

**Department for Education**  
**Guidance for Schools and Colleges: Gender Questioning**  
**Children**  
**12 March 2024**

1. The NASUWT welcomes the opportunity to contribute to the Department for Education (DfE) consultation on its draft guidance for schools and colleges on supporting gender questioning children.
2. The NASUWT is the teachers' union.
3. This submission to the consultation exercise sets out:
  - the extent of demand within schools and colleges for advice and guidance in this important aspect of their duties in respect of the safety and wellbeing of all children and young people for whom they are responsible;
  - the core tests that should be applied to any official guidance and advice published in this field;
  - the extent to which the draft guidance meets or fails to meet these tests; and
  - our recommended next steps.
4. We note at the outset that the consultation focuses on the ways in which schools and colleges might be expected to provide support and advice in cases involving individual children. The draft guidance does not consider how children generally are taught about issues of gender identity and we further note that these matters will be addressed through separate work to

update the statutory guidance on Relationships, Sex and Health Education (RSHE) in due course.

5. The comments below take account of this context but we would note that the expectations, beliefs and actions of schools and colleges in respect of the circumstances of individual children and their families cannot be inconsistent with the principles that underpin curriculum provision. There is, therefore, a clear relationship between guidance on cases involving individual children and general curricular advice that we would expect to inform and guide the development of policy in both respects.

### **The demand and need for advice and guidance**

6. It is our experience that an increasing number of children are reporting to their schools and colleges that they have a gender identity that differs from that of their assigned birth sex, or who are questioning the validity of their assigned birth sex. In addition, schools and colleges work with intersex children who also may not identify with the sex that was assigned to them at birth.
7. Every child has a right to be educated in an environment that is safe, respectful and inclusive, that takes full account of their circumstances and needs and that ensures that they are not subject to less favourable treatment on any grounds.<sup>1</sup> These rights apply equally and fully to transgender, intersex and gender questioning children.
8. A core dimension of the mission of schools and colleges is to ensure that their policies, practices and ethos give meaningful effect to these rights. Schools and colleges also have well-established legal duties to all pupils and students that reflect such rights and recognise the importance of ensuring that these duties are discharged purposefully and pro-actively.

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<sup>1</sup> United Nations (1989). *Convention on the Rights of the Child*. Available at: (<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>), accessed on 08.02.24.

9. It should be acknowledged that in seeking to meet these obligations in respect of transgender, intersex and gender questioning children, schools and colleges have found the absence to date of clear and practical official advice profoundly unhelpful. As the ministerial foreword to the draft guidance recognises, in seeking to act appropriately and in line with their ethical, educational and legal duties, schools and colleges can often encounter sharply divergent assertions about the ways in which the circumstances and needs of these children can best be addressed. These views can be expressed by rights-holders, such as children and their parents, as well as by others beyond the school or college. Schools and colleges have found navigating these matters extremely challenging in many instances
  
10. As providers of statutory, publicly-funded entitlements to education, schools and colleges are, in turn, entitled to advice and guidance from the government in how it expects them to meet their obligations, particularly in respect of sensitive and complex issues. Schools and colleges need to be clear that they are adopting lawful policies and practices that are appropriate in the view of the government and that they will have the full and active support of ministers and their departments in doing so.
  
11. It is a matter of fact that the absence to date of such advice, guidance and support in respect of transgender, intersex and gender questioning children has contributed significantly to the challenges schools and colleges face in meeting their ethical, educational and legal obligations.
  
12. Notwithstanding the delays in the publication of this draft guidance for schools and colleges, the NASUWT is encouraged that the DfE has now published draft guidance for public consultation.
  
13. However, it is regrettable that the government did not take the opportunity to engage more fully with us and with other relevant workforce stakeholders on the text of the draft before it was published, despite clear offers made to it to do so. This may have resulted in draft guidance that

would have addressed many of the questions and concerns that have been raised about the document released by the DfE. It would have ensured that more account could have been taken in the development of the published draft of the experiences of the leaders and teachers that we represent and who are tasked by the government with supporting the children they educate. It would also have assisted the engagement of the workforce in the consultation on a document that seeks to guide their practice and the policies of the settings in which they work.

### **Guidance for school and colleges: tests of appropriateness**

14. Notwithstanding these observations, in assessing the published draft guidance, we have identified three critical, distinct but related tests that it must meet in order to be deemed as sufficiently fit for purpose for use by staff in schools and colleges.

- **Legality**

15. It is essential that official Government guidance does not create unacceptable risks that in following it, schools and colleges may act in ways that are contrary to the law. We regret that the Government does not currently consider that statutory guidance is appropriate. Nevertheless, it should be recognised that non-statutory guidance, as in this instance, does not remove or mediate the statutory and regulatory frameworks within which schools and colleges are required to operate. Importantly, following non-statutory guidance does not provide protection from potentially successful legal action against schools, colleges or their staff by or on behalf of those who believe that their statutory or regulatory rights have been breached.

16. It is understood that the relative absence of case law, as in the case in respect of the matters addressed by this draft guidance, can create difficulties in defining with precision the potential legal liabilities that may arise if particular policies or practices are adopted. However, it is well established in the development of official guidance, that such difficulties do

not prevent the government from using its best endeavours to draw on authoritative and credible legal sources to provide the highest possible level of confidence that such guidance is consistent with legal requirements. The government must be able to demonstrate that it has developed guidance on this basis if its intended users are to have sufficient confidence in its contents as a whole, even in cases where concerns have been identified relating only to some of this content.

17. While schools and colleges are subject to a wide range of legal provisions, in the context of this guidance, particular attention should be focused on the implications of the Equality Act 2010, the Public Sector Equality Duty and those legal provisions that relate to safeguarding, child protection, data protection and prioritising the needs and interests of the individual child.

- **Practicality and factual accuracy**

18. To be effective, guidance should reflect the realities of the circumstances with which schools, colleges and their staff must engage, as well as the realities of the lives of the children and families who are the subject of its advice. It should address issues that have been identified as requiring judgements to be made and support informed and fact-based decision-making. Identifiable failures to reflect these realities will diminish the propensity of schools and colleges to view the guidance as credible and their confidence in implementing its advice.

19. Guidance must take fully into account the resource constraints within which schools and colleges operate, including those related to the substantial workload pressures that teachers and leaders continue to face. We believe that the draft guidance should better recognise the limited access schools and colleges have to external sources of advice and expertise currently and the barriers that teachers and leaders face in undertaking training and professional development in areas addressed in such guidance.

- **Coherence with ‘best interests’ approaches to child wellbeing**

20. Further to the matters on legality described above, the need for schools and colleges to act in the best interests of the child underpins some of the most important legal obligations placed on them, particularly those related to child protection and safeguarding. However, a best interests approach is also central to the guiding ethos of schools and colleges, underpinned by principles such as those set out in Article 3 of the United Nations Conventions on the Rights of the Child (UNCRC).<sup>2</sup> This principle is also a core element of the United Nations Sustainable Development Goals which apply to the development of policy in the UK.<sup>3</sup> Such considerations are also incorporated into expectations of professional conduct through, for example, the provisions in statutory guidance on safeguarding, underpinned by the Teachers’ Standards and the regulatory powers of the Teaching Regulation Agency (TRA).<sup>4</sup>

21. Schools and colleges are, therefore, unlikely to regard as acceptable, or be inclined to take full account of, guidance which appears to conflict with their duty and commitment to make judgements and act in the best interests of individual children. These considerations are particularly engaged for schools, colleges and their staff in matters relating to the physical and psychological wellbeing of children. As an absolute minimum standard, schools and colleges would resist following any provisions in guidance that would appear to them to cause a reasonable risk of harm to individual children.

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<sup>2</sup> *ibid.*

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights (2020). *Child Rights and the 2030 Agenda for Sustainable Development*. Available at: ([https://sustainabledevelopment.un.org/content/documents/26130Child\\_Rights\\_2030\\_Agenda\\_HLPF\\_2020.pdf](https://sustainabledevelopment.un.org/content/documents/26130Child_Rights_2030_Agenda_HLPF_2020.pdf)), accessed on 11.03.24.

<sup>4</sup> Department for Education (DfE) (2023). *Keeping Children Safe in Education. Part one: Information for all school and college staff*. Available at: ([https://assets.publishing.service.gov.uk/media/64f0a84da78c5f000dc6f3b4/Keeping\\_children\\_safe\\_in\\_education\\_2023\\_-\\_part\\_one.pdf](https://assets.publishing.service.gov.uk/media/64f0a84da78c5f000dc6f3b4/Keeping_children_safe_in_education_2023_-_part_one.pdf)), accessed on 08.02.24.; DfE (2021), *Teachers’ Standards: Guidance for school leaders, school staff and governing bodies*. Available at: ([https://assets.publishing.service.gov.uk/media/61b73d6c8fa8f50384489c9a/Teachers\\_Standards\\_Dec\\_2021.pdf](https://assets.publishing.service.gov.uk/media/61b73d6c8fa8f50384489c9a/Teachers_Standards_Dec_2021.pdf)), accessed on 07.02.24.

## Assessment of the draft guidance against these tests

22. In light of the tests described above, our assessment is that they are not met satisfactorily by the draft guidance in its current form. The reasons for this assessment are summarised below.

- **Schools and colleges could not be confident that the guidance is consistent with some of their key legal duties.**

23. There would be genuine grounds for schools and colleges to lack confidence that the draft guidance provides credible advice on supporting transgender, intersex and gender questioning children and engaging with their families in ways that are consistent with their legal duties.

24. The reporting of leaked legal advice from government lawyers on an earlier iteration of the draft guidance has caused widespread and understandable concern across the sector in respect of the potential unlawfulness of the advice it contains.<sup>5</sup> These concerns were highlighted by the response of the government spokesperson to this reporting that appeared to accept that such advice had been given and, in large part, ignored.

25. It is likely to remain the case that trust in the legality of the draft guidance will remain low until such time as the government can provide more convincing evidence that it reflects the best possible understanding of the legal position. That this is the case is entirely understandable given that the liabilities for any breaches of legal duties in this respect rests with schools and colleges rather than with ministers and the government.

26. Without providing an exhaustive legal assessment of the draft guidance, which would be beyond the scope of this submission, it is a relatively straightforward matter to identify important ways in which the information it contains is questionable and on which schools and colleges would be ill-advised to rely.

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<sup>5</sup> Moss, L.; Parry, J.; and Zeffman, H. (2023). 'Lawyers told ministers schools trans guidance was 'high risk''. *BBC News* (22 December). Available at: (<https://www.bbc.co.uk/news/uk-67794387>), accessed on 08.02.24.

27. For example, the draft guidance fails to reflect appropriately key provisions of the Equality Act. The Act states that a person, including a child, has the protected characteristic of gender reassignment if ‘the person is proposing to undergo, is undergoing or has undergone a process of reassigning the person’s sex by changing physiological or other attributes of sex.’<sup>6</sup> It should be noted that protected characteristic status applies in circumstances where an individual has not been subject to any medical intervention nor has no plans to access such interventions; they are regarded under the Act as having the protected characteristic of gender reassignment ‘by changing...other attributes of sex.’ It should be noted that the correctness of this interpretation is confirmed by the DfE’s own guidance for schools on the Equality Act.<sup>7</sup>

28. The legal implications of this provision in respect of transgender, intersex or gender questioning children were, until September 2023, set out in the Equality and Human Rights Commission (EHRC) publication, ‘Technical guidance for schools.’<sup>8</sup> The relevant content was removed without explanation from the most recent edition of the guidance. We are aware of no legal authority that has identified a credible reason why this advice should have been removed and the EHRC has yet to set out its reasoning in this regard.

29. The content of the technical guidance was unequivocal in the context of the implications of the gender reassignment provisions in the Equality Act. Paragraph 3.35 contained the following advice in the form of a frequently-asked question:

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<sup>6</sup> Equality Act 2010, s 7(1).

<sup>7</sup> DfE (2014). *The Equality Act 2010 and schools: Departmental advice for school leaders, school staff, governing bodies and local authorities*. Available at: ([https://assets.publishing.service.gov.uk/media/5a7e3237ed915d74e33f0ac9/Equality\\_Act\\_Advice\\_Final.pdf](https://assets.publishing.service.gov.uk/media/5a7e3237ed915d74e33f0ac9/Equality_Act_Advice_Final.pdf)), accessed on 12.02.24.

<sup>8</sup> Equality and Human Rights Commission (2014). *Technical guidance for schools*. Available at: ([https://www.equalityhumanrights.com/sites/default/files/technical\\_guidance\\_for\\_schools\\_engl\\_and.pdf](https://www.equalityhumanrights.com/sites/default/files/technical_guidance_for_schools_engl_and.pdf)), accessed on 08.02.24.



‘Q: A previously female pupil has started to live as a boy and has adopted a male name. Does the school have to use this name and refer to the pupil as a boy?’

‘A: Not using the pupil’s chosen name merely because the pupil has changed gender would be direct gender reassignment discrimination. Not referring to this pupil as a boy would also result in direct gender reassignment discrimination.’

30. It is clear that the 2014 edition of the EHRC guidance reflects the text of the relevant provision of the Equality Act accurately in that pupils in the circumstances it sets out would need to be considered as possessing a protected characteristic and should be treated accordingly.
31. However, this important consideration is absent from the DfE’s draft guidance. The draft does not in any effective way draw attention to the fact that schools and colleges would need to understand the implications for them of the protected characteristic status of such children. Instead, much of the advice set out in the guidance is based on the premise that schools and colleges have a discretion unfettered by the provisions of the Equality Act to decide how children in these circumstances should be supported and treated. It is difficult to understand how advice provided on this basis could withstand any serious legal scrutiny.
32. Further, a failure to recognise the protected characteristic-related dimensions relevant to transgender, intersex and gender questioning children would not be consistent with schools’ and colleges’ duties under the Public Sector Equality Duty (PSED).<sup>9</sup> Effective compliance with the PSED requires identification of those who possess a protected characteristic under the Equality Act. Non-recognition of those who have a protected characteristic by schools and colleges in their policy and practice provides an insecure basis on which to ensure compliance with the PSED.

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<sup>9</sup> Equality Act (2010) s.149

33. Additional concerns about the legal risks that might arise for schools and colleges applying the draft guidance can be identified in respect of the safeguarding requirements to which they are subject. These requirements are set out in statutory guidance, 'Keeping Children Safe in Education' (KCSIE), which describes practice and procedures to which every school and college must have regard.<sup>10</sup>
34. It is not clear how key aspects of KCSIE are consistent with the draft guidance. In particular, KCSIE makes clear that transgender, intersex or gender questioning status is not, of itself, grounds for safeguarding concerns in respect of individual children. However, it confirms that such status can create risks in respect of bullying at school and abuse at home. This creates important safeguarding thresholds to which schools must have regard in respect of informing parents about matters pertaining to their children, particularly if there are grounds for concern that informing family members of information shared with them by children could result in a risk of harm.
35. In this respect, the stress in the draft guidance that circumstances in which decisions not to disclose information shared by children with their parents would only arise in 'exceptionally rare' circumstances does not describe the full extent of considerations that KCSIE requires them to make in such cases. A decision whether or not to share such information is one that must be based on an objective consideration of the available evidence and through an approach that gives greatest priority to the best interests of the child. None of these underpinnings to the assessment of risks that schools are legally obliged to make are reflected meaningfully in the draft guidance.
36. It is also not clear that the advice that information should only be withheld from parents in exceptional circumstances is consistent with the 'Gillick competence' principles that require decision-makers to take account of the

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<sup>10</sup> DfE (2023). *Keeping Children Safe in Education: Statutory guidance for schools and colleges*. Available at: [https://assets.publishing.service.gov.uk/media/64f0a68ea78c5f000dc6f3b2/Keeping\\_children\\_safe\\_in\\_education\\_2023.pdf](https://assets.publishing.service.gov.uk/media/64f0a68ea78c5f000dc6f3b2/Keeping_children_safe_in_education_2023.pdf)), accessed on 12.02.24.

capacity of children to make decisions for themselves and the degree to which their wishes should be balanced against those of their parents.<sup>11</sup> The crude description in the guidance of the distinctions that should be drawn between the weight given to the views of secondary-age children and those of primary-age fail to acknowledge the individualised nature of the competence assessments that should be made in the accounts taken of the views of children. The importance of individualised assessments is central to the approach in determining Gillick competence as well as in Article 12 of the UNCRC.

37. The government will be aware that schools and colleges have become increasingly concerned to ensure that their practice on data gathering, retention and sharing are compliant with the requirements of the UK General Data Protection Regulations (GDPR) issued under the Data Protection Act 2018. This is especially the case in relation to the treatment of ‘special categories of data’, that apply in respect of the protected characteristics associated with transgender, intersex and gender questioning children in so far as these relate to their health.<sup>12</sup>
38. The ways in which the draft guidance suggests that information about the transgender, intersex or gender questioning status of children should be shared does not appear to be aligned with these provisions. We note that the draft guidance states merely that information about a child’s transitioning should be shared with ‘all relevant staff’, when the requirement of the GDPR and the Act are that more active consideration should be given to which members of staff can receive this information and which should not.

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<sup>11</sup> NSPCC (2022). *Gillick competency and Fraser guidelines*. Available at: (<https://learning.nspcc.org.uk/child-protection-system/gillick-competence-fraser-guidelines/>), accessed on 12.02.24.

<sup>12</sup> Information Commissioner’s Office (2024). *Special category data*. Available at: (<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/>), accessed on 12.02.24.

- **The draft guidance does not address some important practical issues on which schools and colleges continue to request advice.**

39. We note that many of the areas covered in the draft guidance reflect practical issues and concerns on which schools and colleges have sought advice, including on changing names, dealing with parents and single-sex spaces. Notwithstanding the appropriateness or otherwise of this advice, including in respect of its legality in some aspects, it is evident that at least three critical issues with which schools and colleges continue to engage are not addressed adequately in the guidance.

40. First, the framing of the content of the draft guidance through the lens of ‘gender questioning’ children only, does not provide advice to schools and colleges on those children who have already transitioned. Schools and colleges are unlikely to be able to provide the kinds of social and emotional support expected of them towards these children through advice and guidance that does not acknowledge their circumstances and needs in any practical way.

41. Second, the draft guidance provides no support, information or advice to schools and colleges on how they should discharge their duty of care towards intersex children. The draft guidance states that ‘children’s legal sex is always the same as their biological sex’. While this reflects the current legal position in the UK, it does not reflect the reality of the lives of intersex children and intersex people more broadly, including those aspects of these lives recognised previously by the government, and how schools and colleges might best support such children.<sup>13</sup> This is a serious omission from the guidance, particularly in light of estimates of the significant number of intersex people in society.<sup>14</sup>

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<sup>13</sup> Government Equalities Office (2019). *Government calls for evidence on people who have Variations in Sex Characteristics*. Available at: (<https://www.gov.uk/government/news/government-calls-for-evidence-on-people-who-have-variations-in-sex-characteristics>), accessed on 12.02.24.

<sup>14</sup> United Nations Office of the High Commissioner for Human Rights. (2023). *Human Rights Violations Against Intersex People*. Available at: (<https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>), accessed on 12.02.24.

42. Third, the draft guidance places significant emphasis on the notion of ‘watchful waiting’ in cases where schools and colleges wish ‘to accommodate degrees of social transition.’ The draft guidance advises settings to ‘wait for a period of time before considering a request, to ensure it is a sustained and properly thought through decision. This period of ‘watchful waiting’ may help to ensure unnecessary action is not undertaken.’

43. While in all cases, schools and colleges will want to make considered and informed decisions, the advice to ‘watch[fully] [wait]’ would appear to be of little practical assistance in supporting decision-making. Specifically, the guidance does not set out what schools and colleges should watch for, nor does it help them to determine a reasonable duration within which they should watch and wait in particular cases.

- **The draft guidance does not reflect schools’ and colleges’ overarching concern to act in the best interests of the child.**

44. As noted above, as well as serving as a principle underpinning relevant legal provisions, schools and colleges, rightly, see their mission and purpose as involving an obligation to act as far as possible in the interests of each child. This is as much the case for transgender, intersex and gender questioning children as it is for all others.

45. In addition, schools and colleges have requested advice from the government specifically to assist them in addressing the particular challenges and barriers to inclusion that such children can often face. These requests are driven to a large extent by the fact that many schools and colleges have no or little previous practical experience on which to draw.

46. It is not clear that the draft guidance provides such advice. It provides little information about the kinds of experiences that transgender, intersex and gender questioning children can face, including bullying, harassment and abuse and does not appear to reflect the reality of their reported

experiences. The draft guidance does not address the needs of children with other protected characteristics, such as disability, and how they might be best be advised and supported.

47. It is difficult to understand how schools and colleges can be expected to adopt a best interests approach if the voices of children do not appear to have been used to develop the advice. The ability of some children to engage with the information in the draft guidance may be constrained by the failure to publish an accompanying accessible version.

48. While the draft guidance places considerable stress on the importance of engaging with parents, it does not provide practical advice on how such engagement should be undertaken or how issues that might typically arise should be addressed. It does not set out information on the ways in which parental engagement should reflect the best interests principle and what steps should be taken if adopting the preferences of parents may conflict with this principle. The guidance is silent on the most effective ways of working with parents who are supportive of their child's decisions.

49. While noting the best interests principle, the draft guidance advises that the impact on other children of schools' and colleges' decisions in respect of gender questioning children should be taken into account. While the rights and interests of all individual children are of fundamental concern, the guidance does not set out the ways in which schools and colleges might take account of the impacts on other children while respecting the best interests principle with regard to individual transgender, intersex or gender questioning children.

### **Recommended next steps**

50. For the reasons set out above, we are not clear that the draft guidance would meet the fitness for purpose tests necessary for it to provide advice and information in which schools and colleges could have confidence.

51. We, therefore, recommend that the draft guidance is re-written to address the issues that we have identified. In respect of securing the highest possible levels of confidence across the sector in the legality of the guidance, we further recommend that revised draft guidance should be accompanied by additional information setting out the legal assessment on which it is based.

52. Revisions to the draft guidance should be undertaken in full consultation with relevant stakeholder bodies, including the NASUWT, so that the government has the best possible opportunity of producing guidance that will reflect the needs, interests and obligations of all those who will need to use it or who will be impacted by it.

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