

Equality Law and Statutory Schools Guidance

A basic guide for parents

Toilets and Changing Rooms

“Do I have to accept that my daughter must share toilets and changing rooms with male classmates?”

No. Separate facilities such as toilets and changing-rooms are lawful under the Equality Act 2010:

Separate Services for the Sexes

Equality Act 2010 Schedule 3, Part 7, Section 26

(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if—

(a) a joint service for persons of both sexes would be less effective, and

(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if—

(a) a joint service for persons of both sexes would be less effective,

(b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and

(c) the limited provision is a proportionate means of achieving a legitimate aim.

Equality Act 2010 Schedule 3, Part 7, Section 27

- (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if—
- (a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and
 - (b) the limited provision is a proportionate means of achieving a legitimate aim.
- (2) The condition is that only persons of that sex have need of the service.
- (3) The condition is that—
- (a) the service is also provided jointly for persons of both sexes, and
 - (b) the service would be insufficiently effective were it only to be provided jointly.
- (4) The condition is that—
- (a) a joint service for persons of both sexes would be less effective, and
 - (b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.
- (5) The condition is that the service is provided at a place which is, or is part of—
- (a) a hospital, or
 - (b) another establishment for persons requiring special care, supervision or attention.
- (6) The condition is that—
- (a) the service is provided for, or is likely to be used by, two or more persons at the same time, and
 - (b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

Equality Act 2010 Schedule 3, Part 7, Section 28

- (1) A person does not contravene Section 29 so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph
- (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—

- (a) the provision of separate services for persons of each sex;
- (b) the provision of separate services differently for persons of each sex;
- (c) the provision of a service only to persons of one sex.

Equality Act 2010 Schedule 3, Part 7, Section 30

If a service is generally provided only for persons who share a protected characteristic, a person (A) who normally provides the service for persons who share that characteristic does not contravene Section 29(1) or (2)

- (a) by insisting on providing the service in the way A normally provides it, or
- (b) if A reasonably thinks it is impracticable to provide the service to persons who do not share that characteristic, by refusing to provide the service.

<https://www.legislation.gov.uk/ukpga/2010/15/schedule/3>

EHRC Technical Guidance for Schools

3.20 The way in which school facilities are provided can lead to discrimination. Example: A school fails to provide appropriate changing facilities for a transsexual pupil and insists that the pupil uses the boys' changing room even though she is now living as a girl. This could be indirect gender reassignment discrimination unless it can be objectively justified. **A suitable alternative might be to allow the pupil to use private changing facilities, such as the staff changing room or another suitable space.**

<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-england>

Schools must comply with School Premises (England) Regulations (2012). Department for Education guidance is clear on this:

DfE Advice on standards for school premises (2015)

ISS Regulation 23A — (1) Subject to sub-paragraph (2), the standard in this paragraph is met if the proprietor ensures that— a) suitable toilet and washing facilities are provided for the sole use of pupils; b) separate toilet facilities for boys and girls aged 8 years or over are

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; and c) suitable changing accommodation and showers are provided for pupils aged 11 years or over at the start of the school year who receive physical education.

SPRs Regulation 4 — (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.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/410294/Advice_on_standards_for_school_premises.pdf

DfE Gender Separation in Mixed Schools (2018)

It is permissible for toilet and boarding accommodation facilities to be separate as they are captured under existing statutory exceptions.

Separate toilet and washing facilities must be provided for boys and girls aged 8 years and over pursuant to Regulation 4 of the School Premises (England) Regulations 2012, which falls within the exemption provided for in Schedule 22 of the Equality Act 2010.

With regards to boarding accommodation, Schedule 23 of the Equality Act 2010 allows for separation by sex providing the same standard of accommodation is provided for both boys and girls.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719398/Gender-separation-guidance.pdf

For schools in Wales, school premises regulations 1999 apply:

The Education (School Premises) Regulations 1999

(5) (a) Except as provided in regulation 4(3), washrooms for male and female pupils who have attained the age of 8 years shall be separate.

<https://www.legislation.gov.uk/uksi/1999/2/regulation/3/made>

Single Sex Schools

“My daughter goes to an all-girls school but we have been told that male pupils will be admitted if they identify as girls. Can I complain?”

The Equality Act specifically protects single-sex schools:

Equality Act 2010 SCHEDULE 11 Single-Sex Schools

(2) A single-sex school is a school which—

(a) admits pupils of one sex only, or

(b) on the basis of the assumption in sub-paragraph (3), would be taken to admit pupils of one sex only.

(3) That assumption is that pupils of the opposite sex are to be disregarded if—

(a) their admission to the school is exceptional, or

(b) their numbers are comparatively small and their admission is confined to particular courses or classes.

<https://www.legislation.gov.uk/ukpga/2010/15/schedule/11/part/1/crossheading/admission-to-singlesex-schools>

EHRC Technical Guidance for Schools

2.13 For single-sex schools, there are exceptions for admissions to enable them to restrict admission to pupils of only one sex.

2.35 Single-sex schools are allowed to admit pupils of only one sex without this being unlawful sex discrimination. In this context, a single-sex school includes those schools that admit pupils of the opposite sex, but the admission of whom to the school is exceptional or whose numbers are comparatively small and their admission is confined to particular courses or classes.

<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-england>

Sport

“My teenage daughter is now forced to compete against boys in school athletics and thinks this is really unfair but she is being told that they are really girls. What can I do?”

Separating sports by sex is lawful under the Equality Act 2010 to ensure fairness and safety in sports for girls:

Equality Act 2010 Section 195 Sport

(1) A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.

(2) A person does not contravene section 29, 33, 34 or 35, so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity—

(a) fair competition, or

(b) the safety of competitors.

(4) In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.

<https://www.legislation.gov.uk/ukpga/2010/15/section/195>

By ‘transsexual person’ the law refers to any pupil protected under the protected characteristic ‘gender reassignment’:

Protected Characteristic ‘Gender Reassignment’

(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for

the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

<http://www.legislation.gov.uk/ukpga/2010/15/section/7>

Female pupils are protected as 'girls' under the protected characteristic 'sex':

Equality Act 2010 Protected Characteristic 'Sex'

In relation to the protected characteristic of sex—

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.

<http://www.legislation.gov.uk/ukpga/2010/15/section/11>

The EHRC has clarified that for the purposes of sex discrimination a boy who identifies as a girl is still legally male, as no person under the age of eighteen can hold a Gender Recognition Certificate:

EHRC: Our statement on sex and gender reassignment: legal protections and language

"...a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions."

<https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

The Gender Recognition Act 2004 clarifies that it is lawful to exclude even a person who holds a Gender Recognition Certificate from single-sex sports in order to uphold fairness of competition and the safety of all participants.

Gender Recognition Act (2004) Section 19 Sport

(1) A body responsible for regulating the participation of persons as competitors in an event or events involving a gender-affected sport may, if subsection (2) is satisfied, prohibit or restrict the participation as competitors in the event or events of persons whose gender has become the acquired gender under this Act.

(2) This subsection is satisfied if the prohibition or restriction is necessary to secure—

(a) fair competition, or

(b) the safety of competitors,

at the event or events.

(3) “Sport” means a sport, game or other activity of a competitive nature.

(4) A sport is a gender-affected sport if the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport.

<http://www.legislation.gov.uk/ukpga/2004/7/section/19>

Residential Accommodation

“My daughter is going on a school trip. The school hasn’t told us anything, but there is a rumour that the male pupil in her year who identifies as a girl will share the girls’ dormitory. I’m not happy about my daughter sharing a bedroom with someone of the opposite sex. They’re teenagers, anything could happen.”

Single-sex accommodation is lawful under the Equality Act 2010:

Equality Act 2010 SCHEDULE 23 Communal Accommodation

3(1)A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to—

(a)the admission of persons to communal accommodation;

(b)the provision of a benefit, facility or service linked to the accommodation.

(5)Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex.

(6)Communal accommodation may include—

(a)shared sleeping accommodation for men and for women;

(b)ordinary sleeping accommodation;

(c)residential accommodation all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.

<https://www.legislation.gov.uk/ukpga/2010/15/schedule/23>

Safeguarding Girls

"I'm really worried that my daughter will have no rights to privacy in school because they are making everything 'gender neutral.' I think this puts her at risk, she's very shy and at that awkward age where she's embarrassed about her developing body. She wouldn't have the confidence to complain. What can I do?"

Existing guidance for schools may be breached if schools do not consider the privacy and safety of girls in formulating new policies. Sexual harassment is a risk factor and schools must also consider that there will be a percentage of girls who have experienced past sexual abuse even if this has not been disclosed. It can be argued that mixed sex facilities and accommodation constitute an intimidating, degrading situation and a sexualised environment for girls.

DfE: Sexual violence and sexual harassment between children in schools and colleges

"For the purpose of this advice, when referring to sexual harassment we mean 'unwanted conduct of a sexual nature' that can occur online and offline. When we reference sexual harassment, we do so in the context of child on child sexual harassment. Sexual harassment is likely to: violate a child's dignity, and/or make them feel intimidated, degraded or humiliated and/or create a hostile, offensive or sexualised environment."

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719902/Sexual_violence_and_sexual_harassment_between_children_in_schools_and_colleges.pdf

Mixed-sex facilities, or a situation where girls would be excluded from their own facilities if they felt uncomfortable about sharing them with male classmates, would be incompatible with statutory DfE Relationships and Sex Education guidance on positive action to safeguard girls from sexual harassment, and on teaching children about boundaries, privacy and consent, keeping secrets related to being safe, rights over their own bodies, accurate vocabulary to report abuse and having the confidence to do so.

DfE: Relationships and Sex Education

"Provisions within the Equality Act allow schools and colleges to take positive action, where it can be shown that it is proportionate, to deal with particular disadvantages affecting one group. A school or college, could, for example, consider taking positive action to support girls if there was evidence they were being disproportionately subjected to sexual violence or sexual harassment."

"Through Relationships Education (and RSE), schools should teach pupils the knowledge they need to recognise and to report abuse, including emotional, physical and sexual abuse. In primary schools, this can be delivered by focusing on boundaries and privacy, ensuring young people understand that they have rights over their own bodies."

Pupils should know:

- what sorts of boundaries are appropriate in friendships with peers and others
- about the concept of privacy and the implications of it for both children and adults; including that it is not always right to keep secrets if they relate to being safe.
- that each person's body belongs to them, and the differences between appropriate and inappropriate or unsafe physical, and other, contact.
- how to report concerns or abuse, and the vocabulary and confidence needed to do so.

The guidance also specifies that all pupils should understand: "the characteristics of positive and healthy friendships including: trust, respect, honesty, kindness, generosity, boundaries, privacy, consent."

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805781/Relationships Education Relationships and Sex Education RS E and Health Education.pdf?fbclid=IwAR0-ldqe2WllvL4Pt2a2k8HTDxVE0zJH3daoQzV7HVIv1OefV86IPBENgZA](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805781/Relationships_Education_Relationships_and_Sex_Education_RS_E_and_Health_Education.pdf?fbclid=IwAR0-ldqe2WllvL4Pt2a2k8HTDxVE0zJH3daoQzV7HVIv1OefV86IPBENgZA)

If schools do not consider the impact on girls in formulating new policies, they may be in breach of the Equality and Human Rights Commission guidance on Public Sector Equality Duty and the school's obligation to show 'due regard' to all protected characteristics under the Equality Act 2010:

EHRC: Public Sector Equality Duty for Schools

For a school, having 'due regard' means:

- When making a decision or taking an action

a school must assess whether it may have

implications for people with particular protected characteristics.

- It should consider equality implications before and at the time that it develops policy and takes decisions; not as an afterthought, and it needs to keep them under review.

- It should consciously consider each aspect of the duty (having due regard to the need to eliminate discrimination is not the same thing as having due regard to the need to advance equality of opportunity).

- It should assess the risk and extent of any adverse impact that might result from a policy or decision and the ways in which the risk may be eliminated before the adoption of a proposed policy.

- The equality duty has to be integrated into the carrying out of a school's functions. The analysis necessary to comply with the duty should be carried out rigorously and with an open mind – it is not a question of just ticking boxes.

<https://www.equalityhumanrights.com/en/publication-download/public-sector-equality-duty-guidance-schools-england>

Social Transition

“I’ve just found out that my daughter’s school has been calling her by a boy’s name and letting her use the boys’ facilities for about a year. They never told us. My daughter is 14 and extremely vulnerable, she has suffered bullying in the past and she is very suggestible. I am so worried, how could the school do this without letting us know?”

If a school ‘affirms’ a girl as a boy behind the parents’ backs they may be in breach of statutory government guidance Keeping Children Safe in Education which emphasizes the duty of a school to work together with parents. Keeping secrets from parents on a completely new approach with such significant implications for a child would deny parents the right to full participation in decisions affecting their child, as the primary care-givers with ultimate responsibility for the child’s welfare.

Working Together to Safeguard Children

“Everyone who works with children has a responsibility for keeping them safe. No single practitioner can have a full picture of a child’s needs and circumstances and, if children and families are to receive the right help at the right time, everyone who comes into contact with them has a role to play in identifying concerns, sharing information and taking prompt action.”

“All practitioners should follow the principles of the Children Acts 1989 and 2004 - that state that the welfare of children is paramount and that they are best looked after within their families, with their parents playing a full part in their lives, unless compulsory intervention in family life is necessary.”

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779401/Working Together to Safeguard-Children.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779401/Working_Together_to_Safeguard-Children.pdf)