could be unlawfully discriminatory, given the blanket policy would disproportionately, and negatively, impact trans students. Additionally, requiring additional barriers for trans students to wear a different uniform whilst not requiring cisgender pupils to do the same could constitute discrimination. Failure of the guidance to acknowledge the potential for decisions on uniform to unlawfully discriminate against trans pupils may itself make the guidance unlawful, and heightens the likelihood that schools, in following the guidance, will unlawfully discriminate against trans pupils in making their decisions.

Instead of reinforcing the need for gender-specific uniforms, the guidance should encourage schools to enable students of any gender to wear different variations of the uniform. This not only reduces gendered and sexist stereotypes around clothing choices, but enables more inclusive policies for trans students which, in turn, enables trans students to access education.

There is no justification given for the specific refusal for trans students to wear swimwear aligning with their gender. This will result in trans youth being unable to engage in swim-related physical education.

## Physical education and sport

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

No.

**Question 33: If you answered no, in which of the following areas do schools and colleges need further guidance to support children taking part in PE or sport?**

We know that physical exercise is important for a young person's development and mental health, and that there are benefits to some sports being gender-specific - these should be trans-inclusive, however. Schools need further guidance on how to develop an inclusive approach to sport for all students, including trans students - whereas this guidance recommends exclusion. We know that trans students face many barriers to participating in physical education, including exclusion from grassroots, non-competitive sport and PE class when they are unable to play with their peers and/or forced to play with a team of the opposite gender (e.g. a trans boy unable to join the boy's team). The guidance's exclusionary approach contradicts the Public Sector Equality Duty of the school to 'advance equality of opportunity'. Decisions should be made on a case-by-case basis, and from a point of inclusion.

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

No.

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

The guidance should include advice on how to ensure PE and sport can be inclusive and accessible for all students, including those with protected characteristics under the Equality Act 2010 - in this case, trans students who have the protected characteristic of 'gender reassignment'.

The guidance should include more evidence-based nuance on how to make PE or sport fairer and safer, as sex assignment at birth is an inaccurate and inexact determinant of fairness or safety. Each sport is different, and technique, skill and effective training can have an impact on the fairness and safety of sport. The guidance erroneously suggests that people assigned male at birth will always be better, faster and stronger than those assigned female at birth, which remains unevicenced in the particular context of trans people. Additionally, the guidance gives no advice on whether the UK Government expects different treatment for those students who have begun medical transition (e.g. puberty blockers or gender-affirming hormones), if their logic is dependent on pubertal changes.

## Single-sex schools

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

No.

**Question 37: If you answered no, which of the following areas do schools and colleges need further guidance to support effective decisions on the admission of children who are questioning their gender?**

The guidance should be clearer that single-sex schools can choose to admit trans students without losing their single-sex status. It must also be clearer that schools should not refuse admission to a student on the basis of their being trans, nor remove a student on this basis. There should also be practical guidance on how to create an inclusive, supportive environment for a trans student who might be attending a single-sex school that doesn't align with their gender (e.g. a trans boy attending an all-girls' school), including options for alternative uniforms and facilities' access.

## Public Sector Equality Duty

**Question 40: Do you have any comments regarding the potential impact of the guidance on those who share a protected characteristic under the Equality Act 2010, whether negative or positive? How could any adverse impact be reduced and are there any other ways we could advance equality of opportunity or foster good relations between those who share a protected characteristic and those who do not?**

If published in its current form, the guidance itself will likely be in breach of the Public Sector Equality Duty (PSED) and be advising schools to do the same. The Government has failed to meet its own recent PSED guidance, which requires that public bodies "take care to undertake their assessment by reference to the protected characteristics set out in the act". In this case, the Government must have "due regard" to "the need to eliminate discrimination" for trans students (under the protected characteristic of 'gender reassignment') and "the need to foster good relations" between trans and cis pupils. The Government has failed to meet PSED and its most recent guidance by failing to even identify the protected group that guidance is about, i.e. trans students covered by the protected characteristic of 'gender reassignment'. The guidance, in fact, seeks to deny the existence of trans youth by referring to being trans as an 'ideology' or 'contested belief', and refusing to refer to any students as 'trans'.

There is no published Equality Impact Assessment, the Government has refused to meet with any LGBT+ organisations prior to the guidance's publication, and the guidance itself fails to mention or mitigate the need to eliminate discrimination against those with the protected characteristic of gender reassignment - i.e. trans pupils. In fact, the guidance actively advises practices that are highly likely to be unlawful and discriminatory against trans pupils.

Adverse impact could be reduced by acknowledging the existence of trans students, outlining their legal protections, and reframing the entire guidance to centre on the ways schools and colleges can and should be trans-inclusive.

## General

**Question 41: Do you have any comments on the overall approach of the guidance?**

Yes. Trans students, like all young people, deserve a supportive, inclusive school environment where they can learn, make friends, play, and grow. Instead, this guidance seeks to stoke fear, misinformation and discrimination against trans young people. It fails to provide the practical, inclusive and informed advice which schools have needed for many years, nor to reflect their existing statutory and legal obligations accurately.

This guidance has already caused extreme distress for the trans youth and their families who we work with, and has led to some schools preemptively instituting harmful, discriminatory policies and practices which violate the basic rights and needs of trans children and young people. If published and enforced in its current form, this guidance will leave schools open to a myriad of legal challenges. More importantly, it will directly harm a generation of trans young people whose government has encouraged active exclusion and discrimination against them without cause.

The overall approach of this guidance is therefore unsalvageable and should be redrafted in consultation with trans young people, their families, and professionals with experience in supporting them. The approach must instead advise schools on best practice on how to support trans young people and their families, and include accurate information on their legal and statutory duties such as PSED, KCSIE and the Equality Act 2010.